IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 56/2015**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

STEVEN KALIBUKU **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Hamaundu, JJS
On 6th October, 2015 and 12th August, 2020

For the Appellants : Mr. M. Mushemi, Messrs Nhari Mushemi & Associates

For the State : Mrs M. Ziyela, Deputy Chief State Advocate and Ms Gina Nyalugwe, State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Makhanganya v R (1963) R & N 698**
2. **Zulu v The People (1977) ZR 151**
3. **Musole V The People (1963-1964) ZR & NRLR, 173, 180**
4. **Bullard V The Queen (1958) Cr. App. Rep.1**
5. **David Flynn(1958) Cr. App. Rep 15**
6. **Jutronich, Schutte and Lukin V The People (1965) ZR 9**

Legislation referred to:

1. **Juvenile's Act, Chapter 53** of the **Laws of Zambia, S. 122**
2. **The Criminal Procedure Code, Chapter 88,** of the **Laws of Zambia**

Works referred to:

Magistrate's Handbook; Sixth (1991) Edition; E.J. Swarbrick

This appeal is against both conviction and sentence.

The appellant appeared before the subordinate court of the first class at Kafue on the 30th September, 2014, charged with the offence of defilement, contrary to **section 138(1)** of the **Penal Code, Chapter 87** of the **Laws of Zambia**. It was alleged that on 17th September, 2014, the appellant had carnal knowledge of a girl under the age of 16 years.

During the trial, it was established that the victim was actually defiled. It was also established that the child was only 6 years old at the time of the defilement. It was further established that the victim was defiled in the appellant's room; this is supported by the versions of the story from both the prosecution and the appellant. The two versions were as follows: The prosecution witnesses, who included the victim whose testimony was received on oath after a *voire dire*, said that on 17th September, 2014, the victim had appeared at her home at dusk, half naked: That she had then led some adults to a house where the rest

of her clothes were found strewn on the floor, and bloodstained; that a bloodstained shirt (which turned out to belong to the appellant) was also found in that room. In his own version, the appellant said that he had come from a night shift on the morning of 18th September, 2014 and found the person that he was sharing the room with, named Oscar Miyoba, still sleeping; that he had then noticed bloodstained clothing of a child; he had then asked his room-mate as to what he had done, to which he had received no response. That, however, the same morning, the victim's father had come to apprehend him and had taken him to the police; ignoring his explanation that the victim could have been defiled by Oscar Miyoba.

After considering both versions, the trial magistrate accepted the prosecution's version, and rejected the appellant's. The appellant was then convicted of the offence, and committed to the High Court for sentence. There, he was sentenced to a term of 30 years imprisonment.

It should be noted that when the matter went before the High Court judge for sentence, the appellant raised the issue that the *voire dire* was inadequate. In her ruling on review for the purpose of sentencing , the learned judge agreed with the appellant that the *voire dire* conducted in this case did not meet the test in **section 122** of

the **Juvenile Act,** and the approach set out in **Makhanganya v R**[1]. She, however, found that the evidence that implicated the appellant was not from the child witness, but from the adult ones.

Before us, the appellant has raised an argument regarding the *voire dire.*

We must say that this case did not, and indeed this appeal does not, turn on the testimony of the victim. This is because, even assuming that the *voire dire* had properly satisfied the test, the victim did not point at the appellant when she was asked as to who had defiled her. Also, the fact that the victim was defiled in the appellant's house (or room) is not in dispute: the appellant himself acknowledges that he saw in his room the bloodstained items belonging to the child, as well as his own bloodstained shirt. The only point of dispute is that he did not agree that he was the one who defiled the child: But, instead, he suggested that it was his room-mate, Oscar Miyoba, who could have done it. So, in our view, the only issue that was before the trial magistrate was the adequacy of the appellant's explanation. And so, in this appeal, we are only concerned with the manner in which the trial magistrate dealt with the appellant's explanation.

Therefore, the argument on the voire dire is not only misconceived, there being no appeal from the ruling of the High Court Judge on the point, but it has no bearing on this appeal.

We now come to the appellant's first ground of appeal. This is couched as follows:

> **"The trial court erred in law and fact when it convicted the appellant on the mere fact that the house the purported defilement took place in belonged to the appellant yet the prosecutrix had failed to identify him as many as four times at trial opting to point at other persons, therefore failing to establish in fact that it was the appellant or another person who committed the crime".**

Submitting on this ground, Mr. Mushemi, for the appellant, drew our attention to the fact that during trial the victim did not point at the appellant as the person who had defiled her. He drew our attention also to a portion of the trial magistrate's judgment where, in reviewing the appellant's testimony, she wrote:

> **"Accused told court he suggested to PW2's father that they go and pick up the friend so that PW2 would point but was taken to police"**

Mr. Mushemi also referred us to the appellant's testimony in which he said that, at the time of the incident, he was living with a friend named Oscar Miyoba. Our attention was further drawn to the

testimony of the appellant's witness, where that witness confirmed that, at the time of the incident, the appellant was living with a friend.

Counsel went on to point out that no DNA test was conducted in order to positively connect the appellant to the defilement, and that the police did not bother to apprehend the appellant's friend, nor even to present him for identification. Consequently, Mr. Mushemi argued that, given all the foregoing flaws in the case, the prosecution failed to adequately connect the appellant to the offence; and that it was an error on the part of the trial magistrate to convict the appellant.

We must state here that we did not have the benefit of any counter-argument because the prosecution did not file any heads of argument in response.

There being no dispute that the victim was defiled in the appellant's room, and there being no evidence identifying the appellant as the culprit, this case reduced itself to one of circumstantial evidence. As regards circumstantial evidence, we have held in **Zulu v The People**[2], and other subsequent cases, that to support a conviction the circumstantial evidence must take the case out of the realm of conjecture; so that it attains such a degree of cogency which can permit only an inference of guilt.

It is clear from the record that when the appellant took to the stand, he gave an explanation that at the time of the alleged incident he had gone for work, and had left his friend Oscar Miyoba in the room. He also explained that the following morning the victim's father came to apprehend him; and took him to the latter's house: That he suggested to the victim's father that his friend Oscar Miyoba should also be picked so that the victim could point at the person who had defiled her, as between the appellant and Oscar Miyoba; but that the victim's father just took him to the police. Again, it is clear from the record that the witness whom the appellant called stated that he was one of the occupants of the semi-detached house in which the appellant lived. That witness confirmed the appellant's statement that he lived with a friend.

The following portion from the trial magistrate's judgment reveals how she resolved the issue:

She said:

> **"I also find that the surrounding circumstances connect accused to the offence and there is sufficient corroboration by PW3 and PW4 of accused having committed the offence. I also find that accused did not in any way discredit the prosecutions' evidence nor has he given any cogent defence, his evidence was less candid as he failed to bring any witness to ascertain that**

he was not around and that it was his alleged friend who is no longer at his place"

We must point out, first, that the testimony of PW3 and PW4 did not provide corroboration that the appellant committed the offence. That testimony only went so far as to show that the child was defiled in the appellant's room. That fact was not disputed by the appellant. So, when the appellant explained that, at the time of the incident, he was at work but that he had left his friend Oscar Miyoba in the room; and when he suggested that it was probably his friend who committed the offence, the case for the prosecution remained open.

Secondly, by commenting that the appellant had failed to bring any witness to prove his explanation, the trial magistrate committed a cardinal error regarding the burden of proof in criminal cases. In **Musole V The People**[3], *Blagden, J.A.*, dealing with the peculiar issue that was before the Court of Appeal (this Court's predecessor), namely, intoxication heightening the reaction to an act of provocation, said:

"But in saying this I would stress that with the exception of the defence of insanity, with which we are not concerned in this appeal, there is no onus on an accused person to prove or establish any of these defences. The onus remains on the

prosecution throughout to prove the accused's guilt as charged beyond reasonable doubt; and it is for the prosecution to negative these defences when they arise"

This statement is of general application in criminal cases. The learned author of the Zambian *Magistrate's Handbook*, E.J. Swarbrick, summarizes Blagden, J.A,'s statement clearly. He says:

"The general rule is that if a defence is raised the onus is on the prosecution to disprove it and it is not for the accused to prove it"(P.510)

Swarbrick goes on to say:

"Magistrates must be clear as to the difference between 'proving' a defence and 'raising' a defence. A defence may be raised from the evidence for the prosecution or the defence and indeed may be raised without the defence giving any evidence at all. Once a particular defence can be said to be sufficiently before the court to warrant it being considered the onus is on the prosecution to disprove it."(P.510)

Swarbrick concludes with the following:

"The crucial question is always whether on the evidence as a whole there is any evidence which would put in issue the existence of any defence, explanation or excuse which, if accepted by the court as possibly true, would lead to the accused's acquittal"

The *Magistrates Handbook* is a very vital guide to Magistrates, particularly in Criminal Procedure. Magistrates would do well to constantly have recourse to it.

In the instant case, the trial magistrate said that the appellant had not given any cogent defence. It is important to note that the appellant's explanation was given against the following background: the victim, in the court-room, did not point at the appellant. Even assuming that the child may have been frightened by the court room atmosphere, there is still no evidence from the civilian witnesses that, at the time that the appellant was being apprehended, the child pointed at him as the culprit. A question to that effect was posed by the appellant to PW3, who replied that the child never pointed at him. So, from the accounts on record, the appellant was apprehended by the victim's relatives only because he was mentioned by the neighbours as the occupant of that room in which the incident occurred. In those circumstances, therefore, the appellant's explanation did raise quite a cogent defence.

Now, at the trial there was an attempt by the public prosecutor to discredit the appellant's explanation during cross-examination. The prosecutor asked the appellant whether at the time of his arrest he had told the arresting officer about Oscar Miyoba, and also about

the fact that he had been at work at the time of the incident. The appellant replied that he had told the arresting officer. The prosecutor then asked the appellant why he had not put that question to the arresting officer during her testimony. The appellant replied that he had forgotten to pose the question because he was confused. Obviously, the public prosecutor was trying to show that the appellant's explanation was merely an afterthought. But, in her testimony, the arresting officer had only said that she had interviewed the appellant upon his apprehension and that he had denied the accusation. From that statement one cannot, with certainty, say that the appellant had not told the arresting officer about his alibi and suspicion that it was his room-mate who may have committed the offence. In fact, in view of the fact that the appellant was not denying the fact that the child was defiled in his room, one would wonder what his denial before the arresting officer consisted. It is, therefore, possible that the appellant could have given his explanation to the arresting officer but that the latter chose to disbelieve the story, instead of investigating the leads arising therefrom. In any case, we wish to point out that the person who apprehended the appellant was the victim's father; and this is the man to whom, according to the appellant, he tried to explain about

Oscar Miyoba; and whom he even asked to let the victim be allowed to point at the culprit between him and Oscar Miyoba; but that the victim's father did not want to listen to him. The victim's father was not called as a witness. And it can be seen that the events as regards what transpired at the time that the appellant was apprehended and taken to the police are lacking in the prosecution's evidence. If the victim's father had been called to testify, perhaps the appellant would have posed questions to him regarding his explanation. We will never know. But had he been given that opportunity and still omitted to ask the victim's father those pertinent questions, then one would comfortably say that, indeed, the appellant's explanation was an afterthought. But that is not the case now.

While we are still on the prosecutions contention that the appellant's *alibi* and suspicion were an afterthought, we ask one question: when and how should an accused's defence be raised? *Swarbrick* quotes a passage from the case of **Bullard V The Queen**[4], a decision by the Privy Council. The passage says:

> **"the accused must raise the defence by sufficient evidence fit to go to the jury; in other words, the evidential burden is on him. .....The [prosecution] is not called upon to anticipate such a defence in advance and destroy it in advance. The**

> **accused, by the cross-examination of prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as makes the defence (in this case duress) a live issue fit and proper to be left to the jury. But, once he has succeded in doing this, it is then for the [prosecution] to destroy that defence in such a manner as to leave in the jury's mind no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion."**(P.511)

It is clear from this passage that, to be an issue fit and proper to be left to a jury, such issue must not necessarily have to be introduced through cross-examination of the prosecution witnesses. The issue may arise for the first time during evidence called on behalf of the accused. While it is accepted that, in some cases, the failure to lay the ground for an issue during cross-examination of the prosecution witnesses must lead to the conclusion that the issue is a mere afterthought, that is not always the case: The evidence when taken as a whole will determine whether the issue has been sufficiently raised.

In this case the appellant's explanation in his defence should have been weighed as against the lack of evidence pointing at him as

the culprit; and the omission by the prosecution to call the victim's father with whom the appellant could have had questions regarding the events of the apprehension. We think that, in those circumstances, the appellant had raised an explanation which could possibly be true. Therefore, in our view, a burden was placed on the prosecution to disprove that explanation. **Section 210** of the **Criminal Procedure Code** empowers the court to permit the prosecution to call rebutting evidence. According to cases such as **David Flynn**[5], this is applied in cases where the accused or his witnesses give evidence of some new matter which the prosecution could not reasonably have foreseen, for example, where the accused raises some unexpected last minute defence, such as a late *alibi*. This is what the prosecution in this case should have done. They did not.

So, as matters stand, the evidence in the instant case raised at least two possible inferences; first, that the appellant may have been the one that defiled the victim. Secondly, that the victim may have been defiled by the appellant's friend, Oscar Miyoba. It, therefore, cannot be said that the circumstantial evidence in this case was so cogent as to permit only the inference that it was the appellant who defiled the child. For this reason, we find merit in the appeal against conviction.

In the circumstances, we think that the appeal against sentence, which is the subject of the second ground of appeal, has become moot. In passing, we can only say that we approach appeals against sentence from the following three questions, as laid down in **Jutronich, Schutte and Lukin V The People**[6]:

> **"(1) is the sentence wrong in principle?**
> **(2) Is the sentence so manifestly excessive as to induce a sense of shock?**
> **(3) Are there exceptional circumstances which would render it an injustice if the sentence were not reduced?"**

The appellant's argument in this ground is only that the sentence of 30 years imprisonment was very harsh, considering that he was a first offender. The offence carries a maximum punishment of life imprisonment. In this case, the sentencing judge did acknowledge that the appellant was a first offender, but she weighed that factor against the following circumstances, among others; that the child was of tender age, being only six years at the time; and that there was pain and trauma inflicted on the child. She then arrived at the sentence of 30 years imprisonment.

The fact that the victim was very young and must have suffered pain and trauma cannot be denied. When these factors are considered, we do not see how the sentence could have been wrong

in principle; and neither does it induce a sense of shock in us. Therefore, the appeal against sentence would be without merit. But, as we have said, this ground is moot, as the appellant has succeeded on his appeal against conviction.

We allow this appeal and quash both the conviction and sentence.

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G. S. Phiri
SUPREME COURT JUDGE

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE