IN THE COURT OF APPEAL **APPEAL/99/2018**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

FELODY NG'ANDU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: CHISANGA JP, KONDOLO, SC, MAJULA, JJA
On 20TH NOVEMBER, 2018 AND 21ST MAY 2019

For the Applicant: *Mr. C. Siatwinda, Legal Aid Counsel*
For the Respondent: *Mrs. K. Gwendoline, Makumba Ngulube, State Advocate*

JUDGMENT

CHISANGA, JP delivered the Judgment of the Court

Cases referred to:

1. ***Jutronich, Schute and Lukin vs The People (1965) ZR 9 (C.A)***
2. ***The People vs Tenson Chipeta (1970) 83***
3. ***Venai Silungwe vs The People (2008) Vol. 2 at 123***
4. ***Barejena vs The People (1984) Z R 23***
5. ***Kapeshi and others vs The People Appeal No 99/100/2015 (2002)***
6. ***Mangomed Gaanalieu vs The People (2010) 2 ZR 132***
7. ***Berejena v The People (1984) Z.R. 19***
8. ***Sikaonga v The People (2009) ZR 192***
9. ***Kaambo vs The People (1976) ZR 122***

This appeal comes in the wake of a sentence inflicted by the high court on the appellant, following a conviction for the offence of defilement of an imbecile Contrary to Section 139 of the Penal Code CAP 87 of the Laws of Zambia.

The evidence in the trial court was that, on 27th July 2017, around 11:00 hours the appellant was seen by a juvenile, Gift Limbo pulling the prosecutrix, a mad woman to the ground. Gift was apprehensive that the appellant would kill the prosecutrix so he ran to a man he had seen bathing in a canal, and told him what he had seen. The man's name was Mwape. They ran back to check on the mad woman, and found the appellant having carnal connection with her. Mwape got the appellant off the woman and she thanked him for doing so.

The appellant was apprehended, and taken to Nkabika Police Post. The prosecutrix was issued with a medical report, and examined accordingly. The medical report indicated that she had been carnally known. At the trial, the trial court received evidence from the prosecutrix, Gift Mwape, the arresting officer and one other woman. The appellant also testified in his defence.

Upon considering the evidence, the trial court convicted the appellant of the subject offence and remitted the case to the High Court for sentencing. When sentencing the appellant, the High Court judge received mitigation tendered on the appellant's behalf. She enquired whether the appellant was a married man, and was informed by learned counsel appearing for the appellant that he was. The learned judge expressed these views:

> ***"In sentencing the convict in this matter, I take into account that he is a first offender and what has been said in mitigation on his behalf. It is however unbelievable that the convict in this matter, who is a married man with two children can go and have carnal knowledge of a mental patient in the manner that he did. The conduct of the convict in the matter***

has traumatised the wife and children and it will take long for them to recover from the trauma. The convict in this matter took advantage of the victim, a mental patient instead of sympathizing with her. The convict is therefore not entitled to the minimum sentence, because as the child witness testified, he used force, excessive force to have carnal knowledge of the victim, such that the child witness thought that he was killing her. I therefore sentence the convict to 25 years imprisonment with hard labour, with effect from the date of arrest".

The appellant was aggrieved with the length of the sentence and now seeks the intervention of this court to reduce it to the mandatory minimum. The ground of appeal reads as follows:

"The court below fell in error by imposing an excessive sentence of 25 years imprisonment with hard labour when the appellant was a first offender who deserves leniency form the court".

The arguments with which learned counsel hopes to persuade us in his quest are that the sentence of 25 years imprisonment with hard labour inflicted on the appellant was so manifestly excessive as to induce a sense of shock. The appellant was entitled to leniency as he was a first offender, a factor that entitled him to leniency. In addition to this, he was a youth, aged only 31 when he committed the offence.

Learned counsel drew our attention to ***Jutronich Schute and Lukin vs The People[1],*** where the Court of Appeal explained the approach an appellate court should take when dealing with an appeal against sentence.

He as well referred to the High Court's decision in ***The People vs Tenson Chipeta***[2], where, according to counsel, the court listed elements a sentencing court should take into account as mitigatory, when imposing a sentence.

Also, he referred to ***Venai Silungwe vs The People***[3], where the court held that a first offender is entitled to leniency where no aggravating factors are present.

It was learned counsel's contention that the fact that the victim was a mental patient was not an aggravating factor, as it was an ingredient of the offence of defilement of the imbecile. Moreover, learned counsel argued, there was no evidence that the wife and children of the appellant had been greatly traumatised and that it would take long for them to recover from the trauma. To sum it all up, learned court argued that the sentence inflicted on the appellant was so manifestly excessive as to induce a sense of shock, thus warranting interference with by this court.

The respondents crisp argument was that, as pointed out by the learned judge, the appellant used excessive force to have carnal knowledge of the victim, such that the child witness thought he was killing her. This was an aggravating factor. Furthermore, sexual offences are prevalent in our communities such that the court was entitled to impose a 25-year sentence on the appellant. Our attention was drawn to ***Barejena vs The People***[4], ***Kapeshi and Others vs The People***[5] and ***Mangomed Gaanalieu vs The People***[6].

We have considered the arguments in support of and in opposition to the appeal. The Section pursuant to which the appellant was charged and convicted, **Section139 of the Penal Code CAP 87 of the Laws of Zambia**, as read together with **Act No. 15 of 2005**, provides as follows:

> ***"Any person who, knowing a child or other person to an imbecile or person with a mental illness, has or attempts to have unlawful carnal knowledge of that child or other person in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the child or other person was an idiot or imbecile commits a felony and is liable upon conviction, to imprisonment of not less than fourteen years and may be liable to imprisonment for life".***

The elements that inform an appellate court's power to interfere with a sentence are settled. We need only refer to ***Berejena vs The People***[7] Reprint, P 23. It was stated there that an appellate court may interfere with a lower court's sentence only for good cause. To constitute good cause, the sentence must be wrong in principle, law or in fact. It must be or manifestly excessive or so totally inadequate that it induces a sense of shock or there must be exceptional circumstances justifying the interference.

The Supreme Court made a pertinent observation in ***Sikaonga v The People***[8], when discussing sentencing in defilement cases, that the law as enacted is that the minimum sentence for defilement is 15 years and the maximum is life sentence. The range in sentence means that the legislature has given the courts the freedom to impose different sentences according to the facts of each

case. An ordinary case of defilement will ordinarily attract a minimum sentence of 15 years imprisonment. However, where an accused is found to have infected the victim with a sexually transmitted disease, the sentence will certainly attract a more severe sentence above the minimum sentence of 15 years.

It is trite that when determining an appropriate sentence, the sentencing court is expected to assess a sentence merited by the offence itself. Only then should the court consider whether the accused is entitled to leniency. ***Kaambo vs The People***[9] refers. The guidelines to be borne in mind are the antecedents of the accused person and his conduct at trial, particularly with regard to his plea.

In the case now engaging our attention, we note that the sentencing judge was alive to the fact that the appellant was a first offender. We however agree that there was no evidence that the appellant's children and wife were traumatised by the appellant's offence of defiling an imbecile. Perhaps this conclusion was informed by the mitigation that the appellant was a married man with children. Even so, we fail to conceive how this fact alone, without more, could be said to be an aggravating circumstance. It would be a different matter however if, for instance, the offence occurred in the presence of the children, for then it could be said the appellant's children had been traumatised by the appellant's act. Be that as it may, the learned judge took into account the violence employed in ravishing the prosecutrix. It will be borne in mind that the offence is committed where a person has carnal connection with an imbecile in circumstances not

amounting to rape. Here, the appellant pulled the prosecutrix to the ground and forced himself on her. This was an aggravating circumstance which the trial judge was entitled to take into account. Sexual offences have been on the upswing for some time. A deterrent sentence of 25 years does not in the present circumstances induce shock, so as to warrant interference. We remain unmoved by learned counsel's submissions, and dismiss this appeal, as it is devoid of merit.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

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B. M. MAJULA
COURT OF APPEAL JUDGE