

IN THE SUBORDINATE COURT OF THE FIRST
CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

SSPB/148/2016

THE PEOPLE

V.

THOMAS PHIRI

Before: Mrs Mwaaka Chigali Mikalile - PRM

For the people: Mr Liyungu, Mr Nundwe and Mr Manda - NPA
The juvenile offender in person

JUDGMENT

Legislation referred to:

1. The Penal Code Chapter 87 of the Laws of Zambia
2. The Juveniles Act Chapter CAP 53 of the Laws of Zambia; Amendment Act No. 3 of 2011

The juvenile offender is charged with one count of defilement of a child contrary to section 138(1) of the Penal Code Chapter 87 of the Laws of Zambia. Particulars of offence allege that on a date unknown but between 1st and 30th November, 2016, the juvenile offender at Lusaka in the Lusaka District had unlawful carnal knowledge of Betina Jere, a girl under the age of 16 years.

The juvenile offender (J.O) did not admit the charge.

It is incumbent upon the prosecution to prove the case beyond all reasonable doubt and there is no onus on the

J.O to prove his innocence. If after considering all of the evidence adduced for and against the charge, I remain in reasonable doubt as to the guilt of the juvenile offender, then I shall be duty bound to make a finding of not guilty.

According to section 138(1) the offence of defilement is committed when any person unlawfully and carnally knows any girl below the age of 16 years. It shall be a defence for a person charged with this offence to show that he had reasonable cause to believe, and did in fact believe, that the child against whom the offence was committed was of, or above, the age of sixteen.

The prosecution therefore must establish:

1. that the juvenile offender had carnal knowledge of the girl, Betina Jere
2. that she, at the material time, was below the age of 16
3. that the juvenile offender was aware that the girl was below the age of 16 or had no reasonable cause to believe that she was 16 or above.
4. that the juvenile offender had no lawful authority to have carnal knowledge of the girl.

In support of its case, the state called five witnesses.

PW1 was Beauty Daka, the mother to the prosecutrix herein. It was her testimony that when she knocked off from work on 31st January, 2017, her 8-year-old daughter, Betina Jere informed her that she was not too well as her private parts were painful. PW1 said she asked her daughter how she injured herself but she did not respond. She said she did not bother much and did not even check

the child. The following day around 15h00, she received a call from her older daughter, Alice, informing her that the complaint from Betina was as a result of defilement by the uncle. PW1 said after knocking off from work, she met Alice and the prosecutrix and they proceeded to the hospital where the doctor confirmed that the child had indeed been defiled. This was after Alice reported the matter to the police. In support of her evidence regarding the age of the prosecutrix, PW1 tendered a Children's Clinic card in the names of Betina Jere showing that she was born on 31st January, 2009. The same was marked ID1.

When cross examined by the juvenile offender, PW1 stated that she took the prosecutrix to the hospital the same day Alice informed her of the defilement. She also stated that she called home and gave the instruction that the juvenile be apprehended. The juvenile offender, however, was only apprehended the following day. PW1 also stated that the proof that the juvenile offender defiled the prosecutrix is that the doctor confirmed it.

PW2 was Alice Mwenda, PW1's 22-year-old daughter whose evidence was that on 8th November, 2016, she went to her mother's house. Whilst there, she decided to bath her sister, the prosecutrix, and as she washed her private parts, the girl started crying. When asked why, she said she was in pain because uncle Thomas (in apparent reference to juvenile offender) did 'bad manners' to her. When asked what that meant, the child said Uncle Thomas inserted his insect in her private parts in his brother's house on the chair in the sitting room. It was PW2's evidence that the brother to the juvenile was her mother's tenant renting a two room house at the back of

her mother's house. According to PW2, she checked the child's private parts and observed whitish sores and bruises. She then called and informed her mother and the mother instructed her to report the matter at Lesoleil Police Post. She was issued a medical report and proceeded to UTH.

When cross examined by the juvenile offender, PW2 stated that she went to the clinic with her mother. She said the day she went to the police is the very day she went to the hospital. She also stated that she was convinced defilement had occurred when she checked the child but was extra sure after the medical examination.

When cross examined by the guardian, PW2 stated that she did not see the juvenile defile the child. She said she believed the child because her private parts were bruised and enlarged. She saw this on 8th and that is the very day she went to the clinic.

PW3 was the prosecutrix, 8-year-old Betina Jere who testified after a voire dire was conducted and she was adjudged to possess sufficient intelligence and understanding of the duty to speak the truth. PW3 testified that she was with her friends Millie and Precious when Uncle Thomas (the now juvenile offender) called her to his house, told her to undress and directed her to lie down. He then had carnal knowledge of her. She said she experienced pain and developed some sores. She further testified that she told her sister, PW2 herein, about the incident and she was taken to the clinic, hospital and to the police.

When cross examined by the juvenile offender, PW3 stated that she was not sutured at the hospital. She stated that she could not tell how long she had the sores. She also stated that she did not walk on her own to the hospital. She was lifted. She further stated that the juvenile offender was home alone when he called her. She said the juvenile covered her mouth when she attempted to scream.

When cross examined by the guardian, PW3 stated that she went to his house because she was called. She said she had been playing with Millie and Precious when she was called. She also stated that the guardian was at work when the incident occurred.

PW4 was Bupe Mwango Musonda, a medical doctor at the UTH. She testified that on 9th November, 2016, they received a pre-adolescent, PW3 herein, who complained of genital pain and pus discharge. PW3 narrated that an Uncle Thomas who was a tenant in their flat had been doing what she termed 'bad manners'. She said this had happened over a period of time on about five occasions. When asked further, PW3 described the bad manners as Uncle Thomas taking her into his house, putting on what she called a balloon and putting his private part into her private part. The child went on to explain that she would feel pain every time he did that and on two occasions, she bled. The only reason she reported this time was that she had genital sores and pus was coming out. PW4 produced as part of her evidence the patient's file and it was admitted in evidence marked P2.

It was PW4's evidence that the patient was referred to them as a suspected defilement and their examination

revealed swelling of external genitals and on the inside was pus discharge and a bruise at 10 o'clock position. But when they examined the inner genitalia, the hymen was intact. PW4 further told court that they saw the patient twice, the second time, to follow up on the pus discharge. She also said there was no evidence of syphilis or HIV, just bacterial infection which has since been treated.

When cross examined by the guardian, PW4 stated that she came to know the name Thomas from the child herself. She also stated that a bruise meant that a piece of skin had been ripped off. PW4 reiterated that the hymen was intact.

PW5 was Inspector Prisca Kangwa of Ng'ombe Police Post whose evidence was that she was allocated the docket of case on 21st November, 2016 in which PW2 complained on behalf of PW3. She then interviewed the juvenile offender who was in custody in connection with the alleged child defilement. He did not give satisfactory responses hence she made up her mind to charge and arrest him for the subject offence. As custodian of two medical reports issued in the names of the victim PW3, PW5 produced them and they were admitted in evidence marked P3 collectively.

When cross examined, PW5 stated that she found out that the juvenile was the culprit through the story of the victim.

In his defence, the juvenile offender elected to give evidence on oath and called one other witness.

He testified that he started work on 1st November, 2016 and the routine was that he would start off for work around 06h00 and would return home past 17h00. On the material day, 8th November, 2016, he learnt that people started looking for him around 14h00 at which time he was at work. When he got home around 17h00, he met his friend Saidi and shortly after, Moses and a group of people approached him and informed him that they had been looking for him. They began beating him and took him home whereupon PW2 and her sister started shouting at him and called him a dog. He was then taken to Le soleil Police Post but the police refused to incarcerate him as they had not received documentation confirming the defilement. According to the juvenile offender, he went back home. Later, Moses and the same group returned and picked him and took him to Ng'ombe Police Post where he was immediately placed in cells. He asked PW1 what was going ^{on} but she said she would talk to him in court. Thereafter, she evicted them from her house. According to the juvenile offender, he does not know to this date what happened since he has not talked to her.

When cross examined, the juvenile offender stated that he was aware that the victim Betina is below the age of 16 but denied having carnal knowledge of her. When asked why he of all people was mentioned by the victim, the juvenile offender stated that it was probably because he was not liked by her relatives.

DW2 was Jackson Chisenga, the juvenile's elder brother and guardian. It was his evidence that on 8th in a month he cannot recall, he was home, not having gone for work, when he heard people calling for the juvenile's apprehension. At that time, the juvenile was at work and

so was the Land lady, PW1. When the juvenile knocked off from work, he asked him whether he left work at any point and defiled the child. Later in the evening that day, the juvenile offender who had gone to visit a friend was brought back home. He was being accused of defilement. He was taken to the police but the police refused to act in the absence of documents. They went back home and later PW1's brother and his friends came to pick him saying they were taking him to a different police station. He was in cells until his bond was granted.

When cross examined, DW2 stated that he was not always with the juvenile and would not know what he did in his absence.

This is all the evidence. The undisputed facts from this evidence are that the prosecutrix herein was sexually interfered with as evidenced by the medical report and testimony of the doctor that she had a bruise on her vestibule at 10 o'clock and had pus discharge from her vagina. The hymen was, however, intact. The prosecutrix was below 16 years old at the material time. She was in fact 7 years old, having been born on 31st January, 2009. The juvenile offender was a close neighbour to the prosecutrix at the time as his brother was renting a house next to her house. The juvenile's brother was in fact a tenant to the mother of the prosecutrix.

I note the evidence of PW1 to the effect that she learnt about the defilement on 31st January, 2017 but clearly she was misled by the prosecutor who in examination in chief asked her what she recalled about 31st January. The evidence on record however, which includes documentary evidence reveals that PW1 heard about the defilement on

9th November, 2016 on which date the child was first seen by the doctor. The patient's record (P2) clearly shows that the child was first seen on 9th November, 2016 at 17:32 hrs.

As confirmed by the doctor, the child was sexually assaulted thus there was defilement regardless of the fact that the hymen was intact. The fact that the child was injured on the vestibule or entrance and that she had pus discharge proves that there was penetration. What I ought to determine therefore is whether or not the juvenile offender is the one that defiled the prosecutrix, that is to say, had carnal knowledge of her.

The evidence of the prosecutrix is that the juvenile called her to his house made her lie down on the sofa and inserted his private part in her and she felt pain as a result.

I warn myself at this stage of convicting on uncorroborated evidence of the prosecutrix as the law requires that in sexual offences such as defilement and rape, the evidence of the victim must be corroborated.

Clearly, the direct evidence as regards the carnal knowledge is from the prosecutrix, a child of tender years. It is trite law that evidence from children of tender years is corroborated so that it is confirmed that the witness is telling the truth when she says that the offence was committed and that it was the accused who committed it.

Section 122 of the juveniles (Amendment Act) No. 3 of 2011 Chapter 53 of the Laws of Zambia provides that an

accused shall not be convicted of the offence charged if the evidence of the child witness is not corroborated by some material evidence in support thereof implicating the accused.

I note from the record that from the onset, the victim only ever mentioned the juvenile as the culprit. She told the sister as she was being bathed that she was experiencing pain on her private parts as a result of what the juvenile had done to her. Further, the evidence of the medical doctor reveals that the child gave her a more detailed account regarding what happened to her. The child narrated to the doctor that on more than one occasion, the juvenile offender wore a balloon and put his private part into her private parts. This history is recorded in the patient's file, P2.

The juvenile in his evidence, however, denied ever having carnal knowledge of the prosecutrix.

From the foregoing, I ask myself whether there is a possibility that the child falsely implicated the juvenile offender and I ~~find~~^{make} no such finding. This is because as stated above, the child never ever mentioned any other person. She was after all only 7 years old at the time and clearly had no reason to falsely implicate the juvenile offender. The detail in her story including the aspect of the juvenile wearing a balloon clearly indicates that she was not speaking from without. It could not have been a made up story. Furthermore, the child was able to remember details such as the friends she was playing with at the time 'uncle' Thomas called her to his house.

I have taken note of the defence by the juvenile offender that from 1st November, 2016, he would leave home for work at 06h00 and return around 17h00. However, this does not exonerate him because the child did not mention the times that the sexual abuse was occurring. She is still too young to have a proper sense of time. Furthermore, she revealed that the abuse occurred on more than one occasion thus the possibility that it started way before the juvenile started work cannot be ruled. After all, there was no concrete evidence produced showing when exactly he started work. None of the prosecution witnesses was challenged on that aspect. In fact PW2 in cross examination stated that when the child informed her about the pain on her private parts caused by the juvenile's 'bad manners' she did not immediately question the juvenile about it for fear that he would run away. This evidence suggests that the juvenile was actually available at the time and he did not in any way challenge this evidence.

The evidence that he started work on 1st November, 2016 is in my view an afterthought. It was obviously given in light of the fact that the indictment says the incident occurred between 1st and 30th November, 2016.

From the evidence of the prosecutrix, PW2 and the medical evidence, I am satisfied beyond reasonable doubt that the juvenile offender had carnal knowledge of the prosecutrix. He had the opportunity to commit the offence having been a close neighbour, who, no doubt, had gained the trust of the prosecutrix as an uncle and made her comfortable enough to go to his house when called.

Furthermore, there is no evidence on record to suggest that someone other than the juvenile offender penetrated the prosecutrix.

All in all, I find that the evidence of the prosecutrix has received the necessary corroboration as required by section 122 of the Juveniles Act Chapter 53 of the Laws of Zambia as amended by Act No. 3 of 2011.

In the circumstances, I hereby enter a finding of GUILTY against the juvenile offender for the offence of defilement.

DELIVERED IN CLOSED COURT THIS 10th DAY OF AUGUST, 2017



PRINCIPAL RESIDENT MAGISTRATE

