THE PEOPLE
v
THOMAS MANROE

HIGH COURT.
DR. MATIBINI, SC, J.
29th DECEMBER, 2010.
HPA/50/2010.

[1] Criminal law - Defilement - Corroboration - Conditions precedent before securing a conviction.

The convict was charged of two accounts of defilement contrary to section 138(1) of the Penal Code, as read together with Act Number 15 of 2005. The matter was referred to the High Court for review, and sentencing.

Held:

1. Section 131 A of Act Number 15 of 2005 defines "child" as person below the age of sixteen years.

2. The position of the law is that as general rule, Courts may act on the testimony of a single witness even where there is no other evidence which supports it.

3. Both common sense and experience suggest that there are certain categories of witnesses, and certain types of evidence which are dangerous to rely on. Amongst this special species of evidence is the evidence of children.

4. The evidence of children is key in two main respects. First, children may be witnesses to the commission of sexual offences. And second, children may in fact be victims to sexual offences. The general rule, therefore, is that evidence of all children who testify in Court must be corroborated.

5. The rationale for requiring that the evidence of children must be corroborated is that by reason of immaturity of mind of a child, whether the evidence is sworn, or unsworn, one way, falls within the category of what may be conveniently called suspect witness, whose evidence must of necessity be treated as suspect.

6. A conviction which is founded on suspect evidence cannot be regarded as safe, unless such evidence is supported to such an extent as satisfies the trier of the facts that the danger of placing reliance upon suspect evidence has been excluded.

7. The general rule, therefore, in sexual offences is that there must be corroboration of both the commission of offence, and the identity of the offender in order to eliminate the twin dangers

of false complaint, and false implication.

8. Notwithstanding, as a matter of strict law, a conviction on the uncorroborated evidence of the complaint is competent.

9. A voire dire is a preliminary examination to test the competence of a child to give evidence. In Zambia, a voire dire is governed by section 122 of the Juveniles Act.

10. It is essential that the trial Court not any, conducts a voire dire, but also records the question, and answers. And the trial Court's conclusions to enable an appellate Court to be satisfied that the trial Court has carried out its duty.

11. The convict was properly convicted because the evidence of the prosecutrix was corroborated by medical evidence which showed that the complainant's hymen was broken, albeit the report was made late.

12. The record of the proceedings before the subordinate Court clearly showed that a voire dire was conducted. And therefore, the evidence of the prosecutrix was properly received.

Cases referred to:

1. R v Baskerville [1916] 2 K.B. 658.
2. Director of Public Prosecutions v Hester [1972] 3 ALL E.R. 1056
3. Mwelwa v The People (1972) Z.R. 29.
4. Machobane v The People (1972) Z.R. 101
5. Zulu v The People (1973) Z.R. 326.
6. Katebe v The People (1975) Z.R. 13.
7. Emmanuel Phiri and Others v The People (1978) Z.R. 79.
8. Chisha v The People (1980) Z.R. 36.
9. Tembo v The People (1980) Z.R. 218.
10. R v Khan [1981] 73 Cr. App. 190.
11. Emmanuel Phiri v The People (1982) Z.R. 77.
12. Kamanga v The People (2009) 2.R.303.
13. Sinyinza v The People (2009) Z.R. 24.
14. Kombe v The People (2009) Z.R. 282.

Legislation referred to:

1. Penal Code, cap. 87, as read together with Act Number 15 of 2005, ss. 3 A, 137 (1) and 138 (1).
2. Criminal Procedure Code, cap. 88, ss. 186 (3) and 217.
3. Supreme Court Act, cap. 25, s. 15.
4. Juveniles Act, cap. 53, s. 122.

Work referred to:

1. Hodge M. Malek, Phipson on Evidence, Seventeenth Edition, (London, Thomson Reuters (Legal) Limited, 2010).

P. Mutale, Acting Deputy Chief State Advocate in the Director of Public Prosecutions Chambers for the People.
Y. C. Kabende (Mrs), Legal Aid Counsel, Legal Aid Board for the Convict

GENERAL EDITORS NOTE:
Act Number 3 of 2011, - an Act to amend the Juveniles Act - was assented to on 12th April, 2011. The Act repealed and replaced section 122 of the Juveniles Act, Section 122 now provides as follows:

"122 where in any criminal or civil proceedings against any person a child below the age of fourteen is called as a witness, the Court shall receive the evidence on oath, of the child, if in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence on oath, and understands the duty of speaking the truth.
Provided that:
(a) if, in the opinion of the Court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence on oath, and does not understand the duty of speaking the truth, the Court shall not receive the evidence; and
(b) where the evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused."

DR. MATIBINI, SC, J.:The convict was charged of two counts of the offence of defilement, contrary to section 138 (1) of the Penal Code, as read together with Act Number 15 of 2005. The particulars of the first count are that Thomas Manroe, on 14th February, 2011, at Lusaka Province of the republic of Zambia, had unlawful carnal knowledge of Pretty Njekwa, a girl under the age of 16 years. The second count alleged that on the same day, 14th February, 2010, at Lusaka, in the District and Province of the republic of Zambia, the convict had unlawful carnal knowledge of another girl Violet Kafweni, also under the age of 16 years.

When called upon to plead, the charge was explained to the convict the language he understood; Nyanja. He pleaded not guilty to both counts. The Court below accordingly entered a plea of not guilty.

The Court below warned itself from the outset that the onus is on the prosecution to prove its case beyond reasonable doubt. And that there is no onus on the accused to prove his innocence.

The prosecution called six witnesses. The first was Betty Shatontola , the mother to Pretty Njekwa, I will continue to refer to her as Betty. Betty testified as follows: that on 14th February, 2010, she sent her 8 year daughter, Pretty to the shopping complex. On the material date, Pretty returned home late.

Four days later, on 18th February, 2010, Betty observed that her daughter was walking rather akwardly, her legs apart. Betty decided to check Pretty's private parts, and discovered cuts on her private parts. And pus also ensued from the cuts. Betty then immediately decided to call on Violet's parents. Upon calling on them, Betty urged Violet's mother to check the private parts of Violet as well. Thereafter, PW1 decided to report the suspected defilement of Pretty to Kanyama Police post. At the Police station, Pretty confirmed that she had been defiled by a neighbour by the name of Thomas, the convict in this matter.

Whilst at Kanyama Police station, Betty was issued with a medical report. With a medical report at hand , Betty took Pretty to the University Teaching Hospital (UTH) for examination. At UTH Pretty was examined by a medical doctor. After the examination, the medical doctor issued Betty with a detailed medical report. The medical report was forwarded to the police. Subsequently, the police launched a criminal prosecution against the convict.

During the prosecution, Betty identified both Pretty and the convict. Betty also produced before the Court below an under-five card to prove that Pretty was aged 8 years old. Pretty was also called upon to testify. Before the evidence of Pretty was received, a voire dire was conducted by the Court below. The voire dire was in the following terms:

Court: What are your full names?
Child: Pretty Njekwa
Court: Where do you live?
Child: Garden House
Court: How old are you?
Child: I am 8 years old.
Court: Do you go to school?
Child: Yes, in grade 1.
Court: Do you go to church?
Child: I go to Pentecost.
Court: At church do they teach you to tell lies?
Child: No.
Court: What do they say will happen to you if you told lies?
Child: God has stopped telling lies.
Court: What would God do to you if you told lies?
Child: God will burn me.
Court: What will happen if you told lies?
Child: I will be arrested.
Court: So you know what it means to take oath?
Child: No.
Court: Child understands the purpose of telling the truth. But does not understand the purpose of taking oath. The child will therefore give unsworn evidence.

Pretty went on to testify as follows: that on the material date she was sent by her mother; Betty to buy some mealie meal. She was escorted to the shop by Violet her friend. At the shop, she bought the mealie meal. After buying the mealie meal, she and Violet returned home. On their way home, they met the convict near a bush area. The convict was drunk. Suddenly, the convict grabbed Pretty and Violet. He gagged their mouths with some pieces of cloth. The convict made Pretty lie on the ground. He then took off his clothes, and ordered Pretty to remove her skirt, and underwear. Pretty obliged. The convict then mounted himself on Pretty and began having sexual intercourse with Pretty, whilst he held Violet by the hand. As he had sexual intercourse, Pretty experienced excruciating pain. After the convict completed the act with Pretty, he pushed Violet to the ground, and started having intercourse with violet as well. After he completed the act with Violet, the convict removed the pieces of cloth from both Pretty's and Violet's mouths, and threatened to kill them if they dared narrate the ordeal to anyone.

When Pretty returned home, her mother, Betty detected a bad adour on her uniform. And upon inspecting her private parts, Betty discovered some pus on her private parts. Pretty confirmed that she was checked by Betty, after four days. Pretty identified the convict in Court. And testified that she know the convicted because his is a neighbor.

The second witness called by the prosecution was Violet. Violet was considered by the Court below to be a child of tender years. Hence a voire dire was also conducted as follows:

Court: What are your full names?
Child: Violet Kachiba Kafwani.
Court: How old are you?
Child: 7 years old.
Court: Do you go to school?
Child: Yes.
Court: What grade are you?
Child: I am in grade 1.
Court: Do you go to church?
Child: Yes I go to church.
Court: Which church?
Child: I go to CMML
Court: At church do they teach you to tell lies?
Child: God has stopped telling lies.
Court: What would God do to you if you told lies?
Child: No.
Court: At church what do they do if you told lies?
Child: they are burnt.
Court: Are you going to tell me lies?
Child: Child remains silent, I don't know what can happen to me if I told lies.
Court: Upon conducting a voire dire, Court finds that the child does not understand the importance of telling the truth nor the purpose of taking Oath. Child not competent to give evidence.

The third prosecution witness who was called was Joyce Shantontola. Joyce recalled that on 19th February, 2011, she was approached by her young sister; Betty who was emotionally distressed. When she was approached, she was in the company of Pretty. Betty requested to check Pretty's private parts. After checking her private parts, Joyce observed that her private parts were bruised, and had pus. Joyce then decided to take Pretty to UTH. Joyce asked Pretty who had injured her. Pretty informed her that it was the convict. Betty and herself, then decided to report the matter to the police Later, Joyce was informed by Betty that the police had apprehended the convict.

The fourth prosecution witness was Annie Kafwani, the mother to Violet. Annie recalled that on 18th February, 2010, she was approached by Betty who intimated to her about what she had noticed about Pretty.

Upon receipt of the information from Betty, Annie immediately went to Violet's school and explained to the teacher that Violet was the previous Sunday in the company of Pretty defiled. Violet confirmed that she had been defiled. Annie took Voilet to the police where a medical report was issued.

Annie testified that she knew the convict because he is a neighbor. Annie identified the convict in Court. Annie was also able to identify the medical report that was issued to Violet. Annie confirmed that Violet is 7 years old, having born on 11th November, 2002. To support her testimony, Annie produced a photocopy of a card evidencing Violet's attendance at the under-five clinic.

The fifth witness was Dr. Jonathan Mweemba Kaunda. Dr. Kaunda is a pediatrician by profession. He recalled that on 19th February, 2010, he attended to Pretty, and Violet aged 8 and 7 years respectively. When Dr. Kaunda examined Pretty, he established the following: Pretty had a broken hymen at a position of 7 o'clock; and bruised valve, and bad adour. Pretty was also examined for HIV, hepatitis, and gonorrhea. The tests proved negative.

The sixth witness was Mainala Zimba, a sergeant in the Zambia Police Service. Sergeant Zimba recalled that on 23rd February, 2010, he was on duty, and was assigned to investigate a case of defilement in which Pretty, and Violet were alleged to be defiled. Sergeant Zimba received medical report forms, and birth record for Pretty. Later, he visited the scene of the crime. After interviewing the convict, Sergeant Zimba decided to charge the convict of the subject offence.

During the trial, the convict testified on oath and called no witnesses. In his defence, the convict testified that at the material time he was hired to ferry goods for hire with a wheel barrow.

Further, the convict testified that whilst at the shopping complex, he was approached by Violet and was accused of defiling her. After the accusation, the convict was apprehended, and taken to the police. At the police station he was shown Pretty and Violet as the persons whom he had defiled. He further testified that the parents of Pretty and Violet made attempts to reconcile with him by demanding the sum of K 3 million. He spurned the offer. The convict pleaded the defence of alibi.

After the trial, the Court below made the following findings of fact:

a) Pretty knew the convict before the commission of the offence because he lived in the neighbourhood. And therefore was properly identified; and

b) The defence of alibi was not credible because the convict failed to substantiate it by calling witnesses.

Thus the convict was convicted by the Court below on the first count defiling Pretty.

I invited counsel to file written submissions in this matter. In the submissions dated 17th May, 2011, Mr. Mutale submitted as follows: first, that the convict was properly convicted because the evidence of Pretty was corroborated by medical evidence which showed that Pretty's hymen was broken. Second, the convict was properly identified because he was Pretty's neighbor.

Mrs. Kabende filed submissions on behalf of the convict on 16th May, 2011. Mrs. Kabende argued as follows: first that it is trite law that in defilement cases corroboration is required before there can be a conviction. In support of this submission, Mrs. Kabende drew my attention to the case of Kombe v The People (14).

Second, Mrs. Kabende argued that the alleged defilement was reported late. And therefore raised doubts as to the credibility of the prosecution witnesses' evidence. In aid of this submission, Mrs. Kabende drew my attention to the case of Emmanuel Phiri and Others v The People (7). Third, Mrs. Kabende argued that the doubt surrounding the commission of the offence is compounded by the fact that the testimony of Dr. Kaunda is uncertain as to when the prosecutrix was defiled, because there was no date stamp affixed on the medical report form. Fourth, Mrs. Kabende argued that Pretty's evidence is credible because the Court below did not conduct a voire dire to ascertain whether, or not Pretty was possessed of sufficient intelligence to warrant the reception of her evidence. In this respect Mrs. Kabende drew my attention to the case of Zulu v The People (5), where it was held that if a voire dire is not properly conducted, then the prosecutrix evidence must be ignored.

Fifth, Mrs. Kabende argued that all the prosecution witnesses, save for the medical doctor, and the arresting officer where related. Accordingly, they should be classified as suspect witnesses who may want to falsely implicate the convict. Lastly, Mrs. Kabende argued that in light of the irregularities outlined above, I should reverse the decision of the Court below, and acquit the convict. In this regard, my attention was brought to the case of Kamanga v The People (12).

I am indebted to counsel for their submissions, and arguments. I would like to state at the outset that section 138 (1) proscribes defilement when it enacts as follows:

“138 (1) Any person who unlawfully and carnally knows any child commits a felony, and is liable upon conviction to a term of imprisonment of not less than fifteen years, and my be liable to imprisonment for life.”

Section 131 A of Act Number 15 of 2005 defines “child” as person below the age of sixteen years.

The position of the law is that as a general rule Court's may act on the testimony of single witnesses even where there is no other evidence which supports it. (See Hodge M. Malek, Phipson on Evidence, seventeenth edition (London, Thomson Reuters (Legal) Limited, 2010). However, both common sense, and experience suggest that there are certain categories of witnesses, and certain types of evidence which are dangerous to rely on (H. M. Malek, Phipson on Evidence, (supra) paragraph 14-01 at page 103). Amongst this special species of evidence is the evidence of children.

The evidence of children is key in two main respects. First, children may be witnesses to the commission of sexual offences. And second, children may in fact be victims of sexual offences. The general rule therefore is that evidence of all children who testify in Court must be corroborated. (See Tembo v The People (9) at page 219 per Gardner Ag D.C.J).

The rationale for this rule is best explained by the locus classicus on this subject; the case of Chisha v The People (8). In the Chisha case,(supra) the erstwhile Chief Justice Silungwe observed that it is well established that as a matter of law, the sworn evidence of a child in criminal cases does not require corroboration (supra at p 37). However, the Court should warn itself that there is a risk of acting on the uncorroborated evidence of young boys and girls, since it is necessary to heed the warning, corroboration of the sworn evidence of a child is in practice usually sought. The justification for requiring collaboration for sworn evidence of children was explained in the Chisha case by reference to the dictum of Lord Morris in the case of DPP v Hester (2), in the following terms at page 1059:

“The accumulated experience of Courts of law reflecting accepted general knowledge of the ways of the world has shown that there are many circumstances, and situations in which it is unwise to find settled conclusions the testimony of one person alone. The reasons for this are diverse these are some suggestions which can readily be made which are only with more difficulty rebutted. There may in some cases be motives of self-interest, or self-exculpation; or vindictiveness. In some situations, the straight line of truth is diverted by the influence of emotion, or hysteria. Sometimes if may be that owing to immaturity, or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth form falsehood. It must therefore be sound policy to have rules of law, or of practice which are designed to avert the peril that findings of guilt may be insecurely based.”

In the same case of DPP v Hester,(supra) Lord Diplock observed as follows:

“But common sense, the mother of the common law, suggests that there are certain categories of witnesses whose testimony as to particular matters may well be unreliable either because they may have some interest of their own to serve by telling a false story, or through defect of intellect, or understanding, or experience shows the danger that fantasy may supplant, or supplement genuine recollection.”

Thus in the Chisha case, (supra) the Supreme Court concluded that by reason of immaturity of mind of a child whether the evidence is sworn, or unsworn, one way, falls within the category of what

may be conveniently called suspect witness, whose evidence must as necessity be treated as suspect. The Supreme Court went on to point out that a conviction which is founded on suspect evidence cannot be regarded as safe, unless such evidence is supported to such an extent as satisfies the trier of the facts that the danger of placing reliance upon suspect evidence has been excluded.

Thus it well settled now that a conviction of the uncorroborated evidence of an accomplice is competent as a matter of strict law. (See Machobane v The People (4). However, it is instructive to note the observation of Reading L,C.J. in R v Baskerville (1), that:

"this rule of practice has become virtually equivalent to a rule of law. It can but rarely happen that the jury would convict after the proper caution by the judge."

In the Machobane case,(supra) Baron JP, observed that this puts the matter much higher than a straight forward issue of credibility; an accused should not be convicted on the uncorroborated testimony of a witness with a possible interest, unless there are some special, and compelling grounds.

The general rule therefore in sexual offences is that there must be corroboration of both the commission of the offence, and the identity of the offender in order to eliminate the twin dangers of false complaint, and false implication. Notwithstanding, as a matter of strict law a conviction on the uncorroborated evidence of the complaint is competent (see Katebe v The People (6)).

The law relating to corroboration was eventually reviewed, and summed up in the seminal case of Emmanuel Phiri and Others v The People (7), as follows:

a) a judge or magistrate sitting alone or with assessors must direct himself, and the assessors if any as to the dangers of convicting on the uncorroborated evidence of an accomplice with the same care as he would direct a jury, and his judgment must show that he has done so. No particulars form of words is necessary for such direction. What is necessary is that the judgment shows that the judge has applied his mind to the particular dangers raised by the nature, and the facts of the particular case before him;

b) a judge or magistrate should then examine the evidence, and consider whether in the circumstances of the case, those dangers have been excluded. A judge or magistrate should set out the reasons for his conclusions. His mind upon the matter should be revealed;

c) as a matter of law those reasons must consist in something more than a belief in the truth of the evidence of the accomplice based simply on the demenour, and the plausibility of their evidence, considerations which apply to any witness. If there be nothing more ,the Court must acquit;

d) the something more must be circumstances which though not corroboration as a matter of strict law, yet satisfy the Court that the danger that the accused is being falsely implicated has been excluded, and that it is safe to rely on the evidence of the accomplice implicating the accused. This is what is meant by "special and compelling grounds," used in the Machobane case;(supra)

e) the circumstances do not lend themselves to close description. The nature, and sufficiency of the evidence in question will depend on the nature of the facts of the particular case, but

as a principle , the evidence will be in the nature of corroboration in that it must of necessity support, or confirm;

f) there is a distinction between the rule of practice which now has the force of law that a warning must be given of the dangers of convicting on circumstances which a proper warning having in fact given the dangers may be safely regarded as having been excluded. The rules concerning conviction in the absence carroboration are rules of law, developed by the decisions of Courts; and

g) the modern decisions appear to be adopting a less technical approach to what is corroboration as a matter of law, and to be recognizing that identification cases are analogous to, if not virtually indistinguishable from corroboration cases. The question in all cases is whatever the suspect evidence of a complainant in a sexual case, or evidence of circumstances of the case to satisfy the trier of fact that the danger inherent in the particular case of relying on that suspect evidence has been excluded; only then can a conviction be said to be safe, and satisfactory.

The principle upon which corroboration of the offence is required, applies equally to corroboration of the identity of the offender. For in a much as there is always recognized the danger of a false complaint, the Courts have consistently recognized even a greater danger; namely the danger of false implication. (See Emmanuel Phiri v People (11) at p. 78 per Ngulube D.C.J.).

I will now turn to consider the subject of voire dire. And the question that arises is how then is it to be determined whether, or not the evidence of a child is immature, concocted or simply fueled by fantasy. The evidence of a child may for this reason be tested through a procedure popularly known as a voire dire. A voire dire is a preliminary examination to test the competence of a child to give evidence. In Zambia a voire dire is governed by section 122 of the Juvenile's Act. Section 122 enacts as follows:

“122 Where in any proceedings against any person for any offence, or in any proceedings any child of tender years called as a witness does not in the opinion of the Court understand the nature of an oath, his evidence may be received though not on oath, if in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of his evidence, and he understands the duty of speaking the truth, and his evidence though not given an oath but otherwise taken, and reduced into writing so as to comply with the requirements of any law in force for the time being shall be deemed to be a deposition within the meaning of any law so in force.

Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence, unless hat evidence is corroborated by some other material evidence in support thereof implicating him.”

Although the provisions of section 122 appear lucid, in practice they have been a source of confusion. It is for this reason that the erstwhile Deputy Chief Justice, Baron, in the case of Zulu v The People (5), decided to issue crystal clear guidelines to assist trial Courts in the administration of voire dire. After setting out the provisions of section 122 referred to above, Baron D.C.J went onto expound the steps to be taken as follows:

“First the Court must conclude that the proposing witness is a child of tender years; if he is not, the section does not apply, and the only manner in which the witnesses' evidence can be received is on

oath. Second, having concluded that the witness is a child of tender years, the Court must inquire whether the child understands the nature of an oath. If he does he is sworn in the ordinary way, and his evidence is received on the same basis as an adult witness. Third, if the Court is not is not satisfied that the child understands the nature of an oath, it must then satisfy itself:

a) that he is possessed of sufficient intelligence to justify the reception of the evidence; and

b) that he understands the duty of speaking the truth.

If the Court is satisfied on both matters, then the child evidence may be received although not on oath, and in that event in addition to any other cautionary rules relating to corroboration for instance because the offence charged is a sexual one, there arises the statutory requirement of corroboration contained in the proviso to section 122 (1). But if the Court is not satisfied on either of the foregoing points, the child's evidence may not be received at all."

Baron D.C.J., concluded by offering the following counsel:

"Not only must the record show that a voire dire has been conducted, but also the questions asked, and the answers received and the conclusions reached by the Court."

It is essential that the trial Court not only conducts a voire dire, but also records the questions, and answers. And the trial Court's conclusions to enable the appellate Court to be satisfied that the trial Court has carried out its duty. It is instructive to note that one of the challenges in conducting a voire dire is that the Juveniles Act does not define "a child of tender years". A leaf may however be taken from the English case of R v Khan (10), where the English Court of Appeal decided on the age of fourteen years as the limit below which an inquiry should be held. It is also noteworthy that in the case of Mwelwa v The People (3), the Court had not hesitation in holding that a child of twelve years should be examined in voire dire before being allowed to give evidence.

In order to appreciate the current jurisprudence relating to defilement cases, I will briefly review a few recent decisions rendered by the Supreme Court. First, the case of Kombe v The People (14), laid down that odd coincidences, can if unexplained be supporting evidence of identification. In the Kombe case,(supra) the appellant was convicted of the offence of defilement. Upon conviction, he was committed to the High Court for sentence. He was sentenced to a term of 20 years imprisonment. On appeal, the appellant only advanced one ground of appeal. Namely, that the trial Court erred in law, and fact when it convicted him on the uncorroborated evidence of identity. It was pressed on behalf of the appellant that there should have been corroboration both as to the commission of the offence, and also to the identity of the offender. Thus, it was argued in the Kombe case (supra) that there was only corroboration as to the commission of the offence.

Mwanamwambwa, JS, in delivering the judgment of the Supreme Court observed as follows: in sexual offences, such as rape, and defilement, corroboration is required as a matter of law before there can be conviction. Law is not static; it is developing. And therefore, there need not now be a technical approach to corroboration. Evidence of "something more," which though not constituting corroboration

as a matter of strict law, yet satisfied the Court that the danger of false implication has been excluded, and that it is safe to rely on the evidence implicating the accused. Mwanamwambwa, JS, went on to observe that odd coincidences constitute evidence of “something more”. Odd coincidences represent pieces of evidence which the Court is entitled to take into account. They provide support of the evidence of a suspect witness, or an accomplice, or any other witness whose evidence requires corroboration. This is the less technical approach as to what constitutes corroboration.

In the Kombe case (supra) there were four coincidences. The first related to residence, the appellant lived with a friend, in the friend's house. According to the prosecutrix, and one of the witnesses; PW3, that is where the prosecutrix was defiled. The appellant did not deny having lived in the house. The second was that the prosecutrix led PW3 to the house where she was defiled. The third was that shortly after the case of defilement arose, the appellant shifted from the house in question without offering any explanation for the change of quarters. The fourth is that the prosecutrix identified the appellant as the culprit on the identification parade. The Supreme Court concluded that using the less technical approach to corroboration, the four pieces of evidence constituted “something more,” which tended to confirm that the prosecutrix was telling the truth when she testified that it was the appellant who defiled her.

The second case that will be reviewed is that case of Kamanga v The People, (12). The Kamanga case (supra) was an appeal against the decision of a Subordinate Court in which the appellant was convicted of one count of defilement. The medical report confirmed that the complainant was defiled. The appellant also admitted having proposed love to the complainant. However, he denied having defiled the complainant.

On appeal to the Supreme Court, the appellant advanced two grounds of appeal as follows:

a) that the trial magistrate erred in law, and misdirected himself when she held that the prosecution proved its case beyond all reasonable doubt when the totality of the evidence, or record did not support such holding; and

b) that the trial magistrate erred, and misdirect itself when it failed to warn itself of the fact that prosecution witnesses had their own interests to serve.

During the hearing of the appeal, counsel for the appellant argued that the prosecution evidence only showed that the appellant, and the prosecutrix had only social interaction that culminated in the meeting at a Guest House. Furthermore, counsel argued that the prosecution evidence showed that they went to a room where they sat down, and had a drink. And later they parted company. Thus according to counsel for the appellant, it defied all reasoning that the prosecutrix made no mention to having had sexual intercourse with the appellant at the Guest House. As regards the medical evidence, counsel for the appellant argued that it did not show whether the prosecutrix had sexual intercourse. The medical evidence, it was argued, simply stated that there was no hymen. According to counsel a missing hymen alone, is not proof that the conviction on the sole ground that the prosecutrix, and one of her witnesses were minors. And the trial magistrate did not conduct a voire dire when receiving their evidence. Thus, the State submitted that the misdirection could only be cured by ordering a re-trial.

In a judgment delivered by Deputy Chief Justice Mambilima, the Supreme Court observed that the record showed that the trial magistrate before she received evidence from the prosecution observed that:

"....She appeared old enough to appreciate the procedure, and discharging of her duty of giving evidence on oath."

Deputy Chief Justice Mambilima went on to observe that the prosecutrix was 15 years old. And was in grade 9. The trial magistrate therefore determined that the prosecutrix was not a child of tender years to require the conduct of a voire dire. Thus in line with the Zulu case (supra), which I referred to earlier on, the evidence of the prosecutrix was received on the same basis as that of an adult witness.

Further Deputy Chief Justice Mambilima observed that in the case of the other minor, the trial magistrate did not make a similar determination as to whether the witness was of tender age. The other minor was a school boy aged 14 years, and was a grade 9. Nonetheless, the Supreme Court took the view that the witness could not be described as a child of tender years. Ultimately, the Supreme Court rejected the argument by the State that a voire dire should have been conducted in relation to the prosecutrix, and the other minor. As a result, the Supreme Court declined to exercise its jurisdiction under section 15 of the Supreme Court to order a re-trial.

As regards the first ground of appeal, in the Kamanga case (supra), the Supreme Court observed that the kernel of the argument seems to be that the evidence of the sexual intercourse between the appellant, and the prosecutrix was unsatisfactory. To use the words of counsel for the appellant, the prosecutrix evidence only showed a social interaction. Notwithstanding, the Supreme Court observed that during examination in chief, the prosecution testified that the appellant proposed love to her, and she refused. The appellant persisted, and even bought her a skirt. Further, the prosecutrix testified that in one of the interaction, the appellant took her to a Guest House, where they went to a room with a bed. On this visit, the prosecutrix testified during cross-examination as follows:

"I did not tell anyone at Ilamfya [Guest House] after it happened to see what he had done to me. I did not know if I had sustained any injuries.... The accused did not tell me that he wanted to have sexual intercourse. But that he was going to buy me a drink. If he told me, I was not going to follow him to Ilamfya [Guest House]... I did not have sex with any other man except the accused."

The Supreme Court concluded that the evidence of the prosecutrix was clearly to the effect that the two had sex at the Guest House. The fact of the existence of the relationship between the two, was also confirmed by the evidence that the appellant's wife complained to the prosecutrix's grandmother about the relationship. Thus the Supreme Court dismissed this ground of appeal. And eventually the whole appeal.

The third case that will be reviewed is the case of Sinyanza v The People (13). The facts of the case were that the appellant was charged of having unlawful carnal knowledge of three girls, all below the age of 16 years. The three girls were at a fire warning themselves. When the appellant approached

them, and requested them to go and call his former wife. The appellant followed them, and waylaid them to a ditch. Immediately they were in the ditch, the appellant grabbed the chitenge material from one of the girls, and spread it on the ground, whereupon he ordered the three girls to lie down. The appellant ordered the girls not to scream, lest he would beat them. The three girls were later ordered to remove their pants. The appellant removed their pants. The appellant removed his private part, and later inserted it in the private part of the three girls in succession.

The appellant was charged of the offence of defilement. He denied the charge. The trial judge found that the prosecutrix had established all the ingredients of the offence of defilement, and convicted the appellant. The appellant was thereafter committed to the High Court for sentence.

The appellant was sentenced to 15 years imprisonment with hard labour on the second count, and to 20 years imprisonment on the third count. The sentences were to run consecutively. On appeal, the appellant advanced two grounds of appeal as follows:

a) that the trial magistrate erred in law, and in fact in convicting the appellant on count two for defilement, because the medical report showed that there was no inflammation, and the hymen was intact; and

b) the trial magistrate misdirected himself in law in convicting the appellant on the uncorroborated evidence of the two prosecutrix.

In a judgment delivered by Silomba, JS, the Supreme Court in the first instance decided to address the issue of the voire dire, despite the fact that it was not canvassed by the parties. The Supreme Court decided to address the issue in order to remind trial Courts about the procedure to follow when faced with a child witness of tender years. The Supreme Court observed that the correct procedure to be adopted in the conduct of a voire dire is laid down in section 122 of the Juveniles Act. The Supreme Court observed that section 122 was elucidated in the Zulu case (supra) referred to above.

On the facts of the Sinyinza case (supra), the Supreme Court observed that PW1, and PW2 were witnesses of tender years. And that the trial magistrate made inquiries in relation to the two witnesses. The trial magistrate formed the opinion that the witnesses were capable of being sworn on the Bible. The Supreme Court observed that the correct conclusion should have been that the two witnesses understood the nature of an oath for them to be sworn in the ordinary way, and have their evidence received as if they were adult witnesses. Although the conclusion by the trial magistrate was not in the usual format, the Supreme Court was satisfied that the conclusion reached by the trial magistrate showed that the trial magistrate appreciated the capacity of the child witnesses to give evidence of oath.

As regards the first ground, the Supreme Court observed that:

“In the absence of evidence to show that there was inflammation around the vagina, and that the hymen was tampered with, a charge of defilement cannot be sustained.”

The Supreme Court also observed in the course of the judgment that:

"From the medical report we hold the view that there was no penetration because the appellant had just moved from Emelda Mwamba, count one, and his erection had collapsed. But nonetheless, his conduct constituted an offence of indecent assault under section 137 (1) of the Penal Code."

The Supreme Court held that the evidence supported a charge of indecent assault as provided for in section 186 (3) of the Criminal Procedure Code. Section 186 (3) enacts that:

"3 When a person is charged with the defilement of a girl under the age of sixteen years, and the Court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under subsection (1) or (3) of section one hundred and thirty seven of the Penal Code, he may be convicted of that offence although he was not charged with it."

Relying on section 15 of the Supreme Court Act which provides that:

"On any appeal, whether against conviction, or sentence, the Court may substitute a judgment of guilty of such other offence as the trial Court have appellate jurisdiction, the Court shall in addition have power to restore the conviction of the trial Court."

The conviction of the appellant for defilement in terms of section 138 (1) of the Penal Code was reversed, and substituted with one for indecent assault under section 137 of the Penal Code. Further, the Supreme Court affirmed the sentence passed by the trial judge on count two of 15 years imprisonment with hard labour, and was deemed to be the applicable sentence of the offence under section 137 (1) of the Penal Code.

In relation to the second ground of appeal, the Supreme Court held that there was no dispute as to the identity of the appellant because he was properly identified having been a neighbour of the two prosecutrix for some time. The Supreme Court noted that the issue of identity of the appellant was not in any case contested with any seriousness. However, it was contended that the conviction of the appellant was on the uncorroborated evidence of the two prosecutrix. It was argued on behalf of the appellant that as a matter of law and practice in sexual offences, the evidence of the two prosecutrix required corroboration since they were suspect witnesses. Further, it was contended that the relatives of the prosecutrix could not corroborate the proesecutrix because they had an interest to serve. The Supreme Court affirmed that victims of defilement are suspect witnesses, and their evidence should always be corroborated.

It is trite law that before a conviction for defilement is secured there must be corroboration both of the commission of the offence, and the identity of the offender. I agree with the submission by Mr. Mutale that in this case the convict was properly convicted because the evidence of the prosecutrix was corroborated by medical evidence which showed that the Pretty's hymen was broken, albiet the report was made late. I further agree with Mr. Mutale that the convict was properly identified having been a neighbour of Pretty. In any case, the question of the identity of the convict was not contested.

The record of the proceedings in the Court below clearly shows that a voire dire was conducted. And therefore the evidence of the prosecutrix was properly received by the Court below. In view of the

foregoing, I support the conviction of Court below. And accordingly sentence the convict to a term of 15 years imprisonment with effect from the date of the arrest.

Convict sentenced.