IN THE SUPREME COURT OF ZAMBIA **SCZ APPEAL NO. 28/2017**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN

SOFENI KASHUPA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS.
On 5th September, 2017 and on 13th September, 2017.

APPEARANCES:

For the Appellants: *Ms K. Chitupila, Senior Legal Aid Counsel of Legal Aid Board.*

For the Respondent: *Mrs M. G. Kashishi-Ngulube, Senior State Advocate of National Prosecutions Authority.*

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Christopher Nonde Lushinga v the People (2011) 2 ZR 301*
2. *Bernard Chisha v the People (1980) ZR 36*
3. *Katebe v the People (1975) ZR 13*

Legislation referred to:

1. *Penal Code, Chapter 87 Laws of Zambia, section 138.*
2. *The Juveniles Act, Chapter 53 of the Laws of Zambia, section 122(1).*

The appellant was convicted in the subordinate court at Kitwe of defiling the prosecutrix, a girl below the age of 16 years. He was sentenced by the High Court to 17 years imprisonment with hard labour. At the hearing of the appeal before us, Mrs Kashishi-Ngulube very properly conceded that the State was no longer supporting the conviction.

The evidence of the prosecutrix, who testified as PW1, was that in April, 2010 around 14:00 hours in Wusakile Township, Kitwe, the appellant whom she knew as bashi Roydah (father to Roydah) had carnal knowledge of her in his bedroom. He gave her K500 and a bun and threatened to beat her if she disclosed what had transpired. The charge sheet, however, showed that the appellant was arrested on 9th March, 2010.

The prosecutrix described the appellant's house as three roomed, comprising a bedroom, sitting room and kitchen; that there were chairs, a table, a television and a radio, features she was familiar with from her previous visits with the appellant's daughter, Roydah. She stated that there were clothes in the bedroom and a

brown cupboard but did not explain when exactly she saw these items.

The prosecutrix stated that she told PW4, Martha Phiri, who, according to the prosecutrix, informed her mother (PW2) on the same day and the matter was reported to the police. From the police they went to Wusakile Hospital where she was given medicine. When pressed about the date of the incident, the prosecutrix said it was on the 9th but she could not remember the month.

The mother to the prosecutrix, PW2, gave testimony confirming only the age of the prosecutrix whom she said was born on 25th December, 2001. Curiously so, she did not talk about what allegedly happened to her daughter.

PW4's testimony was that in April, 2010, on a date she could not remember, the prosecutrix whom she referred to as her daughter (otherwise a niece) by virtue of her mother being the witness' sister in law, told her that the appellant had defiled her. The prosecutrix told her that there was blood coming out of her private part. The witness said she did not check to confirm because she did not believe the prosecutrix and suspected that she just wanted to falsely

implicate the appellant. She also did not immediately inform the prosecutrix's mother, PW2 because on the same day she went away to her sister's place where she remained for two weeks. She, however, told PW3 what the prosecutrix had told her when she returned. It was then, according to PW4, that PW3 took the prosecutrix to the hospital.

PW3 testified on her part that on 20th May, 2010 the prosecutrix, who was visiting PW4, told her that the appellant had defiled her. She stated that she reported the matter at Wusakile Police Station. A medical report form (dated 21st April, 2010) was issued. The prosecutrix was, thereafter, taken to Kitwe Central Hospital where she was attended to by a doctor.

PW5, the arresting officer's evidence was that she was assigned to investigate the case on 7th May 2010. The prosecutrix told her that the appellant had defiled her. She arrested and charged the appellant. She was led to the appellant's house by the prosecutrix in the company of the appellant. The witness produced the medical report form which showed that on 21st April, 2010 the prosecutrix had complained of "*painful private parts*" on account of being defiled.

The finding by the doctor apparently entered in the medical report on 7th May, 2010, the same date on which PW5 was assigned the matter to investigate, was "*no hymen and no lacerations at the introitus.*" The question to which we will be returning was whether the finding was consistent (i.e. confirmatory) of the report made by the complainant pertaining to the painful private parts.

In his defence the appellant led evidence from himself and two other witnesses who comprised a tenant at his premises and his wife. The evidence endeavoured to show that there was no opportunity at all for the appellant to commit the offence. He testified that on 9th March, 2010 he knocked off from work around 13:50 hours. He got home around 14:50 hours. He did not find his wife and the house was locked. Contrary to what the prosecutrix told the court, the appellant said that his house had three bedrooms. He said that he got keys from a boy named Paul who waited for him while he went into the house to change clothes as he was going into town. He finished dressing and went outside the house where he put on his shoes. His wife found him sitted outside. They agreed to go to town, that he would go ahead and she would follow him after she had

prepared herself and the baby. The purpose of going into town was to do some shopping as the salary for the month had been paid into the appellant's account.

The appellant stated that for the entire period that he had been at home after returning from work there were people in the yard who included DW2 who was sweeping the yard as well as Paul who waited for him when he went into the house. There was also another family and all of them were able to see what was happening in the yard. The appellant, who confirmed that he was the father to Roydah, stated that he did not see the prosecutrix on that day.

The appellant testified further that it was not until 22nd April, 2010 when his wife (DW3) asked him about the allegation that he had defiled the prosecutrix on 9th April, 2010. He denied the accusation and went to the prosecutrix's home with his wife. There the prosecutrix's grandmother denied mentioning any one. He was surprised when the police picked him up from home on 19th May, 2010, a Thursday according to the appellant, around 21:00 hours after he had knocked off from work. We did check the calendar and confirmed that 19th May, 2010 was a Wednesday and not Thursday

as claimed by the appellant. The appellant stated that he was released on police bond after two days and advised to try and reconcile with PW2 or pay some money so that the charge could be dropped. He refused to do so.

DW2, a tenant in the appellant's yard confirmed that she was at home on 9th April, 2010 which date she insisted upon. She denied mentioning 10th April, 2010 as the date of the incident. The appellant found her at home when he knocked off from work. The appellant did not find his wife at home and the house was locked. She got the neighbour's keys from Paul and gave them to the appellant. She later corrected herself that Paul gave the keys to the appellant who went into the house and emerged shortly with a pair of shoes in his hands. He sat outside to put on the shoes. The appellant was telling her to inform his wife to follow him to town when the wife appeared.

The wife, DW3 gave evidence that on 9th April, 2010, she left her home around 14:00 hours to escort visitors. She left the house keys with Paul to give to the appellant when he returned from work. When she returned home she found the appellant in the process of putting

on his shoes. Paul was there. She had been away from home for a short time. They agreed to meet in town where the appellant was going to withdraw money from his salary and they would go shopping. He went ahead and she followed him afterwards.

The trial magistrate accepted the evidence of the prosecution and regarded the medical report as corroborating the prosecutrix as to the fact that she was defiled. As regards the identity of the perpetrator, the learned magistrate found no evidence capable of corroborating the prosecutrix's story that it was the appellant who had defiled her. She, however, reasoned that the prosecutrix was a credible witness, which, according to the learned magistrate rendered her an ordinary witness for whom corroboration with regard to the perpetrator was not required. She regarded the discrepancies in the prosecution witnesses' evidence as reconcilable.

The learned magistrate, however, disbelieved the appellant's defence on the basis that what he and his witnesses said could not have happened because of the discrepancies in their stories especially on how the key was passed on to the appellant. She

accordingly concluded that there was carnal knowledge of the prosecutrix and that the appellant was the perpetrator.

The appellant was dissatisfied with the outcome and appealed to the High Court. How this appeal came about is not explained. What we expected is that the matter went to the High Court for sentencing. The judgment from the court below is, however, clear that it was dealing with an appeal. In her judgment, the learned judge in the court below took the view that the trial magistrate properly directed herself when she held that the prosecutrix's evidence was corroborated by the medical report (thus confirming that she had been carnally known). The learned judge also endorsed the trial magistrate's acceptance of the prosecutrix's evidence that it was the appellant who committed the offence on the basis that her evidence was credible and did not require corroboration. The learned judge however, went on to find that there was corroboration both of the commission of the offence and the identity of the perpetrator after analysing the evidence of the prosecutrix.

There were other issues raised both before the trial magistrate and on appeal in the High Court which we regard as not being central to this appeal which we have omitted.

The issue for consideration in this appeal is whether the conviction of the appellant and the sentence are sustainable. As we said at the beginning of the judgment the State is no longer supporting the conviction. That is as it should be.

The purpose of this judgment, therefore, is to explain the reasons why the conviction cannot be sustained. It is clear from the judgments of the two courts below that the appellant was convicted because it was found that the medical report corroborated the prosecutrix's allegation that she had been defiled and further that her testimony that it was the appellant who defiled her was credible even though it was not corroborated.

The offence in this case being one of a sexual nature, the prosecution had to establish corroboration for both the commission of the offence and the identity of the offender. The case for the prosecution depended largely on the evidence of the prosecutrix, a child of tender age, whose sworn evidence was received after a

successful *voire dire*. In the case of **Christopher Nonde Lushinga v the People**[1], we held that **section 122 (1)** of the **Juveniles Act** requires that the evidence given for the prosecution by a child of tender years requires corroboration whether it was sworn or unsworn.

In accepting that the medical report corroborated the commission of the offence, the learned magistrate made the following observation in her judgment:

> **"Medical evidence as shown by exhibit P1 is that the prosecutrix's hymen was absent and that there were no lacerations on her private parts. However, the medical officer's findings are that they were consistent with the circumstances alleged. I have no reason to doubt the evidence in relation to this and consider the medical evidence as corroborative of PW1's testimony over the commission of the offence."**

On appeal to the High Court, the learned judge stated:

> **"I am of the considered view that the learned trial magistrate properly directed herself when she held that PW1's testimony was corroborated by the medical report."**

The learned judge justified her conclusion by stating that of the two options in the medical report between the findings being consistent with the circumstances and not being consistent with the circumstances, what was ticked or crossed showed that the first

option was selected. This meant that the findings that the prosecutrix had no hymen and no lacerations at the *introitus* (i.e. the vaginal entrance) was consistent with the report that the prosecutrix had been defiled.

We did examine the copy of the medical report included in the record of appeal. It showed that on 21st April, 2010 the prosecutrix had complained about "painful private parts" due to a defilement. On 7th May, 2010 as shown by the hospital date stamp, the medical officer recorded the findings already alluded to. The word "alleged" in the first option referred to above was crossed out. This was in apparent compliance with the instruction at the bottom of the medical report form to delete a provision which was inapplicable. It is our settled understanding from the many police medical reports we have seen that crossing out the first option meant that the finding by the medical doctor was not consistent with the complaint given to the police of the cause of the injury or other trauma sustained by the complainant. In this case, we are convinced that the finding of the medical officer was that his findings did not confirm the complaint that the prosecutrix had been defiled.

The courts below clearly erred in relying on the medical report as corroborating the prosecutrix's allegation that she had been defiled. Our view is that the medical report was quite clear as to the medical officer's finding. We reiterate that the medical report did not corroborate the appellant's allegation that she had been defiled.

We did consider whether any of the prosecution witnesses could be said to have corroborated the fact that the appellant had been defiled. The prosecutrix testified that she had informed PW3 and PW4 that she had been defiled. PW3's evidence was that it was on 20th May, 2010 when the prosecutrix told her about what had transpired. Coincidentally, this is about the same date on which the appellant said he was picked from his home by the police. PW3 was quite emphatic about the date and no effort was made by the prosecution to correct her even though there was already evidence in the hands of the State in form of the medical report that purported to record a complaint of painful private part due to defilement on 21st April, 2010.

It is the duty of the State to clear up any inconsistencies in the evidence of their witnesses as early as possible during the conduct of

the investigations and at the least during the conduct of the trial or risk their evidence being deemed as unreliable. By saying so we are not suggesting for any moment that prosecution witnesses should be coached on what to say. Rather the best evidence should be presented. We are aware that in deciding to prosecute a matter the state will have previewed the evidence available to it and the prospects of success. The State should always have it at the back of the mind that the justice system that we subscribe to places the onus of proving the guilt of an accused on it throughout the case notwithstanding the constant shifting of the burden to adduce evidence. If the evidence presented is full of inconsistencies it should not be expected that courts will always be of the good nature to reconcile them. There was no indication that PW3 may have merely forgotten or mixed up the dates. This left a lingering question in our minds whether there was any mischief in the dates recorded in the medical report. We took the view that the evidence of this witness was at best inconsistent and irreconcilable with the evidence in the medical report and at worst contrived. We did not consider this witness reliable and her evidence cannot corroborate the prosecutrix's story that she had been defiled.

PW4's evidence was that in April, 2010 on a date she could not remember, the prosecutrix told her that she had been defiled. The prosecutrix also told her that she was bleeding in her private part obviously as a result of the defilement. The witness's first reaction was that she did not believe the prosecutrix and suspected her of wanting to falsely implicate the appellant. The witness did say afterwards that she later believed the prosecutrix when she returned two weeks later from where she had gone and the prosecutrix asked her if she had informed PW2. We do not think that the change of stance by this witness was reliable. It should be noted that PW4 was the first person to see the prosecutrix soon after her alleged ordeal and would have noticed her distressed condition which should ordinarily be expected of a 9 year old girl who has not had any prior experience of carnal knowledge and would have concluded that all was not well with the prosecutrix. She still did not believe her story implying that there was nothing untoward in the prosecutrix's appearance that would have raised her heckles. That is why she saw no reason to conduct any inspection of her. The evidence of PW4 can equally not corroborate the appellant's allegation that she had been defiled.

Finally, though not least, there was the testimony of PW5, the arresting officer. She took up the case on 7th May, 2010 the same date when the medical officer purportedly endorsed his findings on it. The medical report showed that the complaint from the prosecutrix was received on 21st April, 2010. The witness did not explain why she was taking up the matter so long after the matter had been reported to the police. To compound the issue the date of arrest on the charge sheet is 9th March, 2010. The date was not amended so that there remained a conflict when the alleged defilement took place. One wonders how the appellant could have been expected to answer the allegations as there were varying dates on which he was alleged to have committed the offence. The witness did say that the prosecutrix accompanied by the appellant did lead her to the appellant's home. This evidence in our view is of little probative value. The appellant was well known to the prosecutrix and she had been in his house before. The witness did not tell the court the number of bedrooms the house had or the particular bedroom in which the alleged defilement took place. Our view is that considered in the light of what we have said about the medical report and the gaps in the dates we equally

do not regard the evidence of PW5 as reliable. Certainly it is not corroborative of the allegation that the prosecutrix was defiled.

All in all there is clearly no corroboration as to the commission of the offence. On this determination alone the conviction would not be sustainable.

Turning to the position taken by the learned trial magistrate and affirmed by the learned judge in the court below that the prosecutrix did not need to be corroborated because she was a credible witness, we find the proposition to be one which is strange.

The prosecutrix was a child of tender years whose evidence sworn or unsworn required corroboration as we have already stated. The effect of the decision in the case of **Bernard Chisha v the People**[2] which is still valid is equally that the sworn evidence of a child requires corroboration. This court observed the following in that case:

> **"Mr Kamalanathan argued that once a child is properly allowed to give evidence on oath such evidence should be placed on an equal footing as the sworn evidence of any other witness in respect of which it is not necessary for the court to warn itself.**
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> **Clearly, the effect of this submission, if accepted, would be to overturn the well-established rule of practice in which case the need for the warning and the need to look for corroboration in all cases involving children who give sworn evidence would no longer arise."**

The case of **Katebe v the People**[3] relied on by the trial magistrate concerned the evidence of an adult complainant and is not applicable to this case.

The evidence of the prosecutrix, in this case cannot be said to have corroborated itself as the learned judge appeared to imply when she said the magistrate did not err in convicting the appellant on the single identification evidence of the prosecutrix, a child witness; that she knew him prior to the incident; it was broad day light and there was uncontroverted evidence that he was home alone at the time; therefore, that there was sufficient corroboration as to both identity and commission of the offence by the appellant. We do not agree with this.

Our view of the prosecutrix's evidence is that it was not reliable. Having stated that she was defiled in April, 2010, she later said it was on the 9th of a month which she could not remember. Her description of the features in the appellant's house is also not reliable since it is not clear on what date she saw the clothes and brown cupboard in the bedroom. There was also no verification of the number of bedrooms in the house. The prosecutrix said it had one

bedroom while the appellant said they were three. PW5 could easily have resolved the issue by confirming what she saw when she visited the house. We could not help but wonder whether the prosecutrix was speaking from her own recollection of her experience or was merely regurgitating a story that she had been fed by someone else but could not remember the details properly. Against her testimony, we found the appellant's defence substantially consistent and quite solid given the uncertainty in the prosecution's evidence of the date when the offence is alleged to have occurred. He was left to grope in the dark for a meaningful defence and we are of the view that he substantially succeeded in doing so. We accept that the discrepancies in who gave the key to him to open the door to his house notwithstanding, the evidence which he marshalled clearly showed that there was no opportunity for him to commit the offence. Granted that DW3 was the appellant's wife and could have given embellished evidence, we found no reason to doubt the testimony of DW2. We do not accept the reasons advanced by the trial magistrate for disbelieving the witness.

Overall, we are of the view that the conviction in this matter cannot be safely upheld. We, accordingly quash it and set aside the sentence of imprisonment. The appellant is acquitted and should be set at liberty.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE