

**IN THE SUPREME COURT OF ZAMBIA    APPEAL NO. 138/2017**  
**HOLDEN AT KABWE**  
*(Criminal Jurisdiction)*

**BETWEEN:**

**EMMANUEL MWAPE**

**AND**

**THE PEOPLE**



**APPELLANT**

**RESPONDENTS**

Coram:    Muyovwe, Hamaundu and Chinyama, JJS.

On 10<sup>th</sup> July, 2018 and 7<sup>th</sup> August, 2018.

*For the Appellant:*                *Mrs M. Marebesa-Mwenya, Legal Aid Counsel - Legal Aid Board.*

*For the Respondents:*        *Mrs M. Kapambwe-Chitundu, Deputy Chief State Advocate - National Prosecutions Authority.*

---

**J U D G M E N T**

---

**Chinyama, JS**, delivered the Judgment of the Court.

**Cases referred to:**

- 1. Ndakala v The People (1974) ZR 19.**
- 2. Nsofu v The People (1975) ZR 287.**
- 3. Emmanuel Phiri v The People (1982) ZR 77.**
- 4. Machipisa Kombe v The People (2009) ZR 282.**
- 5. Emmanuel Phiri and Others v The People (1978) ZR 79.**

**Legislation referred to:**

- 1. Penal Code, Chapter 87, Laws of Zambia.**
- 2. The Supreme Court Act, Chapter 25, Laws of Zambia.**

**3. The Criminal Procedure Code, Chapter 88, Laws of Zambia, section 186.**

The appellant was convicted in the Magistrate's Court at Kasama of one count of Indecent Assault contrary to section 137 of the **Penal Code** as amended by act No. 15 of 2005. The particulars of offence were that the appellant, on 23<sup>rd</sup> July, 2014 at Kasama, did unlawfully and indecently assault a female by way of touching her private part. The High Court sentenced him to the mandatory minimum sentence of 15 years imprisonment with hard labour with effect from the date of arrest which was 27<sup>th</sup> July, 2014. The appeal is against the conviction only, the issue of the sentence, however, being consequential.

The evidence on which the appellant was convicted was that the prosecutrix, aged 18 years at the time, was an epileptic patient who used to suffer from recurring fits while the appellant was a traditional healer with professed ability to cure the ailment. The prosecutrix's parents engaged the appellant to treat the prosecutrix. The appellant prescribed and provided various

remedies over a period of time which did not yield the desired results. Ultimately, the appellant prescribed a ritual that had to be undergone by the prosecutrix in a river.

On 25<sup>th</sup> July, 2014 the appellant took the prosecutrix to the nearby Kolwe River. They were accompanied by the prosecutrix's young sister named Silvia Musonda aged 12 years old. Musonda testified as PW3 in this case. When they reached the river, the appellant instructed Musonda to go away some distance to act as a look out for people approaching. The appellant and the prosecutrix went up to the river bank where the appellant told the prosecutrix to undress. The prosecutrix tried to protest that she could not undress in the presence of the appellant but the appellant pacified her that it was not a big issue as he was used to such scenarios in his occupation as a (traditional) doctor and he would keep it a secret.

The prosecutrix undressed and was told to get into the water and bath. She was not able to see Musonda and Musonda was not able to see her too. She was required to rub some herbs all over her body then throw them upstream and then submerge in the water so that the concoction passed over her head with the current of the water. While in the water, the appellant moved behind her



having by then removed his trousers and pant and remained clad only in a T-shirt rolled up to his chest. The appellant proceeded to have carnal knowledge of the prosecutrix who was leaning forwards in the water in obedience to the instructions in the ritual. He forced her down and each time she tried to shout for help she gulped water. She did not consent to him having sex with her.

When the prosecutrix returned home she recounted to her mother, Evelyn Chisanga Chitambala, who testified as PW2, what had transpired. PW2 tried to follow the appellant but did not find him. The next morning, PW2 and her husband accompanied by three men named Kedrick Sinyangwe, Emmanuel Bwalya and Moses Chitalu followed the appellant to his home. He was asked about the events of the previous day and he admitted having carnal knowledge of the prosecutrix saying that was the "habit when giving the last medication". The matter was then reported to the village headman before whom the appellant again agreed to have had carnal knowledge of the prosecutrix. The headman advised that the matter be reported to the police and this was done. A medical report form was issued to the prosecutrix at the police station. At the hospital, however, it was advised that because of the delay in taking the prosecutrix there, her examination would

not help establish that she had been raped. The appellant was later apprehended and taken to the police station. Subsequently, he was charged with the subject offence.

In his defence, the appellant admitted taking the prosecutrix to the river with her young sister, Musonda, where Musonda acted as a look out. He admitted instructing the prosecutrix to undress and get into the river for the ritual. He stated that he did not get into the river but was close to the prosecutrix "in the river" (in case she had an epileptic seizure and he had to save her from drowning). He agreed that he saw her naked. He, however, denied having carnal knowledge of her or touching her. He also denied the allegation that he told anyone that sexual intercourse was part of the treatment. He did not say anything about the admissions that he allegedly made when he was accosted with the accusation of sexually assaulting the prosecutrix.

In her judgment, the trial magistrate cautioned herself against relying on the uncorroborated evidence of the prosecutrix but stated that it is competent to rely on the uncorroborated evidence of the prosecutrix if it "can be relied upon and carries the degree of truthfulness that cannot be doubted". After reviewing the evidence the Magistrate did not determine whether or not there

was corroboration of the prosecutrix's evidence in this case. She, however, found that the appellant had the opportunity to sexually assault the prosecutrix as she was undressed and that they were just the two of them, Musonda having been told to stand at a distance; that the prosecutrix and Musonda had no motive to lie against the appellant as all they wanted was for him to heal the prosecutrix of the epilepsy. The Magistrate did not accept the appellant's defence that he stood near the prosecutrix so that he could rescue her from drowning in case she had an epileptic attack while in the water.

The appeal in this case is on the sole ground that the trial Magistrate erred in law and fact when she convicted the appellant in the absence of corroboration as to the identity of the appellant and the commission of the offence.

The submissions on behalf of the appellant boil down to the argument that it was not proved that the appellant did indecently assault the prosecutrix; that the evidence of the prosecutrix cannot be relied upon as it was not corroborated in both respects that the offence was committed and that it was the appellant who committed it. It was also submitted that the incident that gave rise to the offence was reported late after a week or more making the



complaint questionable in the terms of this court's decision in the case of **Ndakala v The People**<sup>1</sup> that-

**"The corollary to the principle that evidence of early complaint is admissible to show consistency is that the failure to make an early complaint must be weighed in the scales against the prosecution's case."**

In response to the submissions on behalf of the appellant, it was submitted on behalf of the respondents that there was sufficient evidence that the prosecutrix was indecently assaulted and that it was the appellant who assaulted her; that the appellant put himself at the scene of the crime by his own evidence admitting that he was near the prosecutrix who was naked while Musonda was afar which gave him an opportunity to indecently assault the prosecutrix. It was submitted that this amounted to corroboration in line with the decision of this court in **Nsofu v The People**<sup>2</sup>; that in an appropriate case, opportunity can constitute corroboration as to the identity of the offender. It was contended that the court below drew the only reasonable inference based on the evidence available; that the complainant had no motive to make false allegations against the appellant whom the family merely wanted to heal her of the epilepsy which had afflicted her for a long time; that this amounted to evidence of something more or special and

compelling reasons connecting the appellant to the offence in line with this court's decision in the case of **Emmanuel Phiri v The People**<sup>3</sup>.

On the issue of late reporting, it was submitted that the prosecutrix reported the incident to the mother soon after returning from the river, who immediately escalated the matter to the village headman who in turn referred it to the police. Therefore, that the circumstances which speak to the prosecutrix's consistency and distress after the incident do not fall in the ambit of the late reporting cases. We were urged to uphold the conviction and dismiss the appeal.

We have considered the appeal and the contending arguments on behalf of the parties. The main issue raised in this appeal is that the appellant was convicted in the absence of corroboration as to the commission of the offence and the identity of the appellant. The main proponent of the allegation that the prosecutrix was indecently assaulted is the prosecutrix herself. As a matter of law, her allegation needed to be supported in the material respects that she in fact was indecently assaulted and that it was the appellant who indecently assaulted her.



In this case, the prosecutrix was never medically examined because, according to PW2, the prosecutrix was taken late to the hospital. Therefore, that the alleged sexual assault could not be medically established, as we understood the testimony. This also appears to us to be the reason why the appellant could not be charged with the aggravated offence of rape. It is indeed the case that the results of medical examination ordinarily confirms whether or not a complainant in a sexual offence has had recent sexual experience thereby resolving the question of corroboration in the affirmative. This does not, however, mean that other sources of confirming evidence cannot be relied upon. More so in this case in which the State preferred a charge of indecent assault which does not necessarily require medical evidence. The need for corroborative evidence to support the allegation is no less required.

In the case of **Machipisa Kombe v The People**<sup>4</sup>, this court, in relation to what constitutes corroboration, held that-

**... there need not now be a technical approach to corroboration. Evidence of "something more," which though not constituting corroboration as a matter of strict law, yet satisfied the Court that the danger of false implication has been excluded and that it is safe to rely on the evidence implicating the accused ... odd coincidences constitute evidence of "something more". Odd coincidences represent pieces of evidence which the Court is entitled to take into account. They provide support of the evidence of a suspect witness, or an accomplice, or any other witness whose evidence requires corroboration. This is the less technical approach as to what constitutes corroboration.**

In the present case, the evidence established that the appellant had taken the prosecutrix to the river for a ritual meant to cure her of the troubling ailment. She came from there and made the serious complaint to her mother, PW2, that the appellant had had carnal knowledge of her. This reaction by the prosecutrix is, in our view, an odd coincidence in that the prosecutrix could not react in the way she did if she was not sexually assaulted or had otherwise consented to the act. There is no reason which is apparent from the evidence on record why she should turn around and make such a serious allegation against her benefactor who was supposed to provide a cure to her nagging ailment.

It is clear from the judgment of the court below that the Magistrate was equally alive to the requirement for evidence corroborating the prosecutrix's allegation. What she did not do, as already noted, was to make specific findings that the commission of the offence and the identity of the appellant as the perpetrator were corroborated. The Magistrate, however, believed and accepted the prosecutrix's evidence that the appellant sexually assaulted her bearing in mind that the appellant had the opportunity to commit the offence. In the case of **Nsofu v The People**<sup>2</sup> the following was said about the element of opportunity corroborating



an allegation that the accused had committed the crime in question-

**Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case.**

...

**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.**

In the case before us, the facts are that the appellant sent Musonda away before telling the prosecutrix to undress. He gave false assurance to the prosecutrix that it was alright to undress in his presence. We do not think that it was alright. We cannot say that the situation in this case required only the presence of the appellant especially if all he was there for was to rescue the appellant in the event that she experienced an epileptic seizure while in the water. Surely, an arrangement would have been made with an older female person such as her mother, PW2, to be present during the ritual. Moreover, Musonda was not too young to take the role which the appellant assigned himself, with instructions to alert the appellant who would have been the look out. This would have accorded with the need to maintain decency during the proceeding. The appellant's conduct was certainly



suspicious and given the complaint by the prosecutrix that the appellant had carnal knowledge of her, we have no doubt that the appellant committed the offence which he was charged with. We are satisfied that the odd coincidence and the evidence of opportunity that we have highlighted above corroborate the prosecutrix's allegation that she was indecently assaulted by the appellant.

Regarding the issue that the complaint was made late, the evidence, even of the appellant himself, does not support the submission. It is quite evident that the prosecutrix informed her mother soon after her return from the river, who unsuccessfully tried to seek audience with the appellant. The matter reached the headman the following day after which the report was made to the police. The argument, therefore, that there was delay in reporting the incident is not sustainable. The matter was reported to the village headman at the earliest opportunity, in the circumstances of the case not forgetting that the incident happened in a village setting. As we said in the case of **Emmanuel Phiri v The People**<sup>5</sup>, the value of evidence of early complaint is that a complaint was made at all which is what happened in this case.

There is also the matter of the admissions allegedly made by the appellant that he had carnal knowledge of the prosecutrix in the river. No effort was ever made by the defence either during the cross-examination of PW1 who made the allegations or in his own defence to recant the allegation. The effect of this is that the appellant did not dispute what was said. This leads to the irresistible conclusion that he actually sexually assaulted the prosecutrix in the manner alleged. There was clearly sufficient evidence supporting the fact that the prosecutrix was indecently assaulted by the appellant.

We are in no doubt that the appeal against conviction has no merit and we dismiss it. Having dismissed the appeal we are at large on the question of the appropriate sentence to impose in the circumstances of the case. We have noted that the appellant is a traditional healer to whom the prosecutrix was entrusted to find a cure for her ailment. He, however, took undue advantage of her and indecently assaulted her. This behavior should not be tolerated. Our view is that a stiffer sentence is called for in terms of section 15 (4) of the **Supreme Court of Zambia Act**. We substitute the sentence of 15 years imposed by the High Court with

a sentence of 18 years imprisonment with hard labour effective from the date of arrest.



.....  
**E.N.C. MUYOVWE**  
**SUPREME COURT JUDGE**



.....  
**E.M. HAMAUNDU**  
**SUPREME COURT JUDGE**



.....  
**J. CHINYAMA**  
**SUPREME COURT JUDGE**