

IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT KABWE AND LUSAKA
(Criminal Jurisdiction)
BETWEEN:

APPEAL NO. 94/2017

ANDREW CHALWE

AND

THE PEOPLE



APPELLANT

RESPONDENT

Coram: Mchenga, DJP, Chashi and Mulongoti, JJA

On 2nd May 2017 and 7th September 2017

For the Appellant: K. Katazo, Legal Aid Counsel, Legal Aid Board
For the Respondent: C.Soko, Deputy Chief State Advocate, National Prosecution
Authority

J U D G M E N T

Mchenga, DJP, delivered the Judgment of the Court

Case referred to:

1. **Nsofu v The People [1973] Z.R. 380 (Reprint)**

Legislation referred to:

1. **The Penal Code Chapter 87 of the Laws of Zambia**

Andrew Chalwe, the appellant, appeared before the Subordinate Court sitting at Ndola charged with one count of the offence of Defilement contrary to **section 138 (1) of the Penal Code**. The particulars of the offence alleged that on 1st January 2015, at Ndola, in the Ndola District of the Copperbelt Province of the Republic of Zambia, he had unlawful carnal knowledge of Sylvia Mwape, a girl below the age of 16 years. He denied the charge and the matter proceeded to trial. At the end of the trial, he was convicted and

committed to the High Court for sentencing. On 29th May 2015, he was sentenced to 15 years imprisonment with hard labour.

Dissatisfied with the lower court's verdict, the appellant appealed against his conviction. When the matter came up for hearing of the appeal on 2nd May 2017, the appellant communicated his desire to withdraw his appeal. We invited the State Advocate to address us on whether the plea was properly taken in the trial court.

The record shows that the appellant, who was unrepresented, appeared in court for plea on 13th January 2015. The charge was read out to him and he denied it. A plea of not guilty was entered and the public prosecutor proposed the trial date. It is then that the trial magistrate informed him of the proviso in the proviso and adjourned the matter to 19th January 2015.

In response to our query on the manner in which the plea was taken, counsel indicated that, even if the proviso was not explained before it was taken, the appellant suffered no prejudice because it was subsequently explained to him.

In the case of **Nsofu v The People (1)**, Baron, DCJ, delivering the judgment of the court, at page 382, observed as follows:

"The appellant in this case pleaded not guilty. It is a rule of practice, to which reference has been made in a number of cases, that where it appears that an unrepresented accused person may be intending to plead guilty to a charge of defilement the proviso to section 138 of the Penal Code should be explained to him; even where an accused pleads not guilty it is desirable that the proviso be explained before he pleads but certainly at some early stage in the proceedings,

so that the accused may have the opportunity to direct his cross-examination of the prosecution witnesses to the question of the girl's age. It is unnecessary for us to decide, since the present is not such a case, the effect of a failure to explain the proviso where the accused pleads guilty, but in the case of a plea of not guilty, such failure is at best from an accused person's point of view an irregularity which may be cured if there has been no prejudice".

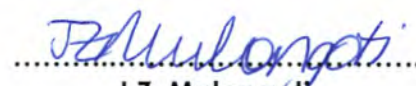
From this extract, it is clear that ordinarily, the proviso is brought to the attention of an unrepresented accused person before the plea is taken. Knowledge of the proviso, which is in effect a defence, enables him build on it when he cross examines prosecution witnesses.

In this case, even though the proviso was only explained after he had taken his plea, we agree with Ms. Soko's submission that the appellant suffered no prejudice. He was informed of the existence of the defence before any witness was called and if he had intended to call it to his aid, he would have done so because the 1st witness was only called six days later. He had sufficient time to decide on how to proceed with his defence and was therefore suffered no prejudice.

Consequently, we find no merit in the appeal and we dismiss it. The conviction and sentence imposed by the lower court are upheld.


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J. Chashi
COURT OF APPEAL JUDGE


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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J.Z. Mulongoti
COURT OF APPEAL JUDGE