R. v. SONDAS MAWA CHUNDAPONDE.

CRIMINAL REVIEW CASE No. 29 OF 1941.

Penal Code section 119 (1)—*defilement of girl under* 12 *years of age—explaining charge to accused—proviso to section should be explained to accused.*

In the judgment hereunder it was held that as Africans do not normally know what is meant by "age" the charge should be explained to an accused by references other than merely to years of age, e.g., reference can be made to the state of puberty. In addition to this the terms of the proviso to the section should be explained to the accused.

For further cases on the proof of age in a charge of defilement see *R.* v. *Kalasa Mvula* 1 N.R.L.R. 84; *R.* v. *Marko Malefu* 4 N.R.L.R. 240; *Diamond Kapwepwe* v. *The Queen* 5 N.R.L.R. 168 (in which the observation in the present case that the proviso to the section should be explained to an accused before his plea is taken was approved); *R.* v. *Samson Manuwa* 5 N.R.L.R. 176; *R.* v. *Jovan Phiri* 5 N.R.L.R. 324 (in which the observation in the present case that the proviso to the section should be explained to an accused before his plea is taken was approved but the suggestion in the present case that reference can be made to the state of puberty was not followed).

Law, C.J., and Robinson, J.: The accused was charged under section 119 (1) Penal Code with having unlawfully and carnally known one Kunda, a girl under the age of 12 years.[1] In reply to this charge the accused said "I admit it, I did it". The Magistrate accepted this plea as one of guilty and recorded it accordingly. The prosecutor stated to the Court that the girl was just under 11 years old. The question for consideration is whether the plea was an unequivocal one of guilty. It was pointed out by the learned Judge in the case of *Rex* v. *Kalasa Mvula*, Law Reports for Northern Rhodesia, 1931–1937, page 84, that Courts are permitted to take judicial notice of certain well-known facts without proof. It is a matter of common knowledge, and therefore within our judicial notice, that uneducated natives in this Territory, such as the accused, do not reckon an individual's age by years. Furthermore, that African children mature earlier than European children and often look older than they really are. Though we have the report of the Magistrate that the accused pleaded guilty to the charge after the interpreter had explained what was meant by "under 12 years of age", we are not satisfied that any explanation by reference to age could possibly have conveyed to him the exact stage of adolescence reached by the girl. Furthermore, and again bearing in mind that the accused is a native, we consider that the proviso to the section is so much involved in the offence charged that it should have been explained to the accused before his plea

[1] The relevant age is now 16 years.—*Editor.*

was taken. This practice should be followed in similar cases except where it is palpably obvious that the child in question is considerably below the age of 12 years.

For these reasons we are of opinion that the accused's plea to the charge should be taken again. In these circumstances we quash the conviction and set aside the sentence and direct the retrial of the accused according to law.