IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 94/2020**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

ROBSON CHIZIKE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Chisanga JP, Mulongoti and Siavwapa, JJA**
On 16th February, 2021 and 9th April, 2021

For the Appellant: *Mr. K. Muzenga, Director Legal Aid Board*

For the Respondent: *Mr. C. Bako, Deputy Chief State Advocate- National Prosecution Authority*

J U D G M E N T

***MULONGOTI, JA**, delivered the Judgment of the Court*

cases referred to:

1. ***Mwaba v The People (1974) ZR 264***
2. ***Gift Mulonda v The People (2004) ZR 135***
3. ***Nsofu v The People (1973) ZR 287***
4. ***Martin Ncube v The People (CAZ Appeal No. 22 of 2016)***

5. ***Kangachepe Mbao Zondo and others v The Queen (1963-1964) NRLR 97***
6. ***Tapisha v The People (1973) ZR 222***
7. ***Goba v The People (1966) ZR 113***
8. ***Alubisho v The People (1976) ZR 11***
9. ***Sakala v The People (1972) ZR 35***
10. ***Jackson Kamanga and four others v The People (SCZ Appeal No. 30, 31. 32, 33 and 34 of 2020)***
11. ***Isaac Musadabwe v The People CAZ Appeal No. 81/2018***
12. ***Wilfred Kashiba v The People (1971) ZR 95***
13. ***Benny Habulembe v The People (CAZ Appeal No. 121 of 2018)***
14. ***Godfrey Chimfwembe v The People (SCZ/9/145/2013)***
15. ***Elvis Mweemba v The people (SCZ Appeal No. 386 of 2013)***
16. ***Emmanuel Phiri v The people (1982) ZR 77***
17. ***Machipisha Kombe v The People (2009) ZR 282***

Legislation and Works referred to:

1. ***The Penal Code, Cap. 87 of the Laws of Zambia, section 138***
2. ***The Juveniles Act, Cap. 53 of the Laws of Zambia***

1.0. Introduction

1.1. This is an appeal against conviction and sentence.

1.2. The appellant, Robson Chizike, was convicted of defilement contrary to **section 138 (1) of the Penal Code Chapter 87 of the Laws of Zambia**, by the Subordinate Court of the Second Class at Chirundu. The appellant was subsequently committed to the High Court for sentencing. The appellant was sentenced to 25 years imprisonment with hard labour by Yangailo, J.

1.3. The particulars of the offence alleged that the appellant, on 1st May, 2016, and 10th July, 2016 at Chirundu in the Chirundu District of the Lusaka Province of the Republic of Zambia, had unlawful carnal knowledge of 'KS', a girl under the age of 16.

2.0. **The Evidence Adduced at Trial**

2.1. The prosecution led evidence from five witnesses including the prosecutrix who gave evidence after a *voire dire*.

2.2. The prosecutrix (PW3) aged 13-years at the material time, alleged that she had an intimate relationship with the appellant, a 20-year-old taxi driver. The prosecutrix said she started seeing the appellant on 5th May, 2016. According to the prosecutrix, on one occasion, the appellant gave her a lift with her friend Cleopatra. She claimed that she would meet the appellant at the market on several occasions. Further, that the appellant had sexual intercourse with her on three different occasions, one of which took place in his taxi.

2.3. The prosecutrix later fell sick. She experienced a headache and abdominal pains. She also observed that she had a white vaginal discharge.

2.4. On 7th July, 2016, the prosecutrix informed her mother (PW1) that she was unwell. PW1 took her to Mtendere Mission Hospital in Chirundu.

2.5. Upon examination, the doctor found that the prosecutrix had a bruised and swollen vagina. She was given medication to treat her for sexually transmitted diseases. On a second visit to the hospital, the prosecutrix was found to be seven (7) weeks pregnant. The prosecutrix said that her boyfriend (the appellant) was responsible for her pregnancy.

2.6. The prosecutrix's mother (PW1) reported the matter to Chirundu Police. The prosecutrix then gave her mother (PW1) the appellant's phone number. PW1 in turn gave the phone number to the prosecutrix's father (PW2) and brother (PW4). PW4 called the appellant pretending that he wanted to book the appellant's taxi to take him to the police station. PW4 met the appellant at a bus station and lured him to the police station. While they were outside the police station, PW4 phoned the police officers to go and apprehend the appellant. According to PW4, the appellant attempted to run away but he managed to apprehend him and took him inside the police station.

2.7. At the police station, the police officers questioned the appellant and the prosecutrix if they knew each other. They both accepted that they knew each other.

2.8. The arresting officer, Inspector Getrude Cheelo (PW5), testified that under warn and caution, the appellant gave a free and voluntary reply admitting the charge. In cross-examination, she denied that she threatened the accused to admit the charge and that he impregnated the prosecutrix.

2.9. In his defence, the appellant gave sworn evidence denying the allegations. He said he did not know the prosecutrix and only admitted the charge because he was threatened.

2.10. He, however, stated that on one occasion, he gave three school girls a lift but, they were not in uniform and he could not recall if the prosecutrix was one of them.

3.0. **Findings and Decision of the Trial Court**

3.1. After analysing the evidence, the learned trial court made the following findings of fact:

3.1.1. That there was corroboration as to the commission of the offence because someone did have carnal knowledge of the prosecutrix;

3.1.2. That although the appellant initially denied responsibility, he later admitted to the arresting officer that he made the prosecutrix pregnant, which is why he was charged and arrested for the subject offence;

3.1.3. That the appellant met the prosecutrix on several occasions and had carnal knowledge of her on 20th June, 2016 sometime after they met;

3.1.4. That there was no motive for the prosecutrix to make a false allegation against the appellant; and

3.1.5. That the prosecutrix was female and below the age of 16.

3.2. The trial court then concluded that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted him.

4.0. **The Appeal**

4.1. Dissatisfied with both conviction and sentence, the appellant appealed to this Court on five (5) grounds, as follows:

4.1.1. ***"the learned trial court erred both in law and in fact when it failed to explain the proviso to the appellant, as a***

result of that failure, he was denied the opportunity to make out the defence which the proviso creates;

4.1.2. ***The learned trial court misdirected itself in law and fact when it placed confessions on record without holding a trial within a trial as the issues of voluntariness had been raised;***

4.1.3. ***The learned trial court erred in law and fact when it convicted the appellant in the absence of corroborative evidence as to the identity of the offender;***

4.1.4. ***The learned trial court misdirected itself in law and fact when it received and considered the prosecutrix's evidence after a defective voire dire was conducted; and***

4.1.5. ***In the alternative to the foregoing grounds, the learned court below misdirected itself in law and in fact when it sentenced the appellant to 25 years imprisonment in light of him being a first offender."***

5.0. **The Arguments**

5.1. The appellant's counsel filed heads of argument in support of the appeal.

5.2. In support of ground one (1), it was submitted that the trial court erred when it failed to explain the proviso to the appellant and thus denied the appellant an opportunity to make out a defence which the proviso creates.

5.3. We were referred to the case of **Mwaba v the People**[1] and a more recent case of **Gift Mulonda v the People**[2] where the Supreme Court held that ***"it is a rule of practice that the proviso to section 138 (1) of the Penal Code should be explained***

to an accused person. Failure to explain the proviso is fatal".

Counsel concluded that the failure by the trial court to explain the proviso caused great injustice to the appellant.

5.4. This is in view of the fact that the prosecutrix who was aged 13 indicated that the appellant was her boyfriend. The appellant, a young man aged 20, could have possibly been mistaken as to the age of the prosecutrix. In the circumstances, the failure to explain the proviso was fatal.

5.5. In support of ground two (2), it was submitted that the trial court erred by placing the confession on record without holding a trial within a trial when an issue as to the voluntariness of the confession was raised.

5.6. It was submitted that when analysing the evidence against the appellant, at page 30 of the Judgment, the trial court referred to a verbal admission allegedly made by the appellant. However, at the time PW5 was testifying about the admissions, the trial court did not enquire from the appellant, about the voluntariness of the alleged admissions. As such, the evidence was admitted in breach of the Judges rules as stated in **Kangachepe Mbao Zondo and others v the People**[5]**.** Counsel also relied on the case of **Tapisha**

v the People[6] to the effect that where a question arises as to the voluntariness of a statement or any part of it, the court must hold a trial within a trial. The trial court's failure to do so, is a serious misdirection which greatly prejudiced the appellant because it influenced the verdict.

5.7. With regard to ground three (3), it was submitted that the trial court erred in convicting the appellant without corroborative evidence as to the identity of the offender. The trial court relied on the fact that there was no motive for the prosecutrix to deliberately and dishonestly make a false allegation against the appellant. According to counsel, this was an attempt by the trial court to look for evidence of something more, having failed to find corroborative evidence to rule out the danger of false implication.

5.8. However, the prosecutrix was a child of 13 years, whose evidence requires corroboration in line with **section 122 of the Juveniles Act**. As there was no corroboration as to the identity of the offender, the danger of the prosecutrix falsely implicating the appellant was not ruled out.

5.9. Concerning ground four (4), it is argued that the trial court erred when it admitted the prosecutrix's evidence based on

a defective *voire dire* as the questions asked and the responses given, were inadequate to ascertain whether the prosecutrix possessed sufficient intelligence and understood the duty to tell the truth. According to counsel it follows therefore, that the findings of the trial court were erroneous because they include the evidence resulting from a defective *voire dire.*

5.10. As such the evidence of the prosecutrix ought to be discounted entirely. To support that argument, counsel placed reliance on the case of **Goba v The People**[7] which holds that ***"when no proper voire dire is carried out, the evidence of the witness should be discounted entirely"***.

5.11. Counsel argued that since the *voire dire* was defective, the conviction cannot be upheld. Consequently, this is a proper case for retrial as there is no other evidence on record sufficient to warrant a conviction.

5.12. The appellant argued ground five (5) in the alternative to the preceding four grounds. It is argued that the sentence of 25 years imprisonment was manifestly excessive because the appellant was a 20-year-old first offender. Especially, in light

of the fact that the offence the appellant was convicted of carries a minimum sentence of 15 years.

5.13. Relying on the case of **Alubisho v The People**[8], it was submitted that in dealing with an appeal against sentence, the Court should ask itself the following three questions:

1. ***Is the sentence wrong in principle;***
2. ***Is it manifestly excessive or so totally inadequate that it induces a sense of shock; and***
3. ***Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?***

5.14. It was submitted that the court below noted that the appellant was a first offender who deserved leniency, yet it imposed a sentence of 25 years which is above the minimum without giving reasons for doing so. The failure by the Court to give reasons is a misdirection, as there are no aggravating factors in *casu*.

5.15. In concluding the arguments, the appellant's counsel urged us to allow the appeal, or, alternatively, set aside the sentence of 25 years imprisonment and in its place impose a fairer penalty.

5.16. In response, the respondent filed heads of argument on 16th February, 2021.

5.17. In response to ground one, it was submitted that the effect of failure to explain the proviso is to be decided on a case by case basis. As the appellant was ably represented by counsel throughout trial, he cannot argue that he was prejudiced. Thus, the failure to explain the proviso to the appellant was not fatal. The cases of **Nsofu v The people**[3] and **Martin Ncube v The People**[4] were called in aid of that submission.

5.18. With regard to ground two, it is argued that the appellant was represented by counsel who did not raise an objection as to the voluntariness of his confession that he had carnal knowledge of the prosecutrix and impregnated her. That a perusal of the evidence in cross-examination of PW5, does not reveal that there were threats or the nature of threats that could have made the appellant to admit the charge at the police.

5.19. Responding to ground three, it was submitted that there is corroboration that the offence was committed because the prosecutrix was found to be seven weeks pregnant. With regard to the identity of the offender, it is conceded that there is no evidence that anyone saw the appellant having

sexual intercourse with the prosecutrix. However, corroboration as to identify is from the evidence on record.

5.20. First, the evidence of PW4 was that the prosecutrix gave him the appellant's cell phone number. Second, PW4 called the appellant and arranged to meet him on the pretext that he wanted to book the appellant's taxi. The appellant confirmed this evidence. Third, the appellant then drove PW4 to the police station where he was apprehended. And, at the police station, he admitted having defiled and impregnated the prosecutrix.

5.21. Thus, according to learned counsel, the evidence of the appellant's apprehension, his attempt to run away and more importantly, his admission at the police sufficiently corroborated the evidence of the prosecutrix to warrant a safe conviction.

5.22. As regards ground four, it is argued that the trial court complied with the procedure for conducting a voire dire. The case of **Sakala v The People**[9] was cited as authority that:

> ***"It is essential with regard to a juvenile of tender years that the trial court not only conduct a voire dire but also record the questions and answers and the trial court's conclusion to enable the appellate court to be satisfied that the trial court has carried out its duty."***

5.23. The record shows that the trial court recorded all the questions and answers as well as its ruling. The trial court was satisfied after conducting the *voire dire* that the prosecutrix understood the duty to speak the truth and had sufficient intelligence for it to receive her evidence on oath. The approach taken by the trial court was in compliance with the two-tier test stipulated in **section 122 of the Juveniles Act**. Therefore, ground four lacks merit.

5.24. The State conceded to the appellant's appeal against sentence set out in ground five. It was submitted that the court below erred by imposing a sentence of 25 years in the absence of aggravating factors. The court below also overlooked the fact that if not reduced, the sentence meted out against the appellant would be unjust in view of the fact that the appellant was 20 years old and the prosecutrix was 13 years old.

6.0. **The Hearing**

6.1. At the hearing of the Appeal, Mr. Muzenga, who appeared for the appellant relied on his written heads of argument and saved the right to reply.

6.2. Mr. Bako who appeared for the respondent also relied on his written heads of argument.

6.3. In elaboration, Mr. Bako, submitted that there was corroboration in the form of the admission by the appellant when he was interviewed under warn and caution.

6.4. He added that when PW5 was on the stand, there was no objection by the appellant's counsel regarding the voluntariness of the confession. He submitted that the trial court could not probe any further because it is not the duty of the Court to do so especially that the appellant was represented by counsel.

6.5. In reply, Mr. Muzenga drew our attention to a recent decision of the Supreme Court in the case of **Jackson Kamanga and four others v the People**[10]. In that case, it was held that the Court has a duty to give the accused an opportunity to object to a confession, notwithstanding that, an accused person is represented by counsel.

6.6. Mr. Muzenga maintained that the admission must be expunged and cannot be used at all in deciding whether there was corroboration or not.

6.7. He argued that there was no corroboration and the events relied upon especially the appellant's attempt to escape at the police station does not make sense as it had no context attached to it. According to learned counsel a person may attempt to run away for many reasons. In *casu* the appellant had no idea why he was needed by the police. Therefore, the only way to pin-point the appellant's attempt to flee to a particular situation, would have been if the context was provided as there could have been many other reasons for his attempted escape including being afraid of the police, as people generally are.

7.0. **The Issues on Appeal**

7.1. We have considered the evidence adduced at trial, the sentence imposed by the High Court, the Judgment sought to be assailed and the submissions by counsel.

7.2. The issues the appeal raises are whether the failure to explain the proviso is fatal such that we should order a re-trial and whether there was sufficient evidence to sustain the appellant's conviction, in light of the fact that the prosecutrix's evidence requires corroboration as a matter of law as she was aged 13 at trial. Key to this issue are the

following questions: Was the *voire dire* properly conducted? Was the trial magistrate in order to rely on the confession the appellant purportedly made to the police?

8.0. **Considerations and Decision on Appeal**

8.1. **Section 138 (1) of the Penal Code, Cap. 87 of the Laws of Zambia** provides that:

> ***"Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than 15 years and may be liable to imprisonment for life;***
> ***Provided that it shall be a defence for a person charged with an offence under this section to show that the person had reasonable cause to believe, and did infact believe, that the child against whom the offence was committed was of, or above, the age of sixteen."***

8.2. The import of the proviso to **section 138(1)** above is that a person who stands charged with defilement can raise, in his defence, the fact that he believed that the prosecutrix was of or above the age of 16.

8.3. We are of the view that the failure to explain the proviso to the appellant, though a legal requirement, was not fatal as he was represented by counsel. We are alive to Mr. Muzenga's argument that some lawyers are ignorant of this legal requirement, but we are unpersuaded, as this is mere

speculation. We reiterate that where an accused is represented by counsel, failure by the Court to explain the proviso does not prejudice them as it is the duty of counsel to bring the statutory defence to their client's attention. See our decision in **Isaac Musadabwe v The People**[11]. Ground one is therefore dismissed.

8.4. As regards ground two, we agree with Mr. Muzenga that the trial court misdirected itself when it placed confessions on the record without holding a trial within a trial when the issue of the voluntariness of the alleged confession was raised.

8.5. The testimony of PW5, Inspector Getrude Cheelo, the arresting officer, asserts that under warn and caution, the appellant gave a free and voluntary reply admitting the charge. However, we note that during cross-examination, PW5 was questioned as to whether the alleged confession was made freely and voluntarily. Despite PW5 denying that she did not threaten the appellant into making the confession, the issue of voluntariness of the statement was not dealt with by the magistrate.

8.6. As soon as the voluntariness of the confession was raised by the appellant, the magistrate had a duty to inquire if the alleged confession was being objected to. In this case, the appellant's line of cross examination suggests that he objected to the confession being made freely and voluntarily. The Magistrate was duty-bound to immediately hold a trial within a trial to ascertain whether the confession was made freely and voluntarily. This, the magistrate failed to do and proceeded to find the appellant with a case to answer following the prosecution closing its case after cross-examination of PW5.

8.7. The question then is, what is the effect of the magistrate's failure to hold a trial within a trial? The respondent submitted that the failure to hold a trial within a trial is inconsequential because the appellant was represented throughout trial. We disagree. A trial court is duty-bound to hold a trial within a trial when the question of voluntariness of a confession is raised even though the appellant is represented. We are fortified in our holding by the cases of **Jackson Kamanga and four others v The People**[10] supra, and **Wilfred Kashiba v The People**[12], which we cited

with approval in **Benny Habulembe v The People**[13]. We stated as follows:

> ***"whether or not an accused is represented, the record should state whether the allegedly free and voluntary character of a statement was challenged, the subsequent proceedings on the issue and the ruling of the court. These steps are not mere formalities; failure to take them is a serious irregularity which will lead to the setting aside of the conviction unless the appellate court is satisfied that, on the remainder of the evidence, the trial court must inevitably have come to the same conclusion."***

8.8. In view of the foregoing, ground two succeeds.

8.9. This brings us to the next question, that is, can the conviction stand on the remainder of the evidence? This inevitably brings the third ground into issue which alleges that the trial court erred in convicting the appellant because there was no corroboration as to the identity of the offender.

8.10. The main witness who led evidence that it was the appellant who committed the offence was the prosecutrix. We agree with Mr. Muzenga that since the prosecutrix was 13 at the time she testified, her evidence, which was admitted after a voire dire, required to be corroborated as a matter of law as provided by **section 122 (b) of the Juveniles Act**. We are guided

by the case of **Godfrey Chimfwembe v The People**[14], where it was stated that the law requires the evidence of child witnesses to be corroborated.

8.11. However, the appeal also attacks the validity of the *voire dire*, hence, before we address our minds as to whether the evidence of the prosecutrix was sufficiently corroborated, we must at this stage, interpolate ground four which challenges the validity of the voire dire before we delve into the question of corroboration in ground three.

8.12. The record shows that the following questions and answers were recorded by the trial court when the voire dire was conducted:

1. ***"What are your names?***
   'KS'
2. ***Where do you stay?***
   Gabon Compound
3. ***What do you do for a living?***
   I am a grade 6 pupil at Mandenga
4. ***What is your favourite subject at School?***
   Maths
5. ***What is the name of the Headmaster?***
   I don't know
6. ***Do you go to church?***
   Yes, I go to church
7. ***Which Church do you go to?***
   New Apostolic Church
8. ***Is it important to tell the truth?***
   You can be charged by God"

8.13. Afterwards, the trial court recorded that it was satisfied that the prosecutrix understood the duty to speak the truth and was possessed of sufficient intelligence for the court to receive her evidence on oath.

8.14. In our view the procedure adopted by the trial court satisfies the requirements of **section 122(a) of the Juveniles Act**. In examining the validity of a voire dire in relation to **section 122(a) of the Juveniles Act**, (which we do now,) the Supreme took a similar approach in the case of **Elvis Mweemba v The People**[15] where it held as follows:

> ***"We have considered the voire dires as conducted by the trial Court including the questions put to the child witnesses and the rulings of the trial Court. We are satisfied that the trial Court properly conducted the voire dires and properly ruled. We do not see why Mr. Muzenga has argued that they are defective. In the first place, the trial Court identified that PW3 and PW4 were children of tender years and that voire dires needed to be conducted to determine whether or not they possess sufficient intelligence to determine whether their evidence had to be given on oath or otherwise; testing questions were then asked; and thereafter the trial Court made rulings. The procedure, therefore, complied with that which this Court laid down in the ZULU (4) case".***

8.15. In view of the foregoing, we hold that the voire dire that was conducted by the trial magistrate was compliant with **section 122(a) of the Juveniles Act**. We, therefore, reject Mr.

Muzenga's argument that the *voire dire* was defective. ground four, therefore, lacks merit.

8.16. Having found that the evidence of the prosecutrix was properly tendered before court, we now advert to ground three on the issue of corroboration as required by **section 122(b) of the Juveniles Act**.

8.17. It is trite law that the evidence of a child in sexual offences requires corroboration as to the commission of the offence and identity of the offender. This is to avoid the dangers of false implication. We note Mr. Muzenga's arguments that the trial court failed to find corroborative evidence and attempted to look for evidence of something more and wrongly concluded that the prosecutrix had no motive to deliberately and dishonestly make a false allegation against the appellant. That absence of motive cannot satisfy the requirement of corroborative evidence under **section 122(b) of the Juveniles Act**.

8.18. Our review of the evidence on record reveals that the appellant was materially linked to the prosecutrix by his phone number which she gave to her mother PW1 then passed on to her brother PW4. PW4 called the appellant

using the said number and this subsequently led to his arrest. Clearly, the trial magistrate found this to be insufficient and attempted to look for something more. Guided by the case of **Emmanuel Phiri v The People**[16] which holds that there can be no motive for the prosecutrix to deliberately and dishonestly make a false allegation against the accused, the trial magistrate accordingly found that the prosecutrix in *casu* had no motive to deliberately and dishonestly make a false allegation against the appellant.

8.19. We must state outrightly that this was a misdirection because **section 122(b) of the Juveniles Act** requires that the evidence of the prosecutrix must be corroborated. This is a matter of law. Thus the trial magistrate was wrong to rely on the cautionary rule.

8.20. On the facts of this case there is no doubt that the offence of defilement was committed against the prosecutrix and this was corroborated by medical evidence. The question that begs an answer, is, was the evidence that the appellant committed this offence corroborated? We are of the firm view that his phone number alone is insufficient to link him to the crime. Furthermore, this phone number was availed

to PW1 and PW4 by the prosecutrix herself whose evidence required corroboration. Needless to say, the phone number alone is insufficient, at the very least messages or call records between the two should have been exhibited.

8.21. We agree that corroboration could be found in something more as illuminated by the Supreme Court in **Machipisha Kombe v The People**[17] that corroboration need not be technical and that several factors which when put together link the appellant to the commission of the offence of defilement can amount to corroboration.

8.22. We found no such factors in *casu*. The phone number and evidence of arrest do not amount to something more or an odd coincidence. We equally find that the fact that the appellant attempted to run away not to be odd or something more. As canvassed by Mr. Muzenga there was no context to this. It is unclear if at that time he was told why he was taken to the police or if he had seen the prosecutrix. Regarding the pregnancy we opine that the evidence was also insufficient to link it to the appellant. Her evidence was that the appellant had carnal knowledge of her on three occasions, the first being on 20th June, 2016. This is at

variance with the medical report that she was seven weeks pregnant when examined on 12th July 2016. Our simple calculation reveals four weeks between those dates. In our view this affects her credibility as a witness. Consequently, we find merit in ground three.

8.23. Having found merit in grounds two and three which are at the core of this appeal, the net result is that, the appeal is allowed. The conviction is quashed and the sentence is set aside. We order that the appellant be acquitted and set at liberty forthwith.

F.M. CHISANGA
JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

M.J. SIAVWAPA
COURT OF APPEAL JUDGE