

**IN THE HIGH COURT OF ZAMBIA
HOLDEN AT MANSA
(Criminal Jurisdiction)**

HNA/3/2011

BRUNO CHIPUNDU TEMBO

V

THE PEOPLE

CORAM: SIAVWAPA J.

FOR THE APPELLANT: MR. P. CHAVULA; LEGAL AID COUNSEL

FOR THE RESPONDENT: MR. MR. J. AKAPELWA; STATE ADVOCATE

J U D G M E N T

AUTHORITIES REFERRED TO:

Phiri (Macheka V the People (1973) Z.R. 145

This matter came to me by way of appeal but after perusing the case record, I noted that the matter had been heard and referred to the High for the purposes of sentencing only pursuant to section 217(1) of the Criminal Procedure Code chapter 88 of the Laws of Zambia. The appeal is against conviction and the question I ask myself is whether, an appeal can be entertained in a matter where trial has come to an end but before the sentence

is passed. In the ordinary course of events, once a verdict is passed, the parties will wait for the court to pronounce the sentence before an appeal is lodged.

Section 322 of the Criminal Procedure Code provides as follows;

“No appeal shall be heard unless entered-

(b) in the case of an appeal against conviction, within fourteen days of the date of sentence imposed in respect of such conviction:”

This section clearly prohibits the hearing of any criminal appeal unless such appeal is entered within fourteen days of the date of the sentence (emphasis mine) imposed. It is therefore, not enough that a conviction has been made, but the sentence thereof must also be passed for any appeal to be valid.

In cases where subordinate courts refer matters for sentencing after convicting an accused person, section 218 of the Criminal Procedure provides that;

“Whenever any person is brought before the High Court in accordance with the provisions of sub-section (2) the High Court shall proceed as if he had been convicted on trial by the High Court.”

The clear import of that provision is that the High Court will adopt the trial and conviction by the subordinate court as its own and as such, the proceedings become complete only after the sentence has been passed. Consequently, any right of appeal can only arise after such completion and not before. I therefore, find the appeal lodged in this case before the passing of the sentence premature and misconceived in law and I accordingly set it aside. I will

instead deal with the matter as one before me for sentencing pursuant to section 217(1) of the Criminal Procedure Code.

The convict in this case was charged with **DEFILEMENT OF A CHILD** contrary to section 138(1) of the Penal Code chapter 87 of the Laws of Zambia as amended by Act No. 15 of 2005. The particulars of the offence are that on the 18th day of February 2010 at Kaputa in the Kaputa District of the Northern Province of the Republic of Zambia, accused unlawfully had carnal knowledge of **I. M. M.** a child below the age of sixteen years.

After conducting a full trial, the magistrate was satisfied as to the act of sexual intercourse, the identity of the accused and the age of the prosecutrix being below sixteen years at the time of the sexual act. I have carefully examined the record of proceedings in the court below as well as the judgment thereof and I, am satisfied that all the ingredients of the offence were proved beyond reasonable doubt. The convict admitted the essential facts raised by the prosecution that he spent a night at PW1's house where the prosecutrix lived, that the following morning after taking PW1 to work, he returned to the house and found the prosecutrix alone. Given the prosecutrix' evidence and the medical findings, the trial magistrate correctly found that accused's identity had been proved and that sexual intercourse had taken place.

As regards the age, PW1, the prosecutrix's father gave evidence that she was born on 26th September 1994 and further, the under-

five clinic card confirmed that fact. There is no doubt that the authenticity of the prosecutrix's date of birth could not be disputed as it was proved by one of the parents as well as the under-five clinic card as per the holding in the case of **Phiri (Macheka) V the People** to the effect that;

“It is not acceptable simply for the prosecutrix to state her age; this can be no more than a statement as to her belief as to her age. Age should be proved by one of the parents or by whatever other best evidence is available.”

As a matter of fact, once a parent testifies as to the age of a prosecutrix, that evidence is conclusive unless evidence to the contrary is adduced. I therefore, find no fault in the finding of the trial magistrate on this score as well.

DELIVERED THE 22ND DAY OF MARCH 2011

J.M.SIAVWAPA

JUDGE