

**IN THE SUPREME COURT FOR ZAMBIA**

**APPEAL NO.**

**9/44/2011**

**HOLDEN AT NDOLA**

*(Criminal Jurisdiction)*

**BETWEEN:**

**PHILIP MUNGALA MWANAMUBI**

**APPELLANT**

**AND**

**THE PEOPLE**

**RESPONDENT**

**CORAM:** Chibesakunda, A.C.J., Mwanamwambwa, Wanki J.J.S.  
On the 7<sup>th</sup> June, 2011 and 13<sup>th</sup> August 2013

*For the Appellant: Mr A. Ngulube, Deputy Director, Legal Aid.*

*For the Respondent: Mr C. R. Mchenga, Director of Public Prosecutions*

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## **JUDGMENT**

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**Mwanamwambwa, J.S., delivered the Judgment of the Court.**

***Cases referred to:***

1. R. v. Dent (1907) 71. 511
2. Zulu v. The People (1973) ZR 326
3. Emmanuel Phiri v. The People (1982) Z.R. 77
4. Chimbini v. The People (1973) Z.R. 191
5. Nsofu v . The People (1977) Z.R. 77.
6. Jutronich, Schutte and Lukin v. The People (1965) Z.R. 12 (C.A.)

***Legislation referred to:***

1. The Juveniles Act, Cap 53. Section 122 (1).
2. The Penal Code Act, Cap 87. Section 138 (1)

The appellant was charged with, and convicted by the Resident Magistrate on, one count of defilement, of a girl under the age of 16 years, contrary to Section 138(1) of the Penal Code.

The particulars of offence were that the Appellant, in November, 2004 at Livingstone, had unlawful carnal knowledge of C. S. a girl under the age of 16 years. Upon conviction, he was committed to the High Court for sentencing. The High Court sentenced the Appellant to 25 years imprisonment with hard labour.

The Appellant now appeals against conviction and sentence.

The case for the prosecution rested on the evidence of P.W.1, the uncle to the prosecutrix, P.W.2, the prosecutrix and P.W.3, the arresting officer. The facts, in brief, were that on the 6<sup>th</sup> of November, 2004 at Livingstone, the prosecutrix was sent by P.W.1 to go and have a phone charged at the house of the Appellant. That the prosecutrix knew the Appellant because she used to take P.W.1's phone for charging at the Appellants' house. That there, the Appellant defiled her and she went home crying. She told PW1 that the Appellant had defiled her. The matter was reported to the police and afterwards, a medical examination revealed that the prosecutrix had been defiled.

Under warn and caution at the police, the Appellant denied the charge, and during his defence in court, he elected to remain silent.

The trial Magistrate, upon considering the evidence, found that the prosecutrix was defiled. That the prosecutrix was on the material date, at the Appellants house. He also found that she narrated the defilement incident to P.W.1 and named the Appellant as the defiler, immediately after it happened. The trial Magistrate also found that P.W.1 used to send the Prosecutrix to the Appellant's house, to have P.W.1's phone charged. That the identity of the Appellant cannot be mistaken.

The Appellant filed three grounds of appeal. These are:-

- 1. The Court below erred both in law and in fact by proceeding on a defective voire dire and ruling.**
- 2. The Court below erred both if fact and law by convicting the Appellant on uncorroborated evidence.**
- 3. The sentence imposed on the Appellant was wrong in principle and/or in law.**

In support of the first ground of appeal, Mr. Ngulube submitted that the voire dire administered by the trial court

was defective. He submitted that it is important to emphasise that a child may understand a general duty to tell the truth without

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realising the particular importance of his/her duty to tell the truth in the proceedings in which the child is a witness or potential witness. He further submitted that for a child to understand the nature of an oath so that he or she can be sworn in as a prosecution witness for any offence, the child must understand that his or her duty in giving evidence on oath is something more than the mere duty of speaking the truth. He cited the case of **R. v. Dent** <sup>(1)</sup> in support of this argument.

In reply to Mr. Ngulube's submission, Mr. Mchenga, the learned Director of Public Prosecutions (D.P.P.) conceded that the *voire dire* was defective. But he submitted that the conviction could still stand based on the other evidence on record.

**Section 122(1)** of **the Juveniles Act** (before the 2011 amendment) provided that:

**“Where, in any proceedings against any person for any offence or in any civil 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 understands the duty of speaking the truth; and his evidence though not given on oath but otherwise taken and reduced into writing so as to comply with the requirements of any law in force**

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**for the time being, shall be deemed to be a deposition within the meaning of any law so in force.”**

In **Zulu v. The People** <sup>(2)</sup> , this Court stated the correct procedure on conducting a voire dire under **Section 122 of the Juveniles Act**, as follows:

**“(a) The court must first decide that the proposed witness is a child of tender years; if he is not, the section does not apply and the only manner in which the witness's evidence can be received is on oath.**

**(b) If the court decides that the witness is a child of tender years, it must then 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 that of an adult witness.**

**(c) If, having decided that the proposed witness is a child of tender years, the court is not satisfied that the child understands the nature of an oath, it must then satisfy itself that he is possessed of sufficient intelligence to justify the reception of his evidence and**

**that he understands the duty of speaking the truth; if the court is satisfied on both these matters then the child's 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 matters the child's evidence may not be received at all."**

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In the instant case, the *voire dire* in contention reads as follows:

**"I am C. S. I am 14 years old. I was born on the 26<sup>th</sup> June, 1990. I am at school at Shanalumba Basic school. I stay with my uncle, F. K. We are four at home, my auntie and the young brother to my uncle are the people I stay with. I stay at Z. I am in Grade 8, I take 8 subjects and my history teacher is Mr K. I go to church, at New Apostolic Church. We pray on Sundays, we learn the Bible and also pray. I believe in God, he punishes people who commit sin. God punishes people who tell lies. I do not tell lies, I believe in God and if I told a lie, God would punish me."**

The Court then concluded that the juvenile was capable of giving evidence on oath.

From the above requirements of the law, we are satisfied that the voire dire was defective. The voire dire conducted by the trial magistrate did not establish that the child understands the nature of an oath and the duty of telling the truth. The magistrate concluded that the child is capable of giving evidence on oath simply because the child stated that: ***“I believe in God and if I told a lie, God would punish me”***. This is not the test that **section 122 of the Juveniles Act** envisages for the swearing of a Juvenile witness.

For the above reasons, this ground of appeal is allowed.

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On **ground two**, Mr Ngulube submitted that corroboration is required in defilement cases, as to the identity of the accused and as to the commission of the offence. He cited the case of **Emmanuel Phiri v. The People** <sup>(3)</sup> and many other cases on the need for corroboration.

In response, Mr Mchenga submitted that even without the evidence of the prosecutrix, the trial court would have still convicted the Appellant. He submitted that the evidence of PW1 was that she sent the prosecutrix to the home of the Appellant from where she came back crying. Upon being asked, she replied that she had been defiled. He stated that the evidence on record shows that the prosecutrix had been to the Appellants house on the material day. He stated that during the trial, the Appellant elected to remain silent. He

submitted that the only inference that can be drawn from the evidence is that the Appellant defiled the victim. He cited the case of **Chimbini v. The People** <sup>(4)</sup> in support of his argument.

We have considered the submissions of both learned Counsel and have examined the evidence on record.

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On the commission of the offence, the Medical Report produced by the prosecution corroborated the evidence of the prosecutrix that she was defiled.

As to the identity of the offender, we agree with Mr. Mchenga that despite the voire dire being defective, there was some other evidence on record, warranting the conviction to stand. In the first place, there is evidence from P.W.3 that at the Police Station, the Appellant admitted that the prosecutrix had been to his house and that he was there when she came. His own admission put him at the scene of the crime when it was committed. Therefore, he had an opportunity to defile the prosecutrix. In an appropriate case, opportunity can constitute corroboration, as to identity of the offender: **See Nsofu v The People** <sup>(5)</sup>.



In the present case, the opportunity coincided with the defilement. Therefore, the only irresistible inference is that the Appellant was the person who defiled the prosecutrix. Accordingly, we hold that the opportunity constitutes corroboration as to identity of the Appellant, as the person who defiled the prosecutrix.

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Secondly, the evidence raises the principle of special and compelling ground or "*something more*". This principle states that where in the particular circumstances of the case, there can be no motive for the prosecutrix, deliberately and dishonestly to make a false allegation against an accused, and the case in effect resolves itself in practice to being no different from any others in which the conviction depends on the reliability of her evidence, as to the identity of the culprit, this is a special and compelling ground, or something more which would justify a conviction on un corroborated evidence: **See Phiri v The People** <sup>(3)</sup>.

In the present case, there is evidence that the prosecutrix had taken P.W1's phone to the Appellant's house for charging, many times before. But she had never before, complained to her Uncle, P.W.1 that she had been defiled by the Appellant.

She only complained against the Appellant on 6<sup>th</sup> November 2004. There was no motive on the part of the prosecutrix, to deliberately and dishonestly make false allegations against the Appellant, on 6<sup>th</sup> November 2004. On the authority of **Phiri v The People** <sup>(3)</sup>, the evidence of “*something more*” or special and compelling grounds, further connected the Appellant to the commission of the offence in this matter. For the foregoing reasons, **ground two** fails, for lack of merit.

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**Ground three** relates to sentence. On this ground, Mr. Ngulube argued that the sentence imposed on the Appellant was wrong. He referred to **Section of 138 (1)** of **the Penal Code**, which then, provided as follows:-

**“Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for life.”**

He then referred to the sentiments of the learned Judge, during sentencing, when she said:

**“These cases of defilement are on in the increase hence the reason why the legislature had to increase the penalty for such cases to deter would be offenders... I sentence him to 25 years IHL with effect from 7<sup>th</sup> November, 2004. He has a right of appeal to the Supreme Court against conviction and sentence.”**

He submitted that the judge sentenced the Appellant to 25 years in prison based on the new amended law which provided for a mandatory minimum sentence of 15 years. He submitted that the mandatory minimum sentence came into effect after the amendment to **Section 138** of **the Penal Code** in 2005.

Mr Mchenga did not submit on this ground.

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We have considered the arguments of Mr. Ngulube on this ground. **Jutronich, Schutte and Lukin v. The People** <sup>(6)</sup>, laid the general approach of appellate Court in sentencing. In that case, it was held that in dealing with appeals against sentence, the appellate Court should ask itself these questions:

- 1. Is the sentence wrong in principle?**
- 2. Is the sentence so manifestly excessive as to induce a sense of shock; and**
- 3. Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?**

That only if one or the other of these questions can be answered in the affirmative, should the appellant Court interfere with the sentence. In the same case, there is a

further guiding principle quoted from **R. v Bull (1951) 35 Cr. Apph 164**, as follows:

**“In deciding the appropriate sentence, a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it.”**

At this stage, we wish to repeat what we said in **Phiri v The People** <sup>(3)</sup>, on sentence, specifically involving sexual offences. We said:

**“We must point out that rape is a very serious crime which calls for appropriate custodial sentences to mark the gravity of the offence, to emphasize public disapproval, to serve as a warning**

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**to others, to punish the offenders and, above all to protect women.”**

Coming back to this case, we wish to start by commenting on the sentencing Judge’s sentiments. That is the issue that gave rise to ground 3 of appeal. **The Penal Code** was amended on 15<sup>th</sup> September 2005, by setting the minimum sentence for defilement at 15 years. The record shows that the prosecutrix was defiled in November 2004. It is clear that as at 25<sup>th</sup> January 2006, when the learned Judge passed sentence, she was under the mistaken belief that the defilement was

committed after the amendment. Before the amendment, the sentence for defilement ranged from one day to life imprisonment. The question here is whether the mere mistaken reference to the minimum sentence by the learned sentencing Judge, rendered this sentence excessive or wrong in principle.

In this case, the Appellant was a neighbour to the prosecutrix's uncle. As such neighbour, the uncle trusted the Appellant and used to send the prosecutrix to the Appellant's house, to charge the cellphone. The Appellant abused that trust. He forcefully dragged her to his bedroom and defiled her. He did so under the cover of loud music which he had deliberately increased so that people would not hear her shouts for help. The Appellant is a married man. That is according to the evidence of

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the prosecutrix. We wonder why a married man should defile a 14 year old niece of his neighbour. What is it that a married man can get from a 14 year old girl, under circumstances of forced sexual intercourse, which his wife has failed to give him? In our view, there is none. This was a mere case of irresponsible lust. In our view, by so doing, he insulted his wife. We consider the abuse of trust by the neighbour and the insult

to his wife, aggravating factors. We consider defilement of girls, just like rape of women, a very serious offence. And defilement is a prevalent offence.

Given the two aggravating factors, the prevalence and seriousness of the offence and the maximum sentence of life imprisonment, the sentence of 25 imprisonment, with hard labour, does not come to us with a sense of shock. The mere mistaken reference to the minimum sentence of 15 years, does not render the sentence of 25 years excessive or wrong in principle. The lower Court was on firm ground when it sentenced the Appellant to 25 years imprisonment with hard labour. We would add that those who choose to defile under age children, need to be caged for reasonably long periods, to put them out of circulation, for the safety of children.

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We hereby dismiss **ground three** for lack of merits. The net result is that the appeal is hereby dismissed.

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L.P. CHIBESAKUNDA

**ACTING CHIEF JUSTICE**

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M.S. MWANAMWAMBWA  
**SUPREME COURT JUDGE**

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M.E. WANKI  
**SUPREME COURT JUDGE**