IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

SCZ JUDGMENT NO. 43 OF 2014
APPEAL NO. 354 OF 2013

BETWEEN:

KWEZEKANI CHITALO APPELLANT
AND
THE PEOPLE RESPONDENT

CORAM: **WANKI, AND MUYOVWE, JJS, LENGALENGA, AG. JS,**
On 5th November, 2013, 8th April, 2014 and 14th October, 2014

For the Appellant: Mr. W. Mutofwe - Douglas and Partners; and Mr. P.H. Namangala P and P Advocates

For the Respondent: Mrs. M.B. Nawa - National Prosecutions Authority

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J U D G M E N T

WANKI, JS, delivered the Judgment of the Court.

CASES REFERRED TO:-

1. **Sikota Wina, Princess Nakatindi Wina -Vs- The People, (1996) SCZ Judgment No. 8 of 1996.**

2. **Emmanuel Phiri -Vs- The People (1982) Z.R. 77 (S.C).**

LEGISLATION REFERRED TO:-

3. **The Penal Code Chapter 87 of the Laws of Zambia.**

(1019)

The appellant Kwezekani Chitalo was sentenced to 25 years Imprisonment with hard labour by the Lusaka High Court following his conviction by the Subordinate Court of the First Class Holden at Lusaka on one count of unnatural offence, contrary to **Section 155 of the Penal Code Chapter 87 of the Laws of Zambia.**

The particulars of the offence were that he on 1st April, 2009 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, had carnal knowledge of the prosecutrix against the order of nature.

The appellant's conviction was based on the evidence of three witnesses, namely; Agness Phiri, PW1, Angela Susu, PW2, and Number 31287 Detective Sergeant Bertha Kalitute.

The testimony of PW1 was that on 1st April, 2010 she left the prosecutrix her two years nine months old child by the door of her house before she went to collect her other child Suzan from her neighbour's house. As she was at her neighbour's

house she heard someone calling her dependant Jane to go and rescue

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Agness in whose mouth the appellant was putting his penis. When she turned she saw the appellant putting his penis in the mouth of the prosecutrix outside her house. She then rushed there to rescue her child; she pulled the child. The appellant then ran into his house.

The matter was reported to the police and the appellant was then apprehended. Thereafter, she took her child to the hospital.

The testimony of PW2 was that on 11th July, 2010 at about 13.00 hours as she was sitting outside her house, she saw the appellant come out of his house with his trousers zip open. He then went to PW1's house and picked the prosecutrix and put his penis in her mouth. Upon seeing that, she shouted out for the child's mother to alert her. The child's mother, PW1 went to rescue her child.

The testimony of PW3 was that on 11th July 2010 at about 13.00 hours he received information from members of the public to the effect that somebody had abused a child. Acting on the information he went to Chaisa Compound where he was told by

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people that the appellant had carnal knowledge of a child against the order of nature. He then apprehended the appellant; and subsequently he arrested him for the subject offence. Under warn and caution in Nyanja, the appellant denied the charge.

The appellant gave sworn evidence and called no witnesses. His brief testimony before the trial Court is that he could not remember where he was on 1st April, 2009 as he was sick. He was found coming out of the house at Chaisa without a shirt around 13.00 hours and the zip of his trousers was also open. According to him, the prosecutrix was near his house as they are neighbours but he had no contact with her. According to the appellant, he was suffering from cerebral malaria, he

went to the hospital and he had medical evidence to that effect dated 14th July, 2010, 21st December, 2010 and 23rd March, 2011. His sick slips were obtained by his mother after the incident.

The Subordinate Court after considering the evidence before it found that the prosecution had proved its case beyond all reasonable doubt and convicted him as charged. It then

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committed him to the High Court for sentencing; and the High Court proceeded to impose the sentence of 25 years Imprisonment with hard labour. It is against his said conviction that he has appealed.

The appellant advanced two grounds of appeal as follows:-

1. **The lower Court erred in law or fact when it upheld the conviction of the appellant as there was evidence that the appellant was insane in light of the receipts from Chainama Hills Hospital that were availed to the trial Court**.

2. **The lower Court erred in law or fact when it convicted the appellant as the prosecution failed to prove the case beyond reasonable doubt.**

In support of these grounds of appeal Mr. Mutofwe, Counsel for the appellant filed heads of argument. Counsel

argued in support of ground one that it is trite law that where a trial was flawed on a technical defect, it is in the interest of justice to subject the appellant to a retrial. He contended that the trial Court ought to have ordered that the appellant be examined by a mental hospital to determine his state of mind immediately the issue of insanity arose when the appellant showed the trial Court receipts from Chainama and when he naively claimed he had

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cerebral malaria (a disease which affects the mind). Counsel argued that the trial Court erred in law to proceed with trial when it had evidence before it that the appellant was receiving treatment from Chainama Hills Hospital, the only psychiatric Hospital for mentally ill patients in Zambia as this was evident from the receipts that were presented before the trial Magistrate. Mr. Mutofwe referred to **Section 160 of the Criminal Procedure Code** and the case of ***SIKOTA WINA, PRINCESS NAKATINDI WINA -VS- THE PEOPLE*** [(1)], where it was held that:-

> **“…..a retrial could be ordered if the first trial was flawed on a technical defect or if there were good reasons for subjecting the accused to a second trial: where, as here, the prosecutions had adduced all its evidence there would be no point for a retrial.”**

It was Counsel’s argument that the trial Magistrate ought to have taken judicial notice that cerebral malaria affects the balance of the mind and a normal person with cerebral malaria will display signs of mental illness. Further, Chainama Hills Hospital is the only hospital that treats mental illness and the more reason the trial Magistrate ought to have ordered that the

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accused person be examined by the psychiatrist to determine whether he was capable of defending himself. It was contended that it was procedurally wrong to try a person where there is evidence that he received treatment from a mental hospital and receipts are availed to that effect; if a Court proceeded to hear the matter, the accused person would be grossly prejudiced and the trial would not be free and fair. Counsel pointed out that the appellant was unrepresented and he was not capable of defending himself as he failed to cross-examine State witnesses. Counsel cited **Article 18(1) of the Constitution.**

The gist of the arguments in support of ground two as advanced by Counsel is that an unnatural offence is a sexual offence where corroboration is required to support the evidence of suspect witnesses. It was argued that there was no corroboration to support the evidence of PW1 and PW2 who in Counsel's view were suspect witnesses. Counsel relied on the case of ***EMMANUEL PHIRI -VS- THE PEOPLE***. (2)

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Mrs. Nawa, Deputy Chief State Advocate requested that they be given a bit of time to file their response. The Court accordingly directed that the respondent should file submissions on or before Friday 11th April, 2014. However, Mrs. Nawa did not file the submissions within the time given. Therefore, we decided to proceed with our judgment without the respondent's submissions.

We have considered the offence for which the appellant was convicted created by **Section 155 of the Penal Code**. It provides in part thus:-

> **“Any person who-…. has carnal knowledge of a child against the order of nature; …. that person commits an offence….”**

For the offence under **Section 155 of the Penal Code** to be established it must be shown that sex against the order of nature occurred. Sex which involves insertion of a male private organ into the mouth of a child for instance, is without doubt against the order of nature.

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Section 160 of the criminal Procedure Code provides guidance on what the trial Court should do whenever the question of inability to make a proper defence arises at the instance of the defence or otherwise. The section provides thus:-

> **“Where on the trial of a person charged with an offence punishable by death or imprisonment the question arises, at the instance of the defence or otherwise, whether the accused is, by reason of unsoundness of mind or of any other disability, incapable of making a proper defence, the Court shall inquire into and determine such question as soon as it arises.”**

From the above cited provision, it is clear that whenever the question of inability to make a proper defence on account of unsoundness of mind or some other disability arises, the trial Court is required to inquire into and determine such question as soon as it arises. This procedure enables the trial Court to ascertain whether indeed the accused person is incapable of conducting a proper defence. If it is found that the accused person is capable of making a proper defence then trial takes the ordinary process but if it is found that the accused person is unfit to make a proper defence then the trial Court during the trial of

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such accused person, adopts the procedure outlined in **Section 161 of the Criminal Procedure Code** which provides as follows:-

> **Where a Court, in accordance with the provisions of Section One Hundred and Sixty, finds an accused incapable of making a proper defence, it shall enter a plea of "not guilty" if it has not already done so and, to the extent that it has not already done so, shall hear the evidence for the prosecution and (if any) for the defence.**

(2) At the close of such evidence as is mentioned in Subsection 1), the Court, if it finds that the evidence as it stands-

(a) Would not justify a conviction or a special finding under section one hundred and sixty-seven, shall acquit and discharge the accused; or

(b) Would, in the absence of further evidence to the contrary, justify a conviction, or a special finding under section one hundred and sixty-seven, shall order the accused to be detained during the President's pleasure.

(3) An acquittal and discharge under subsection (2) shall be without prejudice to any implementation of the provisions of the Mental Disorders Act, and the High Court may, if it considers in any case that an inquiry under the provisions of section nine of that Act is desirable, direct that the person acquitted and discharged be detained and taken before a magistrate for the purpose of such inquiry.

For the trial Court to resort to the provision of **Section 160 of the Criminal Procedure Code** the question of the accused's inability to make a proper defence must have arisen. It is within the preserve of the trial Court to determine that the said question has arisen in the due course of the trial. There are several facts

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from which the trial Court can determine that the question of the accused's inability to make a proper defence has arisen. Where upon being arraigned before the trial Court the accused

fails to make intelligent answers when questions touching on personal particulars are put to him or her; and or the accused's conduct in Court reveals an apparent departure from the ordinary among others, the trial Court may hold that the question of such accused's inability to make a proper defence has arisen.

This appeal raises two questions for our determination as can be deduced from the two grounds of appeal. The first is whether there was evidence that the appellant herein was insane at any material time while the second question is whether the prosecution failed to prove the case beyond reasonable doubt.

We have thoroughly examined the record of proceedings in our hope to find evidence showing that the appellant was insane. We found no evidence establishing that the appellant was insane at any material time and we disagree with Counsel's argument on this point. It is our view that the receipts showing that the

appellant receives treatment from Chainama Hills Hospital do not constitute conclusive evidence that the appellant is insane. What may have constituted evidence of insanity include the report of medical examination to the effect that the appellant was insane and testimonies of relatives or members of the community within which the appellant lived showing that the appellant's behaviour was like that of an insane person among others.

Further, it is opined that not all persons receiving treatment from Chainama Hills Hospital can be regarded as insane persons. In fact persons suffering from insanity proper are generally admitted by the said hospital. However, the appellant herein was not admitted by the hospital. The appellant was living within the neighborhood of PW1 and PW2 who never indicated that the appellant was a mental patient.

Insanity is a defence which must be pleaded and proved on a balance of probabilities by the defence. It is our view that the said defence was not pleaded by the appellant during his trial and

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if it was pleaded the same was not established hence there being no evidence of insanity.

In light of the foregoing, our answer to the first question in this appeal is that there was no evidence of insanity in this case. It is our view that in the circumstances of this case, the question of unfair trial does not arise. Although Counsel spiritedly argued to the contrary the said arguments were like bullets shot in the vaccum. The first ground of this appeal fails.

As regards the second question, we hold that the prosecution proved its case beyond reasonable doubt. The appellant was seen committing the offence by PW1 and PW2 who were all neighbours to the appellant during the day. The witnesses had sufficient light and opportunity to observe the incident. Further, there was corroboration as to the commission of the offence and the identity of the appellant. PW1 and PW2 lived in harmony with the appellant prior to the incident and

therefore no motive of their own to serve can be attributed to them. Ground two of this appeal has no merit and it fails.

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The two grounds having failed the sum total is that the appeal against conviction has failed and the same is dismissed and the sentence of 25 years Imprisonment with hard labour is accordingly confirmed.

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M.E. Wanki,
SUPREME COURT JUDGE

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E.N.C. Muyovwe,
SUPREME COURT JUDGE

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F.M. Lengalenga,
ACTING SUPREME COURT JUDGE