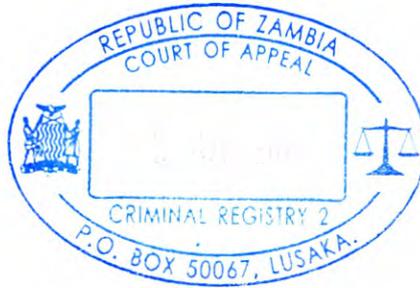


BETWEEN:

AARON TEMBO

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Makungu and Ngulube, JJA

On 18th January 2021 and 15th June 2021

For the appellant: O. Ngoma, Lungu Simwanza and Company

**For the respondent: N.T. Mumba, Chief State Advocate, National
Prosecution Authority**

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Emmanuel Phiri v The People [1982] Z.R. 77
2. Ali and Another v The People [1973] Z.R. 233
3. Mhango and Others v The People [1975] Z.R. 275
4. John Nyambe Lubinda v The People [1988-1989] Z.R. 110
5. Jeffrey Godfrey Munalula v The People [1982] Z.R. 59
6. Kambarange Mpundu Kaunda v The People [1990-1992] Z.R. 30
7. Tapisha v The People [1973] Z.R. 222
8. Penias Tembo v The People [1980] Z.R. 218
9. Emmanuel Phiri and Others v The People [1978] Z.R. 79
10. Davis Mangoma v The People SCZ Judgment No. 217 of 2015

11. Katebe v The People [1975] Z.R. 13
12. Machipisha Kombe v The People SCZ Judgment No. 27 of 2009
13. Kahilu Mungochi v The People CAZ Appeal No. 58 of 2016
14. The People v Moses Ainela Phiri and Others [2014] 2 Z.R. 160
15. Charles Lukolongo and Others v The People (1986) Z.R. 115

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Juveniles Act, Chapter 53 of the Laws of Zambia
3. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

1. INTRODUCTION

1.1. This is an appeal from a judgment of the High Court (Maka-Phiri, J.), delivered on 12th December 2019.

1.2. The appellant initially appeared before the Subordinate Court (Hon. M. Mulalelo), on a charge containing one count of the offence of defilement contrary to **section 138(1) of The Penal Code**. The allegation was that on the 7th of April 2018, at Kazungula, he had unlawful carnal knowledge of a girl below the age of 16 years.

1.3. He denied the charge and the matter proceeded to trial. At the end of that trial, he was convicted

for committing the offence, and committed to the High Court for sentencing.

1.4. On the 12th of December 2019, the High Court sentenced him to 35 years imprisonment, with hard labour.

1.5. He has now appealed against both the conviction and the sentence.

2. CASE BEFORE THE TRIAL COURT

2.1. On the 7th of April 2018, in the afternoon, Joe Chibuye, a boy aged 12 years and Christine Mashi, a girl aged 13 years, were playing outside their parent's house in Kazungula's Customs Compound. With them, was the prosecutrix, who was aged 4 years.

2.2. At some point, Joe Chibuye and Christine Mashi entered the house, leaving the prosecutrix alone outside. When they came out of the house, they did not find her.

2.3. All they could see were her books outside Peter Tembo's house; the house is next to their house. Peter Tembo is the appellant's brother and he lived

with the appellant. They knocked but there was no response.

2.4. Peter Tembo, who was having a bath told them to continue knocking as he had heard the appellant, who he had left in the house, talking to the prosecutrix and call her baby girl.

2.5. Joe pushed the door and found the prosecutrix inside the house sweating and crying. She informed him that the appellant had carnally known her. Joe and Christine took the prosecutrix to Gladys Kabusa

2.6. The prosecutrix told Gladys Kabusa that the 'uncle with a beard' had violated her. That prompted Gladys to call Peter Tembo.

2.7. When Peter Tembo was told what had happened, he went to look for his brother, who had since left the house.

2.8. When the appellant was found, he denied having carnally known the girl but admitted having lifted her and called her 'baby girl'.

2.9. The prosecutrix was taken to the hospital where medical examination confirmed that she had been

defiled. The presence of spermatozoa was also detected.

2.10. During the course of the trial, a statement made by the appellant under warn and caution was produced into evidence. This was after a trial within a trial. The trial magistrate found that the appellant, who denied making the statement, had made it freely and voluntarily.

2.11. In that statement, the appellant admitted having been with the prosecutrix that afternoon. He however denied having carnal knowledge of the prosecutrix, he said he only inserted his finger in her vagina.

2.12. In his defence the appellant denied defiling the prosecutrix. He said on the 7th of April 2018, on his way to the market, he met the prosecutrix who he lifted and kissed, as he usually did. The prosecutrix told him that she injured herself.

2.13. It is on this evidence that the appellant was convicted. The trial magistrate found that the fact that the appellant had carnal knowledge of the prosecutrix was confirmed by the medical report.

2.14. He also found that the prosecutrix's claim that she was defiled by the appellant was confirmed by Joe Chibuye and Christine Mashi; whose evidence was corroborated by Peter Tembo's brother. Their combined evidence was that the appellant was with the prosecutrix in the house, shortly before she was found violated.

3. GROUNDS OF APPEAL AND ARGUMENTS IN SUPPORT

3.1. Although three grounds were set out in support of appeal, similar arguments were submitted in support of those grounds of appeal.

3.2. The thrust of the appellant's case is that he was convicted on unreliable evidence. He also contends that the prosecutrix's evidence was uncorroborated and he was incriminated by suspect witnesses whose evidence was not corroborated.

3.3. Mr. Ngoma referred to the case of **Emmanuel Phiri v The People**¹ and **section 122 of the Juveniles Act**, and submitted that because of her age, the prosecutrix's evidence required corroboration. In this case, her testimony on the identity of the

appellant, as the offender, was not corroborated because the medical report only corroborated the fact that she had been defiled.

3.4. Mr. Ngoma also referred to the case of **Ali and Another v The People**² and submitted that the prosecutrix's court room identification of the appellant was of no probative value. He argued that going by the decision in **Mhango v The People**³, an identification parade ought to have been conducted, after the appellant's apprehension.

3.5. In addition, Mr. Ngoma referred to the case of **John Nyambe Lubinda v The People**⁴ and submitted that the failure by the prosecution to produce the results of the semen, urine and blood obtained in court was a dereliction of duty. The court should have made an inference favourable to the appellant.

3.6. As regards the finding that the Peter Tembo's testimony corroborated the evidence of Joe Chibuye and Christine Mashi, Mr. Ngoma argued that he could not provide the required corroboration. That is because he was a suspect, he was present at the time the offence was committed, he had a beard and he

only testified after being declared refractory or hostile.

- 3.7. He then referred to the case of **Jeffrey Godfrey Munalula v The People**⁵ and submitted that Peter Tembo could not be a corroborative witness having been a hostile or refractory witness.
- 3.8. Mr. Ngoma then referred to the case of **Kambarange Mpundu Kaunda v The People**⁶ and submitted that Joe Chibuye, Christine Mashi and Peter Tembo, were witnesses whose evidence required corroboration. Joe Chibuye and Christine Mashi's evidence required corroboration because they were relatives, while Peter Tembo's evidence required corroboration because he could have committed the offence and was therefore a suspect.
- 3.9. Coming to the statement the appellant made to the police, Mr. Ngoma said it was wrongly admitted into evidence.
- 3.10. He argued that the trial within a trial was not properly conducted. Evidence of the contents of confession was allowed to be given; he referred to the case of **Tapisha v The People**⁷ and submitted that

the evidence should have been limited to the circumstances in which the statement was made.

3.11. Mr. Ngoma's final argument, which was in the alternative, was that the 35 years sentence imposed on the appellant should be set aside. He pointed out that since the appellant only admitted to inserting his finger in the girl's vagina, the court should have convicted him of the offence of indecent assault contrary to **section 137 of the Penal Code**.

3.12. On the same point, he argued up to the case to answer point, the evidence against him did not support the charge of defilement. He referred to the case **Penias Tembo v The People**⁸ and submitted that at that point, the appellant should have been acquitted of the charge of defilement.

3.13. He went on to argue that since the maximum sentence for indecent assault is 20 years, the 35 years should come to this court with a sense of shock.

4. **RESPONDENT'S ARGUMENTS AGAINST THE APPEAL**

4.1. In response, Ms. Mumba submitted that the case against the appellant was sufficiently corroborated

as enunciated in the case of **Emmanuel Phiri and Others v The People**⁹.

4.2. The medical report confirmed that the prosecutrix was defiled.

4.3. As regards the identity of the appellant, it was corroborated by Joe Chibuye, Christine Mashi and Peter Tembo's testimony. She pointed out that Joe Chibuye and Christine Mashi found the prosecutrix crying in the house where the appellant lived. At that time Peter Tembo was bathing.

4.4. Since the appellant was the only person in the house, no one else other than him could commit the offence. She then referred to the case of **Davis Chiyengwa Mangoma v The People**¹⁰ and submitted that the opportunity to commit the offence, was corroborative, in the circumstances of this case.

4.5. Coming to the argument that the danger of false implication was not ruled out, Ms. Mumba referred to the cases of **Katebe v The People**¹¹ and **Machipisha Kombe v The People**¹² and submitted that even if the trial magistrate did address his mind to the issue,

the conviction should still be upheld because there was corroborative evidence.

4.6. She pointed out that the evidence the prosecutrix, Joe Chibuye and Christine Mashi, where all corroborated by Peter Tembo. In addition, there was no evidence that the witnesses were not truthful.

4.7. She concluded by referring to the case of **Kahilu Mugochi v The People**¹³, and submitting that the mere fact that Joe Chibuye and Christine Mashi were relatives, did not warrant their classification as suspect witnesses.

5. CONSIDERATION OF APPEAL AND COURT'S DECISION

5.1. In our view, the issue main issues that this appeal raises, is whether the prosecutrix evidence that the appellant defiled her was corroborated.

5.2. However, before we deal with that issue, we will deal with a number of ancillary issues that Mr. Ngoma has raised.

5.3. The first issue we will deal with, is the manner in which the trial within a trial was conducted. When the prosecutor attempted to produce the statement

the appellant made to the police, it was objected to on the ground that it was not made freely and voluntarily.

5.4. The trial magistrate then ordered that a trial within a trial be conducted. In the course of that trial, not only did the police officers talk about how the statement was recorded, they were also allowed to recount what the appellant said happened on the material day. We agree with Mr. Ngoma that allowing the police officers to disclose what the appellant said on the material day was a misdirection.

5.5. The only evidence that witnesses can narrate during a trial within a trial, is that which relates to the circumstances or the conditions, which prevailed when the statement was being made. This includes where the statement was made, how long it took to make the statement and who was present when it was being made. Witnesses shouldn't have been allowed to talk about what was said in the statement.

5.6. In this case, even if the witnessed were allowed to recount what the appellant said in the statement

during the trial within a trial, we find that the appellant did not suffer any prejudice because the statement was subsequently admitted into evidence.

5.7. Although the appellant initially objected to the production of the statement on the ground that it was not made freely and voluntarily, during the trial within a trial, he disclaimed the statement that the prosecutor sought to produce. He said the signature on the statement was not his. He also claimed that he was made to sign two statements.

5.8. Following this change in the appellant's position, the trial magistrate ruled that voluntariness was no longer an issue. In the case of **The People v Moses Ainela Phiri and Others**¹⁴, it was held that a trial within a trial is rendered redundant where accused person denies making the statement.

5.9. In the circumstances, the trial magistrate cannot be faulted for admitting the statement without ruling on whether it was made freely and voluntarily, because having denied making the statement that the prosecutor sought to produce, the

voluntariness in the making of that statement was no longer an issue.

5.10. Coming to Mr. ngoma's argument that the identification of the appellant by the prosecutrix in in court was not of any evidential value, it is our view that the principle set out in the case of **Ali and Another v The People²**, is not applicable to the circumstances of this case.

5.11. When the prosecutrix described her abuser, the appellant was apprehended and brought to where the prosecutrix was. Having been exposed to the prosecutrix and other witnesses, holding an identification parade would have served not purpose. It is our view that the police where correct when they decided not to hold a parade. That being the case, the court room identification in this case, had evidential value

5.12. Mr. Ngoma also argued that that Peter Tembo could not corroborate the testimony of Joe Chibuye and Christine Mashi because he had been declared to be refractory or hostile. Further, he was a suspect

because he had a beard and was at home at the time the offence was committed.

5.13. First of all, the declaration of a witness as being refractory does not result in the same consequences as the declaration of a witness as being hostile.

5.14. When a witness is declared hostile, as was held in the case of **Jeffrey Godfrey Munalula v The People⁵**, the witness's evidence is expunged from the record. It is as if the witness did not testify. In this case, Peter Tembo was not declared hostile but refractory and so the principle set out in the case of **Jeffrey Godfrey Munalula v The People⁵**, on the effect of a witness being declared hostile is not applicable.

5.15. Under **section 150 of the Criminal Procedure Code**, one of the reasons for which a witness can be declared hostile, is refusing to be sworn. In this case, when Peter Tembo was called to the stand, he refused to take the oath indicating that he was not a prosecution witness. Since there was information that he had given a statement to the police on what transpired in this matter, it is our view that the

trial magistrate was entitled to declare him refractory and order his detention.

5.16. In our view, the mere fact that a witness testifies after being detained for being refractory does not render the testimony of such a witness not credible or suspect. In this case, there is no evidence that the fact that he had been detained had any effect on his testimony. In fact, it was not even suggested in cross examination.

5.17. As regards the argument that he was a suspect witness because he may have committed the offence, as was pointed out by Ms. Mumba, at the time Joe Chibuye and Christine Mashi were looking for the prosecutrix Peter Tembo was bathing. In fact, he encouraged them to continue knocking on his door because he had heard the appellant talk to the prosecutrix.

5.18. Further, there is no evidence that he was detained in connection with the offence or even suspected of committing the offence. That being the case, we find no basis on which the trial magistrate should have treated Peter Tembo as a suspect witness.

- 5.19. Another issue that Mr. Ngoma raised was that the trial magistrate did not warn himself on the danger of convicting on the uncorroborated evidence of witnesses who were suspect on account of being relatives. This caution did not apply to Peter Tembo because he was in fact the appellants brother and not related to the prosecutrix or any other witness.
- 5.20. Even if that was the case, the trial magistrate still recognised the need for corroboration of the key prosecution witnesses, Joe Chibuye and Christine Mashi, be it on account of being children. We therefore find nothing wanting in his approach.
- 5.21. As we indicated at the beginning, the main issue in this case is whether the prosecutrix's identification of the appellant was corroborated. This is because the fact that she was defiled was corroborated by the medical report.
- 5.22. The identification evidence incriminating the appellant was given by the prosecutrix, Joe Chibuye and Christine Mashi. The prosecutrix told the court that she was defiled by the appellant. In the case of Joe Chibuye and Christine Mashi, who gave

evidence after undergoing a *voir dire*, their evidence is that they retrieved the prosecutrix from a house where the appellant lived.

5.23. She was crying and she immediately informed them that she had been defiled by the appellant. On being checked, it was confirmed that she had been defiled.

5.24. Ms. Mumba submitted that the corroborative evidence is provided by the opportunity to commit the offence. We agree with her that it is the case, but that was not the only corroborative evidence.

5.25. As we indicated earlier on, the appellant's statement to the police was properly admitted into evidence. In that statement, the appellant admitted having been with the prosecutrix in the house. Although he denied having sexual intercourse with her, he admitted having inserted his finger into her vagina.

5.26. That statement corroborated the prosecutrix evidence that he had carnal knowledge of her, contrary to Mr. Ngoma's submission that it, at the most, point at an indecent assault. The presence of spermatozoa in the prosecutrix's vagina renders the

appellant's claim that he only inserted a finger, improbable.

5.27. The admission that he was with the girl in the house and the recovery of spermatozoa during the medical examination corroborates the prosecutrix's evidence that he had carnal knowledge of her.

5.28. Mr. Ngoma had submitted that there was dereliction of duty when the results on the tests on the semen and blood and urine that was collected during investigations were not produced in court.

5.29. In the case of **Charles Lukolongo and Others v The People**¹⁵, the following was said on the consequences of their being a dereliction of duty:

'Where evidence available only to the police is not placed before the court, the court must presume that, had the evidence been produced, it would have been favourable to the accused. This presumption can only be displaced by strong evidence.'

5.30. It is our view that the overwhelming evidence in the case displaces any presumption that may have arisen on account of the failure to produce the results that Mr. Ngoma referred to. The fact that the

prosecutrix was defiled is beyond dispute. So is the fact that the appellant 'tempered' with the prosecutrix's private parts. Though he claims that he only used a finger, it is clear that he actually had carnal knowledge of her.

5.31. We are satisfied that the case against the appellant was proved beyond all reasonable doubt by credible evidence. We are also satisfied that the prosecutrix's testimony, incriminating the appellant was corroborated. Similarly, we are equally satisfied that the evidence of witnesses who were relatives was corroborated.

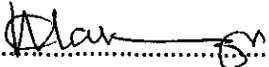
5.32. This being the case, we find no merit in the three grounds of appeal and we dismiss them.

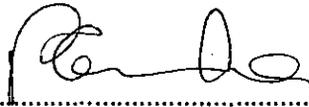
5.33. Coming to the sentence, the 35 years imprisonment imposed on the appellant who was 36 years old, for a defiling the 4 year old, daughter of a neighbour, does not come to us with a sense of shock, as being excessive. We find no basis of tampering with it and we uphold it.

6. VERDICT

- 6.1. Having dismissed all the grounds of appeal, the appeal against both conviction and sentence fails. The conviction and the sentence are upheld.
- 6.2. The appellant will serve 35 years imprisonment with hard labour, with effect from the 9th of April 2018, the date of his arrest.


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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT


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C.K. Makungu
COURT OF APPEAL JUDGE


.....
P.C.M. Ngulube
COURT OF APPEAL JUDGE