IVESS MUKONDE
v
THE PEOPLE

SUPREME COURT
SAKALA, C.J., MWANAMWAMBWA, AND MUYOVWE, JJS.,
7th DECEMBER, 2010, and 3rd MAY, 2011.
(S.C.Z. Judgment No. 11 of 2011)

[1] Criminal law -Evidence Corroboration - Character of.

[2] Criminal law - Sentencing - General approach of appellate Court.

The appellant was following upon his committal to the High Court for sentencing, sentenced to 25 years imprisonment with hard labour for each of the two counts of defilement. The sentence was ordered to run concurrently. The appellant appealed against both the conviction and sentence.

Held:

1. In considering the issue of corroboration of the evidence of a minor, it is not always the date of the commission of the offence that has to be corroborated; but the commission of the offence itself, and the identity of the perpetrator of that offence.

2. Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of a particular case. The circumstances, and the locality of the opportunity May, be such that in themselves amount to corroboration.

3. The circumstances and the locality of the opportunity in the instant case amounted to corroboration of the commission of the offences.

4. The evidence of minors was corroborated on both the commission of the offences, and the identity of the appellant.

5. The sentence was neither wrong in principle, nor manifestly excessive.

6. There was no exceptional circumstance that would render the

sentence unjust, if it were not reduced.

Cases referred to:

1. Jutronich and Others v The People (1965) Z.R 9
2. Imusho v The People (1972) Z.R. 77.

3. Nsofu v The People (1973) Z.R 287.
4. Chisha v The People (1980) Z.R. 36.
5. Tembo v The People (1980) Z.R. 218.

N.M. Chomba Principal Legal Aid counsel Legal Aid Board, for the appellant.
C.F.R Mchenga, Director of Public Prosecutions for the State.

SAKALA, C.J.: delivered the judgment of the Court. The appellant was, following upon his committal to the High Court for sentencing, sentenced to 25 years imprisonment with hard labour on each of two counts of defilement. The sentence was ordered to run concurrently. The particulars of the offence on both counts were that the appellant, on 18th September, 2005, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did have unlawful carnal knowledge of M. K, on the first count, J. M., on the second count, both girls under the age of 16 years.

The case for the prosecution centered on the evidence of PW1, a girl aged 14 years, and a pupil in grade nine; PW2, a housewife, PW3, a girl aged 11 years, the prosecutrix on the first count; and PW4, a girl aged 8 years, the prosecutrix on the second count. Both PW3 and PW4 gave evidence on oath after a voire dire had been conducted.

The evidence of PW1 was that on 18th September, 2005, after receiving a report from J. M. that her landlord had carnal knowledge of J. and M., she examined the vaginas of the two girls. She found that each had a white discharge on her. She reported the matter at Chawama Police Post. Thereafter, with the help of others, they apprehended the appellant. This witness was not cross-examined.

The evidence of PW2 was that she was the wife of the appellant; that M. K., mentioned in the first count, was her daughter, who was aged 11 years at the material time; that on 19th September, 2005, she had a fight with her husband, the appellant, and subsequently ran away from home at night.

According to her evidence, she left her husband with a friend and the friend's wife and the two children, namely: M. K. and J. M.; that on the following day, the two children reported to her that they had not slept properly as they felt someone turn them over; that M. told her that the same person lifted her legs and removed her underwear and laid on top of her and used his private part to force himself into her; and that J. repeated the same story.

According to PW2, she took the children to the clinic at Chawama, where they were referred to the University Teaching Hospital, after having reported at Chawama Police. In cross examination, she explained that the person who forced his penis into the children's vaginas was their father and that according to M. K., they slept in the same room with the appellant, and saw the appellant take off his underpants.

PW3 testified that on 18th September, 2005, the appellant, her father, slept in the same room

with them. He woke up in the night, lifted her leg and forced his penis into her vagina. In the morning, she reported to her mother what had happened.

The evidence of PW4 of what happened on the night of 18th September, 2005, was same as that of PW3, that the appellant forced his penis into her vagina.

The fifth prosecution witness was a Police Officer, who arrested and charged the appellant with the two counts of defilement. She also produced the two medical reports in Court marked as exhibits P1 and P2.

The appellant gave very short evidence on oath in his defence, denying defiling the two girls. He confirmed that the two girls were his children whom he kept for five years.

The learned trial Magistrate having reviewed the evidence, found that the appellant shared the same bedroom with the two girls on the material day, that on the evidence of PW3 and PW4, supported by the two medical reports, the appellant had carnal knowledge of PW3 and PW4, and that the appellant on the evidence, had ample opportunity to have carnal knowledge of the two girls, particularly that he was in the bedroom alone with them the whole night, and that they could not escape as the door was locked.

The learned trial Magistrate found that there could not be any mistaken identity by PW3 and PW4 as they knew the appellant as their father and uncle, respectively.

The learned trial Magistrate concluded that the offence of defilement had been established on both counts. The appellant was, accordingly, convicted. Hence, the appeal to this Court.

On behalf of the appellant, Mr. Chomba, the Principal Legal Aid counsel, filed two grounds of appeal, namely: that the learned trial Magistrate erred in law and fact when he convicted the appellant on the uncorroborated evidence of PW3 and PW4; and that the learned judge on committal erred when he imposed a sentence of 25 years imprisonment with hard labour on each count to run concurrently.

Counsel also filed written heads of arguments based on the two grounds of appeal.

The gist of the written heads of arguments on ground one relating to uncorroborated evidence of PW3 and PW4 is that the case against the appellant rested on the evidence of the victims, PW3 and PW4, both children, whose evidence required corroboration as to the commission of the offence, and the identity of the perpetrator. The case of Tembo v The People(5), was cited in support of the argument.

On the commission of the offence, it was pointed out that the evidence of PW3 and PW4, was that they were defiled on 18th September, 2005, and reported to the mother the following day and who in turn reported the matter to Chawama Police who issued Medical Report Forms, which were

produced in Court showing that the offence was reported to the Police at Chawama on 25th September, 2005, as per exhibits P1 and P2; that the two Reports do not corroborate the testimony of PW3 and PW4; that the offences complained of, if any, were committed on 18th September, 2005; and that there was no explanation as to the gap on dates.

It was submitted that this Court was at large to make its own inferences on the issue. It was further submitted that the Court could make its own inference that the whole tale about the defilement was concocted by PW2, the appellant's estranged wife to settle scores with him, and that PW3 and PW4 were influenced by PW2 to make a false report.

It was contended that PW2 coached PW3 and Pw4 on what to say; and that this explained why their evidence was exactly the same. The case of Chisha v the People (4), in which we said

" It is the immaturity of mind that directly accounts for a child's susceptibility to the influence of third persons, fantasy, and lack of appreciation of the gulf that separates truth from falsehood," was cited in support of this contention.

On identity of the perpetrator of the offence, it was pointed out that PW3 and PW4 had testified that on the night in question each one was defiled by the appellant in the dark; that no evidence was led to show how the children were able to see clearly in the dark. It was submitted that it was a misdirection on the part of the trial Court to find that there could have been no question of mistaken identity in this case simply because PW3 and PW4 knew the appellant very well. This Court was urged to reverse this finding based on the authority of Imusho v The People (4) .

It was pointed out that even if the appellant had opportunity to commit the offence to amount to corroboration of the perpetrator's identity, opportunity on its own does not amount to corroboration. The case of Nsofu v The People (3), was cited in support of the argument, where we said:

"Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case. In Credland v Knowler [2] Lord Goddard, C.J., at page 55 quoted with approval the following dictum of Lord Dunedin in Dawson v Mackenzie [3]:

"Mere opportunity alone does not amount to corroboration but... the opportunity May, be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity May, be such as in themselves to amount to corroboration".

It was submitted that in this case, the appellant's opportunity was not of such a character; and that from the evidence, it was clear that there were other occupants in the house apart from the appellant, PW3 and PW4, one of whom was an adult male, whose identity was never explored by the trial Court.

It was contended that the evidence of the other occupants would certainly have been of great help to the trial Court; that the other occupants were never called as witnesses by the prosecution; and that it

should be inferred that had they been called, their evidence would have exonerated the appellant.

The summary of the written heads of arguments on ground two relating to the sentence of 25 years imprisonment with hard labour on each of the two counts ordered to run concurrently is that the sentences are excessive, despite the extraordinary feature which aggravated the seriousness of the offence, namely; the wide disparity of age between the appellant and each of the victims; that the same did not warrant the extension of 10 years above the statutory minimum.

It was submitted that on the principle expounded in the case of Jutronich and Others v The People (1), this Court should ask itself the following three questions: Is the sentence wrong in principle?, Is the sentence manifestly excessive so as to induce a state of shock?, and are there exceptional circumstances which would render it an injustice if the sentence were not reduced?

It was pointed out that in the Jutronich case (1), it was held that if the appellate Court answered one or other of the three questions in the affirmative, then it ought to interfere with the sentence imposed by the trial Court. It was submitted that the sentence in the present case was manifestly excessive. We were urged to interfere with the sentence.

The learned Director of Public Prosecutions, who made oral submissions, supported the conviction. The gist of his oral submissions is that the arguments on behalf of the appellant are that he was convicted on the uncorroborated evidence of two minors, PW3 and PW4. He submitted that the evidence was corroborated by the two Medical Reports which showed that the two, PW3 and PW4, were victims of an assault.

On the identity of the appellant, the learned Director of Public Prosecutions pointed out that there is evidence of the appellant admitting spending the night in the same room with the two children on the day they were defiled; but denying defiling them and suggesting that he was unable to trace the other people who were in the same house.

The learned Director of Public Prosecutions concluded his argument by submitting that both the commission of the offence and the identity of the appellant were corroborated.

In reply, Mr. Chomba, on behalf of the appellant, submitted that the Medical Reports did not support defilement on 18th September, 2005; but that the Medical Reports show that the defilement was reported on 25th September, 2005. It was submitted that the discrepancy was not explained.

We have carefully examined the evidence on record, the judgment of the trial Court, and the submissions on behalf of the appellant and those by the learned Director of Public Prosecutions.

The gist of the submissions on behalf of the appellant is that the conviction of the appellant on both counts was based on the uncorroborated evidence of PW3 and PW4, both minors, in relation to the commission of the offence and in relation to the identity of the perpetrator of the two offences.

Mr. Chomba, on behalf of the appellant, has attacked and criticized the prosecution evidence on the basis that although PW3 and PW4 testified to being defiled on 18th September, 2005, and the defilement being reported to the Police at Chawama on 19th September, 2005, the two Medical Reports show that the report of defilement was made to the Police at Chawama on 25th September, 2005. Mr. Chomba contended and submitted that the two Medical Reports do not corroborate the evidence of PW3 and PW4; that the offences complained of were committed on 18th September, 2005 and by the appellant.

We have anxiously considered the arguments on the discrepancy in relation as to the date, when the offences are allegedly said to have been committed; 18th September, 2005, and the date when the Medical Reports were made, 25th September, 2005. The arguments by Mr. Chomba are indeed ingenious and perhaps have force in them. However, in considering the issue of corroboration of the evidence of a minor, it is not always the date of the commission of the offence that has to be corroborated; but the commission of the offence itself and the identity of the perpetrator of that offence. Thus, in some cases, the particulars of the offence May, read "on a date unknown but between .... and ...." In such a scenario, it cannot be seriously argued that because the date had not been specified, the commission of the offence and the identity of the perpetrator had not been corroborated.

In the instant case, the evidence of PW3, a minor in count one, given on oath, was that on 18th September, 2005, she was asleep on a sofa at
night. Her father, the appellant, made a bed for her and J. Her father, herself, J. and her father's friend and his wife spent a night in a room. She saw her father take off her underwear. He lifted her leg, turned her over and forced his penis into her vagina. She felt pain. In the morning, she went to her mother, who reported the matter to Chawama Police. They were given a document and referred to Chawama clinic and finally went to U.T.H. She identified the document which had her name. In cross-examination, PW3 explained that they were five in the house.

PW4, also a minor, gave evidence on oath. She testified of sleeping in the same room on 18th September, 2005, when the appellant lifted her leg, put his penis into her vagina. He turned on the light. Following morning she reported to PW2, who reported at Chawama Police, who gave them a document and went to U.T.H.

The evidence of PW2 was that the two girls reported to her what happened. She took them to Chawama Police where she was given two documents and went to U.T.H. She identified the two documents, the two Medical Reports of PW3 and PW4.

Mr. Chomba's contention was that none of the two Medical Reports corroborated PW3 and PW4. Our understanding of PW3's and PW4's evidence is that the appellant had carnal knowledge of the two minors. The appellant in his evidence admits keeping the two girls; but denied defiling them. The two Medical Reports were that the findings of the Doctor were consistent with defilement.

In the Nsofu case (3), we pointed out that whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of a particular case. We further observed that the circumstances and the locality of the opportunity May, be such as in themselves to amount to corroboration.

If we accept the evidence of the Medical Reports, which we do, then we must find that the evidence of PW3 and PW4 was corroborated as to the commission of the offences. In addition, the evidence of PW2 confirms that she left the appellant in the same house with the two children. The appellant admits being with the two children in the same house.

We, therefore, accept that there was an opportunity to commit the offences. We are satisfied that the circumstances and the locality of the opportunity in the instant case amounted to corroboration of the commission of the offences.

We reject the submission that PW2 coached PW3 and PW4 of what to say. Above all, PW2 was never cross-examined of having coached PW3 and PW4.

As to the identity of the perpetrator, the appellant admitted keeping the two girls and PW2 confirmed leaving the two girls with the appellant. All in all, we are satisfied that the evidence of the minors, was corroborated on both the commission of the offences, and the identity of the appellant. The discrepancy on the date when the offences were committed and the date on the two Medical Reports can only, in our view, be explained by the fact that the Medical Reports, being made on a standard Zambia Police Medical Report Form, must have been completed long after the report of the offences to the Police at Chawama and long after the medical examination of the two girls. Thus, the reports bear two dates, one on the Police date stamp, which is 25th September, 2005, while the other date is 26th September, 2005, which is on the U.T.H. date stamp. But as already noted, the issue of two different dates were never canvassed at the trial, and cannot assist the appellant now. Ground one of appeal is therefore dismissed.

Ground two related to sentence. In sentencing the appellant, the learned judge noted that the appellant was a 1st offender, but that there were two counts. We take note that the two girls, were at the material time aged 11 and 8 years. The appellant was father and uncle, respectively. We also take note that the offence of defilement has become too prevalent. Following the principle set out in the case of Jutronich and Others (1), we cannot say the sentence was wrong in principle or manifestly excessive. We also find no exceptional circumstances which would render it an injustice if not reduced.ground two is also dismissed. In the result, the appeal against conviction and sentence is dismissed.

Appeal dismissed.