IN THE SUBORDINATE COURT OF THE **2SPD/031/2017**

FIRST CLASS FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

VERSUS

BRIGHT SHAMUKUNI

Before the Hon. Magistrate Mr. Humphrey Matuta Chitalu, at 09:00 hours this 30th day of August, 2017.

For the People: Munenga (Public Prosecutor)

For the Accused: In Person

JUDGMENT

STATUTES REFERRED TO:

1. ***Constitution of Zambia, Cap 1, Art 18***
2. ***Penal Code, Cap 87, ss, 13, 132***

CASES REFERRED TO:

1. ***Woolmington v DPP*** **(1935) ALL E.R 1**
2. ***Mwewa Murono v The People SCZ Judgment No. 23 of 2004***
3. ***R v Chapman*** *(1959) 1 QB 100*
4. ***R v Hughes*** *(1841) 9 C & P 752,*

5. ***R v Baskerville*** **[1916] 2 KB 658**
6. **Nkole v The People (1977) ZR 351 (SC)**
7. **The People v Kufekisa (1975) ZR 244**
8. ***Turnbull (1976) 63 Cr App R 132***
9. ***Kateka v The People (1970) ZR 35***
10. ***Haamenda v The People (1977) ZR 184***
11. ***Mkandawire v The People (1978) ZR 46***
12. ***Situna v The People (1982) ZR 115 (SC)***
13. ***A-G for Northern Ireland v Gallagher (1963) AC 349***

OTHER AUTHORITIES REFERRED TO:

1. ***OXFORD ADVANCED LEARNER'S DICTIONARY 7th edn. Oxford University Press at page 215***

In this case the juvenile, Bright Shamukuni stand charged with one count of rape contrary to section 132 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence allege that on the 1st day of January, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, the juvenile had carnal knowledge of Beatrice Malupenga without her consent.

The juvenile pleaded not guilty.

I warn myself at the onset that the onus is upon the prosecution to prove their case beyond all reasonable doubt and there is no onus on the juvenile to prove his innocence. The landmark decision in the case of ***Woolmington v DPP*** (1935) ALL E.R 1, held that:

"In criminal cases it is the duty of the prosecution to prove the accused's quilt beyond all reasonable doubt."

This doctrine is lucidly entrenched in our ***Zambian Republican Constitution Chapter 1 of the Laws of Zambia*** which states in ***Article 18(2)(a)***:

"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty."

In this regard the Supreme Court made its pronouncement in the case of ***Mwewa Murono v The People SCZ Judgment No. 23 of 2004*** when it held:

"In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the quilt of the accused lies from the beginning to the end on the prosecution. The standard of proof must be beyond all reasonable doubt."

The juvenile is entitled to call and give evidence or say nothing at all. If he elects to remain silent this does not affect the burden on the prosecution to prove the guilt of the juvenile to the required standard. If, after considering all the evidence, there is any doubt in my mind as to the guilt of the juvenile then the juvenile must be given a benefit of that doubt.

Rape is defined under ***section 132 of the Penal Code, Chapter 87 of the Laws of Zambia*** in the following terms:

"S.132 ***Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed "rape"."***

According to ***OXFORD ADVANCED LEARNER'S DICTIONARY 7th edn. Oxford University Press at page 215***, the phrase **"Carnal knowledge"** means sexual intercourse. From the above definitions it follows therefore, that a man commits rape if-

1. **He has sexual intercourse with a woman or girl ; and**
2. **Who at the time of the intercourse does not consent to it.**

The word ***"unlawful"*** is included in the definition of rape as the offence cannot be committed by a husband on his wife as she is irrebuttably presumed to have consented to all acts of sexual intercourse upon marriage. In the case of ***Chapman*** (1959) 1 QB 100 the word unlawful in the definition was held to apply to sexual intercourse outside the bonds of marriage.

Sexual intercourse is proved by penetration only. In the case of ***R v Hughes*** (1841) 9 C & P 752, it was held:

"Penetration is established on proof of the slightest entry of the accused's penis into the woman's vagina; the hymen need not be ruptured."

Having established the foundation upon which the offence of rape can be examined, I now consider the evidence in this case. The prosecution called four witnesses. The first prosecution witness PW1, was Beatrice Malupenga the alleged prosecutrix in this matter aged 68 years. According to the witness she recalled at around 18 00 hours on the 24th December, 2016 it was Christmas Eve and she went to sleep. It was submitted that at around 03 00 hours PW1 saw the door to her house open. According to PW1 there was a battery lamp in the house. As such the house was sufficiently lit. It was submitted that PW1 saw a man opening the door and walked towards her. It was asserted that the man held the witness by her neck and squeezed it. It was stated that the man pushed PW1 to the ground and touched all over her body. It was submitted that the man had carnal knowledge of PW1 by inserting his penis into her vagina. According to PW1 she was admitted at the University Teaching Hospital (UTH) where her private parts were examined. PW1 stated that she went to the father of the juvenile one Bright Simukuni and showed him what his son had done. It was asserted that the witness did not allow the juvenile offender to rape her.

In cross examination PW1 stated that she saw the juvenile raping her. It was asserted that the juvenile and PW1 live together in the same community and

that PW1 know the juvenile. It was affirmed that PW1 saw the face of the juvenile. PW1 stated that she could not scream because the juvenile grabbed her neck and threatened to kill the witness. It was submitted that when the witness went at Michelo's house she indicated that she was raped by Bright. It was stated that the juvenile was not at the cousin's house at 03 00 hours but at PW1's house.

In reexamination PW1 stated that there was light in the house and that she saw the juvenile's face.

The second prosecution witness PW2, was Benias Kanyenesha. According to PW2 the juvenile in this matter is her nephew. She recalled on the 25th December, 2016 she was at home when she received a phone call from Enoch Akola who asked her to come to his house as the juvenile had 'touched' his grandmother. PW2 submitted that she went at Enoch's house where she found PW1, her distant relative. That PW1 told PW2 that she was raped by the juvenile. PW2 stated that PW1 removed her blouse and showed the witness the scratches and bruises all over her back and that she had soil or dust on her body. That PW1 had injuries on her body and was bleeding. It was asserted that PW2 called for transport for PW1 to be taken at the hospital. It was further submitted that the father to the juvenile came and stated that the juvenile was at his house. According to PW2 she went with the juvenile's father at his house. It was submitted that the juvenile was found at his father's house. PW2 asserted that the witness and the juvenile's father took the juvenile at PW1's house. It was submitted that at the crime scene the juvenile told PW2 that he came from drinking and went to PW1's at around 03 00 hours. That the juvenile said he had entered PW1's house and raped PW1 on the material night. It was submitted that the matter was reported at Momba Police Post where PW1 was referred to University Teaching Hospital (UTH).

In cross examination PW2 stated that she asked the juvenile about the time he left the drinking place. That the juvenile offender said he left at 03 00 hours.

The third prosecution witness PW3, was Fides Kapandula. According to the witness she recalled at around 06 00 hours on the 25th December, 2016 she was woken up by PW1, her mother. PW3 stated that the mother told her she had been raped by Bright. That PW1 had injuries on her body. It was submitted that the matter was reported at police where PW1 was referred to UTH where she was admitted for a day. That PW1 was issued with medical report forms.

In cross examination PW3 stated that she did not enter PW1's house when the juvenile was brought at the crime scene and could not hear what the juvenile said.

The fourth prosecution witness PW4, was detective sergeant Queen Phiri. According to PW4, she recalled on the 15th January, 2017 she reported for work at Momba Police Post. That whilst on duty she was assigned a docket of rape in which PW1 reported that she was raped by a known person one Bright Simukuni of Mungule area in Chibombo District. That the witness made inquiries of which she charged and arrested that the juvenile for the subject offence. It was affirmed that under warn and caution statement, the juvenile gave a free and voluntary reply denying the charge. It was submitted that the witness kept the medical report forms relating to this matter. The two medical report forms were produced into evidence as Exhibits P1 and P2.

In cross examination PW4 stated that she visited the crime scene. That the witness did not have any evidence to show court that she had visited the crime scene.

The juvenile elected to give evidence on oath and he called three witnesses. The first defence witness DW1, was Bright Simukuni the juvenile in this matter. According to the juvenile he recalled at around 20 00 hours on the 24th December, 2016 he left home with his brother one Boswell Simukuni and went to a bar. It was submitted that three other cousins joined. That the team later moved to Mayeya Bar where they drank beer up until 07 00 hours the following

day when the accused in the company of two others decided to go back home. It was asserted that as trio reached near the juvenile's house the juvenile saw his father and a grandchild joining the road. According to the juvenile his mother informed him that her aunt (PW1) had said that he had entered her house. It was submitted that the allegation surprised the two other persons in the company of the juvenile. It was submitted that the three cousins that were with the juvenile on the material night were: Masi, Bernard and Joe.

It stated that after a while, vigilantes came and apprehended the juvenile whom they took at PW1's home. According to the juvenile offender he found PW1 in the house. It was submitted that the juvenile entered the house. According to the juvenile PW1 alleged that he had pushed the door and that he had carnal knowledge of her. It was asserted that the juvenile offender denied the allegations.

In cross examination the juvenile stated that on the 24th December, 2016 it was Christmas Eve. It was submitted that the juvenile was not so drunk. It was stated that PW1 is an aunt to the juvenile and that she knows him. The juvenile submitted that PW1 could not make a mistake in identifying him. That PW1's eye sight is still good. It was asserted that PW1 said that on the material night there was light in the room and that she was able to identify the juvenile. It was submitted that PW1 does not have any grudge against the juvenile. That the medical reports confirm that PW1 was raped.

The second defence witness DW2, was Bernard Shimulaba, a friend to the juvenile offender. According to DW2 he recalled on the Christmas Eve of the 24th December, 2016 he was with the juvenile having a beer at a Chelsea Tavern. It was stated that the two had been drinking from 15 00 hours up until the following day. DW2 stated that the tavern closed between 23 00 hours and 24 00 hours on the Christmas Eve. It was asserted that the dual moved to Mayeya Bar where they found and joined other friends. That between 07 00 hours to 08 00 hours on the 25th December, 2016 the juvenile and DW2

decided to go home. It was asserted that the dual were given a lift home by the three friends they met who were cycling bicycles. It was submitted that when the dual arrived at the juvenile's home the juvenile's mother said that the juvenile had raped PW1. According to DW2 he was with the juvenile drinking beer the whole night.

In cross examination DW2 stated that juvenile was his friend and that he would not be happy for the juvenile to go to prison. It was submitted that DW2 would say anything to make sure that DW1 is out of prison. It was submitted that DW2 was a witness with his own interest to serve. DW2 stated that he started drinking beer with the juvenile from 17 00 hours on the 24th December, 2016. It was asserted that DW2 was not controlling all the juvenile's movements who would sometimes go to urinate during the drinking spree. It was further submitted Mayeya Bar was crowded with many people on the material night and that DW2 was not monitoring all the juvenile's movements. DW2 submitted that if the juvenile sneaked to go and see the girl and committed the offence, DW2 would not know about it. That on the material night DW2 and the juvenile were so drunk. It was submitted that Mayeya Bar is 1 hour walking distance from the juvenile's house.

The third defence witness DW3, was Masi Kashika, the juvenile's cousin. His evidence was similar to DW1 and DW2 in a material particular.

In cross examination, DW3 stated that the juvenile is his cousin standing charged with the offence of rape. That DW3 was not happy about it. It was submitted that during the drinking spree the witness was not able to follow every movement the juvenile made. DW3 further submitted that he would not know everything the juvenile did when he left the group to go to the toilet.

In reexamination, DW3 stated that he could not recall when the juvenile left the group for a long time.

The fourth defence witness DW4, was Joseph Kasheke. His evidence was similar to DW1, DW2 and DW3 in the material particular.

In cross examination it was submitted that Chelsea Tavern is about 100 meters away from PW1's house. It was asserted that it was very possible for a person to leave Chelsea Tavern and go to PW1's home. DW4 stated that during the drinking spree the juvenile would leave the group to go and urinate. That DW4 would not know what would happen when the juvenile had left the group. It was stated that the witness loved the juvenile and that he would not be happy if he went to prison.

Having heard all the evidence in this matter I now make my findings of facts. It is not in dispute that at around 03 00 hours on the 25th December, 2016 Beatrice Malupenga was raped in her house. The charge is factually incorrect in that the particulars of the offence allege that the offence was committed on the 1st day of January, 2016. At 06 00 hours on the 25th December, 2016 the prosecutrix reported the matter to the father of the juvenile that she was raped by his son. At the same time PW2 and PW3 were informed about the rape and they observed that PW1 had sustained scratches and bruises all over her back and that she had soil or dust on her body. PW1 had sustained fresh injuries on her body and was bleeding. It is not in dispute that juvenile's father in the company PW2 took the juvenile at PW1's house. According to PW2, she is an aunt to the juvenile and PW1 is distant relative. PW2 asserted that at the house of PW1 the juvenile confessed having raped PW1 at around 03 00 hours after he had taken alcohol.

The juvenile pleaded alibi. According to the juvenile on the Christmas Eve of the 24th December, 2016 he had been drinking beer at Chelsea Tavern and Mayeya Bar in the company of DW2, DW3 and DW4 from 15 00 hours up until the following day at 07 00 hours to 08 00 hours on the 25th December, 2016 when he went to his home.

The matter was reported at Momba Police Post where PW1 was referred to UTH. PW1 was issued with medical report forms Exhibits P1 and P2. These are the facts in brief.

The questions which have been posed for my consideration as I see them are as follows:

1. Whether the charge is defective;
2. Whether the offence of rape was committed; and
3. Whether offence was committed by the juvenile;
4. Whether court competent to convict on the testimony of a single identifying witness;
5. Whether the defence of intoxication can avail the juvenile; and
6. Whether the defence of alibi can avail the juvenile;

I will address the above issues in that order. On the question of whether the charge is defective, the issue arises because the particulars of the offence allege that the offence was committed on 1st day January, 2016 in conflict with the facts proved or evidence before court which clearly indicate the offence was committed on the 25th day of December, 2016. However, in my view the defect is merely voidable and does not render the charge void. When dealing with the issue of defective charges the test to be applied was clearly espoused in the case of ***Nkole v The People (1977) ZR 351 (SC),*** where Silungwe, CJ: as he was then held that:

i. ***The statement of offence was clear and so were the particulars of the offence; what was wrong was the inaccurate reference to the section of the enactment that created the offence.***

ii. ***This error did not make the charge bad but simply defective, and in the absence of embarrassment or prejudice to the accused the proviso to section 15 (1) of the Supreme Court of Zambia Act will be applied.***

iii. The question of whether or not the accused is prejudiced by the defect must be considered on the facts of each particular case.

I have carefully considered the facts before me, in my view there has been no embarrassment or prejudice that has been occasioned to the juvenile. As such section 15 (1) is applicable.

Regarding the issues of whether the offence of rape was committed and that it was committed by the juvenile, I am mindful that these are charges which it is easy for females to bring, and difficult for the man against whom they are brought to refute. Therefore, it has been long laid down, not as a rule of law but as a rule of practice that it is unsafe for the court to convict on the evidence of the women alone. There must be corroboration evidence. In the case of ***R v Baskerville*** [1916] 2 KB 658, Lord Reading said:

"That corroboration evidence is independent testimony which affects the accused by connecting him or tending to connect him with the crime. It must be evidence which implicates him, that evidence which confirms in some material particular, not only evidence that a crime has been committed but also that the accused committed it."

I have no doubt in my mind that the complainant in this matter was raped. The independent medical evidence recorded on Exhibits P1 and P2 clearly confirms that her vagina had sustained hyperemia (or redness) and bruises consistent with circumstances of rape.

Lastly, the issue of whether the rape was committed by the juvenile, there is firstly, evidence of the prosecutrix PW1, a single identifying witness. This issue of whether it is competent for court to convict on the testimony of a single identifying witness was clearly addressed by the Supreme Court in the case of ***Sammy Kambilima, Ngati Mumba, Chishimba Edward and Davy Musonda Chanda v The People*** SCZ Judgement No. 14 of 2003, in the following words:

"It is settled law that a court is competent to convict on a single identifying witness provided the possibility of an honest mistaken identity is eliminated."

The English Court of Appeal laid down some guidelines on the approach to be taken in regard to identification evidence in the case of ***Turnbull*** *(1976) 63 Cr App R 132* which guidelines have been quoted with approval by the Supreme Court in cases such as ***Kateka v The People*** *(1970) ZR 35,* ***Haamenda v The People*** *(1977) ZR 184,* ***Mkandawire v The People*** *(1978) ZR 46,* ***Situna v The People*** *(1982) ZR 115 (SC).* The guidelines as laid down by ***Turbull*** are as follows:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or by a press of people? Had the witness ever seen the accused before? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the

accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of such descriptions, the prosecution should supply them.

Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

I have warned myself in terms of the above guidelines espoused by ***Turnbull.*** There is uncontroverted evidence that PW1 is an aunt or close relative to the juvenile and that she knew him before the incident. The juvenile and PW1 live in the same village. The juvenile submitted that PW1 could not have made a mistake in identifying him. That PW1's eye sight is still good. PW1 does not have any grudge against the juvenile. By its very nature, sexual intercourse is a physical act whereby the perpetrator of rape comes into close contact with his victim. It was not disputed that on the material night there was light in the room and as such PW1 was clearly able to identify the juvenile. The offence was committed at 03 00 hours and was reported to the juvenile's father at 06 00 hours on the 25th December, 2016. There was no time lapse between the commission of the crime and reporting of the same, clearly consistent with circumstances of rape. I am satisfied that the possibility of an honest mistaken identity is eliminated.

The other evidence connecting the juvenile to the crime was the uncontroverted testimony of PW2 who asserted that at the house of PW1 the juvenile confessed having raped PW1 at around 03 00 hours on the 25th December, 2016 after he

had taken alcohol. PW2 submitted that the juvenile in this matter is her nephew while the victim is a distant relative. The testimony of PW2 to me is very reliable.

The fifth question arises from the fact the juvenile alleges that he had been drinking from15 00 hours on the 24th December, 2016 up until the following day at 07 00 hours to 08 00 hours on the 25th December, 2016. Intoxication under ***section 13 of the Penal Code Chapter 87 of the Laws of Zambia*** is a defence to crime of specific intent such as rape. The proviso provide as follows:-

"S 13 (2) Intoxication shall be a defence to any criminal charge if, by reason thereof, the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing, and

(a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) The person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section one hundred and sixty-seven of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

His lordship Cullinam J, as he was then had occasion to consider the defence of intoxication and insanity as intervening defence in the case of the ***The People v Kufekisa*** (1975) ZR 244 where he held:

"Where a specific intent is essential element in the offence, evidence of drunkenness rendering the accused incapable of forming such intent should be taken into consideration in order to determine whether he had infact formed the intent necessary to constitute the particular crime. If he is so drunk that he is incapable of forming the intent required, he cannot be convicted of a crime which is committed only if intent is proved."

The juvenile's testimony was to the effect that he freely and voluntary took alcohol and was throughout very conscious of the environment around him. There is no evidence suggesting that by reason of intoxication he was temporarily insane or incapable of forming the necessary intent required to constitute rape. I am satisfied beyond doubt that the defence of intoxication does not arise in this matter. In the case of ***A-G for Northern Ireland v Gallagher*** (1963) AC 349, in the House of Lords lord Denning stated at p. 382:

"If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on his self-induced drunkenness as a defence to the charge of murder, nor even reducing it to manslaughter. He cannot say that he got himself into such stupid state that he was incapable of an intent to kill.....the wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do."

On the question of whether the defence of alibi can avail the juvenile, I have carefully evaluated the evidence on record. According to the defence evidence, the juvenile had been drinking in the company of DW2, DW3 and DW4 from15 00 hours on the 24th December, 2015 up until the following day at 07 00 hours to 08 00 hours on the 25th December, 2016. Simple arithmetic calculation will entail that he had been drinking for 16 hours! I am alive to the

legal requirement that whenever the accused raises a defence of alibi the state is under a duty to investigate and disprove the defence beyond reasonable doubt. Although there is no evidence of investigations into the alleged alibi by the state, it is very clear from cross examination of the defence witnesses that the juvenile was not throughout the 16 hours of the alleged drinking spree in the company of DW2, DW3 and DW4. He would sometimes leave the group. It follows therefore the defence is not watertight or uncontroverted.

With those few remarks I am satisfied there is abundant independent evidence connecting, or implicating the juvenile offender or confirming in some material particular not only that a crime has been committed but also that the juvenile offender committed it. In the circumstances I have no doubt in my mind and I find the juvenile offender guilty as charged of the offence of rape contrary to section 132 of the Penal Code Chapter 87 of the Laws of Zambia.

Delivered in open court this 30th day of August, 2017.

Hon. Humphrey M. Chitalu

RESIDENT MAGISTRATE.