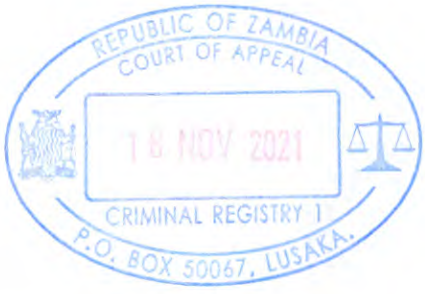
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE

Appeal No. 161/2020

(Criminal Jurisdiction)



BETWEEN:

VISCAR HAMUKALI **APPELLANT**

VS

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 18th May 2021 and 18th November, 2021

For the Appellant : *Mrs. M.K. Liswaniso, Senior Legal Aid Counsel – legal Aid Board*

For the Respondent: *Mrs. G.L. Mulenga, Principal State Advocate — National Prosecution Authority*

J U D G M E N T

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Nsofu vs The People (1973) ZR 287 (SC)*
2. *Chilimba vs The People (1971) Z.R. 36 (C.A.)*
3. *Bright Katontoka Mambwe vs The People* SCZ Judgment No. 8 OF 2014
4. *Hara vs The People (SCZ No.162 of 2011)*
5. *Mwaba vs The People (1974) ZR 264)*
6. *Gift Mulonda vs The People (2004) ZR 135*
7. *Hakagolo vs The People (SCZ Appeal No. 607/2013)*
8. *Jutronich and Others vs The People (1965) Z.R. 11*

9. R vs Ball (1951) 35 Cr App. R. 164

10 Alubisho vs The People (1976) Z.R. 11 (S.C.)

11 Philip Mungole Mwanamubi vs The People (SCZ Judgment No.9 of 2013)

1.0 INTRODUCTION

1.1 This is an appeal against conviction and sentence of 35 years imprisonment imposed on Viscar Hamukali (the appellant herein). The appellant was charged with the offence of defilement contrary to section 138(1) of the Penal Code as read with Act No 15 of 2011. The particulars of the offence alleged that between 1st July 2019 and 23rd September 2019 at Kabwe District of Central Province, he had unlawful carnal knowledge of a girl under the age of 16 years.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The prosecution's case was centered on the evidence of four witnesses. PW1 was Vaida Mundala (the prosecutrix herein); PW2 was Precious Chipuya, the prosecutrix's mother; PW3 was Rodwell Sikasote, the Headteacher at St Joseph Primary School where the prosecutrix is enrolled; and PW4, the arresting officer, Inspector Osward Silungwe.

2.2 The key witness was the prosecutrix who explained that on the material night around 20.00 hours she was home with family, including the appellant who is her cousin. Other family members retired to bed while she remained outside with the appellant and Brighton Mandala.

2.3 After a while, the appellant told her to meet him behind the toilet for the house. It was there that he undressed her and asked to lie down on the ground. He then undressed himself and proceeded to have sexual intercourse with her. She narrated that this was not the first occasion as they previously had similar sexual encounters in the bush during day time.

2.4 On the fateful day, as the act was still in session, she heard her mother call out her name. When she looked around, she saw her mother standing 5 meters where she lay on the ground. Upon realizing that they had been caught, the appellant got up and fled the scene.

2.5 The matter was subsequently reported to the police. After obtaining a medical report form, the mother took the prosecutrix to Kabwe General Hospital where she was examined. The report from the Medical Practitioner who examined her, Doctor Mumba was that the hymen was broken and she was 12 weeks pregnant.

2.6 According to Precious Chipuya, on the fateful night, she found the prosecutrix and the appellant behind the toilet having sexual intercourse. When the appellant noticed her presence, he disengaged and ran away.

2.7 She immediately examined the prosecutrix vagina and found semen. Precious stated that she was able to recognise the

appellant with the aid of moon light and also the fact that he was her dependant.

2.8 As regards the age for the prosecutrix, Precious testified that the child was born on 22nd June 2006. This evidence was corroborated by Rodwell Sikasote who told the court that the prosecutrix was born in the year 2006 and enrolled at St Joseph primary school in 2014. At the time of the incident she was aged 13 and attending grade 6. To support his assertion, he produced the school register which was in his custody.

2.9 In his defence, the appellant elected to remain silent.

3.0 FINDINGS AND DECISION OF THE LOWER COURT

3.1 The trial court scrutinized the evidence that was deployed before it and came up with the following findings of fact:

1. That the prosecutrix was born in 2006 as confirmed by the testimony of the mother and the school register. She was therefore aged 13 years at the time of the commission of the offence.
2. That the court found that the prosecutrix had been carnally known as confirmed by the medical report which showed that the hymen was broken.
3. That the trial court accepted the evidence of the prosecutix as to the identity of the perpetrator which was corroborated by the mother.

3.2 On the totality of the evidence, the trial court was persuaded beyond reasonable doubt that the prosecution had proved its case against the appellant. The appellant was then convicted and referred to the High Court where Mr. Justice I. Kamwendo meted out a 35 year sentence on the convict.

3.0 GROUNDS OF APPEAL

3.1 Disenchanted with the decision of the lower court, the appellant has approached this court fronting two grounds structured as follows:

> *"1. The trial court erred in law and fact when the court found that the appellant was guilty of defilement of a child contrary to section 138(1) of the Penal Code without taking into account the defence raised by the appellant that he thought the prosecutrix was 16 years or above.*
>
> *2. The trial court erred in law and fact when the court sentenced the appellant to 35 years imprisonment with hard labour."*

4.0 APPELLANT'S ARGUMENTS

4.1 In support of the appeal, heads of argument were filed on 14th May 2021. In the said arguments, Mrs. Liswaniso began by highlighting what was stated by the appellant during plea. For ease of reference the following is what the appellant stated:

"I understand the charge and I admit. I believed the girl to be 16 years or above."

4.2 It was argued that the appellant raised a defence even though he elected to remain silent in his defence. It was her contention that the defence under the proviso succeeded as there was nothing on record to show that the prosecutrix does not appear to be 16 years or above. To buttress her argument, she referred the court to the case of ***Nsofu vs The People***[1].

4.3 Moving on to ground two, Mrs. Liswaniso submitted in the alternative that the sentence of 35 years should come to this court with a sense of shock as there were no aggravating factors. The case of ***Chilimba vs The People***[2] was cited where the court observed:

> *"Unless there is an extraordinary feature which aggravates the seriousness of the offence, a first offender ought to receive a minimum sentence."*

4.4 We were called upon to set aside the sentence of 35 years and replace it with 15 years.

5.0 RESPONDENT'S ARGUMENTS

5.1 In opposing the appeal, learned counsel for the respondent filed into court written heads of arguments. Counsel submitted that for the defence under the proviso to succeed, the appellant ought to have raised it in his defence rather than

elect to remain silent. As authority for this proposition, we were referred to the case of ***Bright Katontoka Mambwe vs The People***[3].

5.2 In the alternative it was argued that should this court be of the view that the accused's plea constitutes a defence, it was noted that the purported defence is not sufficient and does not meet the requirements set out in the proviso to section 138 and the case of ***Nsofu***[1] that was relied on.

5.3 It was further submitted that for a defence under the proviso to succeed, an accused must satisfy the court that he had reasonable cause to believe that the girl was of or above the age of 16 years and also that he did in fact believe this.

5.4 Turning to the second ground of appeal, it was contended that the sentence of 35 years imprisonment imposed by the lower court was not wrong in principle or manifestly excessive. We were referred to the case of ***Hara vs The People***[4] where the apex court observed:

> *"Courts are slow to interfere with the sentence unless if it is shown that the sentence has been exercised wrongly or were it is shown that the sentence is so severe that it induces a sense of shock."*

5.5 Counsel pointed out that the prosecutrix was only 12 years at the material time she was impregnated as a result of defilement by the appellant. It was stoutly argued that the

appellant was traditionally an elder brother to the prosecutrix who was expected to protect her. We were urged not to interfere with the 35 year sentence.

6.0 HEARING OF THE APPEAL AND ARGUMENTS CANVASSED

6.1 Both parties relied on the documents filed. However, Mrs Liswaniso also made oral submissions the gist of which is that the appellant did raise a defence when he stated in his plea that he believed the prosecutrix was 16 years or above. She argued that the trial court ought to have addressed this issue by stating, among other things, its view of the ocular observations with regard to age of the prosecutrix.

6.2 With respect to ground two, Mrs. Liswaniso reiterated that the 35 year sentence was excessive and therefore ought to be interfered with by this court. In her view, there were no aggravating factors to warrant a stiff punishment such as the one imposed by the court below. She contended that pregnancy is not an aggravating factor as it is a natural consequence of sexual intercourse.

6.3 In concluding, she beseeched the court to allow the appeal.

7.0 CONSIDERATION AND DECISION OF THE COURT

7.1 We have considered the record of appeal, the grounds of appeal as well as the submissions of counsel. The first ground

of appeal is criticizing the judgment of the lower court for not availing the appellant the defence under the proviso to section 138 of the Penal Code. Considering that this ground is anchored on the proviso to section 138 of the Penal Code, we find it imperative to reproduce it hereunder:

Section 138(1) of the Penal Code:

"...provided that it shall be a defence for a person charged with an offence under this section to show that the person had reasonable cause to believe, and did infact believe, that the child against whom the offence was committed was of, or above, the age of sixteen."

7.2 In the case of ***Gift Mulonda vs The People***[6] the Supreme Court made it abundantly clear that:

"It is a trite rule of practice that the proviso to section 138 of the Penal Code should be explained to an accused person."

Further in ***Hakagolo vs The People***[7] the Supreme Court observed thus:

"...it must be made clear here that the whole purpose of the court explaining the proviso is so an accused understands, that the onus is on him to prove his belief that the girl was above the age of 16 years was reasonable" (emphasis ours).

7.3 We are satisfied that notwithstanding the fact that the appellant was not represented that trial Magistrate did explain the proviso to him.

7.4 The appellant is insisting that this defence should avail him on account of the fact that at plea stage he did state that he believed she was above the age of 16. Reliance has been placed on the case of ***Nsofu vs The People***[1]**.** The apex court categorically stated that:

"For a defence under the proviso to succeed, an accused must satisfy the court that he had reasonable cause to believe that the girl was of or above the age of sixteen years, and must satisfy the court also that he did in fact believe this."

In ***Mwaba vs The People***[5] the Supreme Court stated thus:

"Even where an accused person pleads guilty it is desirable that the proviso be explained before plea, but certainly at an early stage in the proceedings, so that the accused may have the opportunity to direct his cross-examination of the prosecutrix witnesses to the question of the girls' age." (underlined for emphasis).

7.5 From the foregoing it is clear that the proviso is anchored on the beliefs of the offender. The question that therefore arises is how do you establish that belief? The view we take is that the court must look at the evidence deployed before it in order to consider the availability of the proviso under section 138 of

the Penal Code. The appellant only indicated, as earlier alluded to, at plea stage after explanation of the proviso that he believed the girl was above 16.

7.6 At trial he elected to remain silent which of course is his prerogative. The belief, if any, was not expressed. He did not reveal his belief to the court by outlining what made him arrive at such a belief. He should have given a basis for that belief. The appellant should have put sufficient material for court to consider. Failure to do so militates against him.

7.7 The Chief Justice of Bostwana couldn't have expressed himself better when he had the following to say in the case of ***Manawe vs The People (2005) BLR 275***

> *"The essential idea embodied in the provision, in my view, is that if it is made to appear to the court that an accused person had good grounds for believing that the girl was 16 years or above and in fact believed it to be so, then the defence should be available to him. To have reasonable cause to believe implies an objective standard, with the implication that ordinary reasonable people in the shoes of the accused would have found the grounds influencing the mind of the accused to be reasonable and capable of giving or making him to believe."*

7.8 We are further fortified by the case cited by learned counsel for the respondent of ***Bright Katontoka Mambwe vs The People*** where it was observed that:

"The evidence of the defence is made up of facts, inferences from facts and statements which proves or tends to prove the facts being inquired into presented to the court by or on behalf of the accused person. The defence must have presented evidence to the trial court either through the accused person and or witnesses for the court's record to have what is described as defence evidence."

7.9 Had the appellant given evidence in his defence or through witnesses for the court's record to have what is described as defence evidence, then the magistrate would have had the basis to establish whether or not the available evidence would entitle the appellant to the proviso under section 138 of the Penal Code.

7.10 Pertaining to the plea we wish to mention that what is said during a plea is only material if one is raising issue as to whether it was properly taken. At the end of trial, you cannot look at plea to determine issues of plea.

7.11 A plea does not constitute evidence, the magistrate can therefore not be faulted for rejecting that line of defence. We are of the considered view that there was no defence evidence on the record presented to establish that the appellant 'had

reasonable cause to believe and did in fact believe that the girl was of or above the age of 16.'

7.12 In light of the foregoing we find no merit in ground one and dismiss it.

7.13 Turning to the second ground of appeal, the appellant is disconsolate with the sentence of 35 years that was meted out. We are well guided on how to deal with appeals against sentence as an appellate court. Blagden C.J. in ***Jutronich and Others vs The People***[8], observed at page 12 as follows:

> *"In dealing with an appeal against sentence, the appellate Court should, I think ask itself three questions:*
>
> *(1) is the sentence wrong in principle?;*
>
> *(2) is it manifestly excessive so that it induces a sense of shock?; and*
>
> *(3) are there any exceptional circumstances that would render it an injustice if a sentence were not reduced?"*

7.14 An additional guiding principle quoted from ***R vs Ball***[7] is that:

> *"In deciding the appropriate sentence, a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it."*

7.15 In the case of ***Alubisho vs The People***[9] the court of last resort gave the following guidance:

"With the exception of prescribed or mandatory sentences, a trial Court has a discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate Court does not normally have such discretion."

7.16 Apart from addressing our minds to when we can interfere with a sentence from a lower court we have also taken into account a plethora of decisions by the apex court in relation to defilement cases and sentences meted out. For example in the case of ***Philip Mungole Mwanamubi vs The People***[10] where the brief facts were as follows:

> *"In this case the appellant was a neighbor to the prosecutrix's uncle. As such neigbour, the uncle trusted the appellant and used to send the prosecutrix to the appellant's house to charge the cell phone. The appellant abused that trust. He forcefully dragged her into his bedroom and defiled her. He did so under the cover of loud music which he had deliberately increased so that the people would not hear her shouts for help. The appellant is a married man. That is according to the evidence of the prosecutrix. We wonder why a married man should defile a 14 year old niece of his neighbor. What is it that a married man can get from a 14 year old girl, under circumstances of forced sexual intercourse, which his wife has failed to give him? In our view, there is none. This was a mere case of reprehensible lust. In our view, by so doing he insulted his wife. We consider the*

abuse of trust by the neighbor and the insult to his wife aggravating factors."

7.17 The Supreme Court went on to opine that:

"Given the two aggravating factors, the prevalence and seriousness of the offence and the maximum sentence of life imprisonment, the sentence of 25 years with hard labour does not come to us with a sense of shock."

Further:

"We would add that those who choose to defile under age children, need to be caged for reasonably long periods, to put them out of circulation, for the safety of children."

7.18 All in all, we are of the view that the sentence of 35 years is rather excessive. We are compelled to set it aside and impose a sentence of 25 years with hard labour with effect from 1st October 2019.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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B.M. Majula
COURT OF APPEAL JUDGE

.....
K. Muzenga
COURT OF APPEAL JUDGE