IN THE SUPREME COURT OF ZAMBIA **Appeal No.182/2020**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

DAVID CHAMA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Hamaundu, Kajimanga and Chinyama JJS**
On 10th August 2021 and 5th October 2021

For the Appellant: Mrs. M. K. Liswaniso, Legal Aid Counsel

For the Respondent: Mrs. M. K. Chitundu, Deputy Chief State Advocate

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J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. *Ndakala v The People (1974) Z.R. 23*
2. *Emmanuel Phiri v The People (1978) Z.R. 79*
3. *Barrow and Young v The People (1966) Z.R. 43*
4. *Kenious Sialuzi v The People (2006) Z.R. 87*
5. *Gideon Mumba v The People SCZ Appeal No. 50 of 2017*
6. *Nsofu v The People (1973) Z.R. 287*
7. *Mkandawire and Others v The People (1978) Z.R. 46*
8. *Machipisa Kombe v The People (2009) Z.R. 282*
9. *Anthony Mwaba Mpundu v The People SCZ Appeal No. 149 of 2016*

Legislation referred to:

1. *Penal Code, Chapter 87 of the Laws of Zambia; section 137(1)*

Introduction

[1] The appellant was tried and convicted on a charge of indecent assault on a female. The particulars alleged that on 15th May 2012 at Samfya, the appellant unlawfully and indecently assaulted a girl named Dorcas Bwalya.

The Prosecution's Evidence

[2] The prosecution's evidence in the court below disclosed that on 24th May 2012, at about 15.00 hours, PW1 and his wife took their daughter (PW2) to the taxi station. Whilst there, they approached the appellant and asked him to take PW2 to Samfya High School. The appellant charged them K60,000.00 (unrebased) which PW1 gave to PW2 before leaving her. The following day, PW1 received a phone call from PW3 informing him that PW2 had been indecently assaulted by the appellant. PW1 then instructed PW3 to report the matter to the police and he started off for Samfya with his wife. Upon their arrival, they found the appellant's family at the

police station and the appellant's father approached PW1 for a reconciliation which he rejected.

[3] The evidence of PW2 was that on the material day, she was travelling from Mansa to Samfya High School in a taxi being driven by the appellant which had been booked for her by her parents. At the time, there were six people in the taxi, including herself, the appellant and PW3. PW2 testified that when they arrived in Samfya, the accused did not take her to school on account that it was late and instead he took her to BCM guest house where he left her and told her he would pick her up the following morning to take her to school. PW2 entered the room and slept. The appellant later returned that night and began to touch PW2 all over her body. When she tried to shout, he threatened her and continued to touch her until he left the next day at 06:00 hours. When PW2 left the room, she met PW3 in the corridor of the guest house and narrated what happened to her the night before whilst in tears.

[4] PW3 testified that after PW2 recounted how the appellant had indecently assaulted her the previous evening, she assisted PW2 in contacting her parents to inform them about what had

transpired. Whilst waiting for PW2's parents to arrive, the appellant's brother and father approached them to ask for forgiveness.

[5] According to the guard at the guest house (PW4), the appellant did not return to the guest house after dropping PW2. The testimony of the arresting officer (PW5) was that when he received the report that the appellant had indecently assaulted PW2, he had difficulties apprehending him as he was at large and only presented himself after he was brought to the police station by his father.

The Appellant's Evidence

[6] In his defence, the appellant testified that he did not drop PW2 at school because he ran out of fuel. Consequently, he agreed with PW2 that she sleeps at a guest house on condition that he gives her a discount to enable her to pay for the room. The appellant then took her to BCM guest house where they found PW4, the security guard and manager of the lodge, who offered her a room and assisted the appellant in carrying PW2's luggage to her room. Thereafter, the appellant left with the promise that he would pick PW2 the next day if he found fuel. However, the following morning

he could not find any fuel. Subsequently, he received a phone call from Lusaka inviting him for interviews which he later attended and only returned to Samfya after being informed by his brother about the allegations PW2 made against him. The appellant however, denied going back to the guest house to indecently assault PW2.

Consideration of the matter by the Surbordinate court

[7] After considering the evidence and arguments of the parties, the trial magistrate found that PW2 was indecently assaulted because when she narrated to PW3 about what had happened to her, she began to cry. She opined that the reason for her crying was because she remembered the sad and helpless experience she underwent the previous night at the hands of the assailant.

[8] On the fact that the offence did occur, the trial magistrate found corroboration in the conduct of PW2 when reporting to the first person she thought was reliable and could confide in who was PW3. She also found corroboration in the crying when PW2 was narrating to PW3 in the morning of 26th May 2012.

[9] The trial magistrate further found corroboration in PW2 asking for PW3's cellphone so that she could report to her parents what

happened to her. In addition, there was corroboration in PW2 failing to answer PW3 when she was greeting her in the morning on 26th May 2012 but could only afford a cosmetic smile.

[10] On the identity of the assailant, the trial magistrate found that when the assailant came to her room, PW2 had the opportunity to see him before he switched off the light. In her view, there was enough light to enable her to see the assailant because the assailant was able to see PW2 in order to move to where she was and begin to touch her body. The trial magistrate found that PW2 had enough time to see the appellant and hear his voice during the trip and in Samfya before booking the room as well as the following morning when the assailant was leaving the room. Hence, it was easy to identify him if he was the assailant and she could not mistake him for another person.

[11] In the circumstances, the trial magistrate found that there was overwhelming corroboration on the fact that it was the appellant who went and entered the room where PW2 slept. She also found that the conduct of the appellant's failure to leave PW2 at Samfya High School as one coming from a deliberate motive to commit the offence.

[12] The learned magistrate therefore found that the appellant was guilty of the offence of indecent assault and convicted him accordingly. Upon confirmation of sentence by the High Court, the learned judge upheld the conviction of the appellant by the lower court and sentenced him to 15 years imprisonment with hard labour.

Grounds of appeal and arguments by the parties

[13] Aggrieved with this decision, the appellant now appeals to this court on four grounds as follows:

[13.1] The trial court erred in law and fact when the court found as corroboration the conduct of the prosecutrix when she reported that she had been indecently assaulted by the appellant to PW3 being the person she thought was reliable and she could confide in her.

[13.2] The trial court erred in law and fact when the court found as corroboration the crying by the prosecutrix when she was narrating to PW3 that she had been indecently assaulted by the appellant on 26th May 2012 in the morning.

[13.3] The trial court erred in law and fact when the court found that there was corroboration in PW2 asking for PW3's cell phone so that she could report to her parents what happened to her and that there was corroboration in PW2 failing to answer PW3 when she was greeting her in the morning of 26th May 2012 but could only afford a cosmetic smile.

[13.4] The trial court erred in law and fact when the court made findings against the appellant which were not supported by the evidence on the record.

[14] In her heads of argument, counsel for appellant argued grounds one, two and three together. It was her submission that the conduct of the prosecutrix was not consistent with someone who had been assaulted. According to counsel, when the prosecutrix met PW3 at the guest house around 06:00hrs she did not inform PW3 of the alleged indecent assault when she was greeted but only smiled and later told PW3 that she could not get a taxi. That the prosecutrix only told PW3 of the alleged indecent assault 1 hour 30 minutes after leaving the guest house to look for a taxi. This, counsel contended, is not conduct consistent with a person who has been indecently assaulted. She argued further, that because the appellant did not go to pick up the prosecutrix in the morning and because she was going to spend money getting another taxi, she had motive to falsely implicate the appellant.

[15] We were referred to the case of *Ndakala v The People*[1] where it was held that:

> *"The corollary to the principle that evidence of early complaint is admissible to show consistency is that the failure to make an early complaint must be weighed in the scales against the prosecution case".*

[16] Counsel therefore submitted that there being no early complaint by the prosecutrix, the trial court was supposed to weigh the scales against the prosecutrix and not to treat the lack of early complaint by the prosecution as corroboration in respect of the commission of the offence. She further argued that for a conviction of indecent assault to stand, there must be corroboration as to commission of the offence and the identity of the offender. In support of this argument, counsel cited the case of *Emmanuel Phiri v The People*[2] where it was held that:

> *"In a sexual offence there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the court to warn itself is a misdirection".*

[17] Counsel accordingly submitted that the danger to falsely implicate the appellant was not eliminated and there was no corroboration as to the commission of the offence.

[18] In arguing ground four, it was submitted that PW4's evidence was favourable to the defence and the trial court should have resolved the doubt in favour of the appellant, there being no good reason for the court to prefer PW3's evidence over that of PW4. The case of *Barrow and Young v The People*[3] was cited in

support.

[19] According to counsel, the trial court was biased against the appellant in evaluating the evidence and made findings against the appellant that were not supported by the evidence on record. She argued that the court brought its own evidence which was not presented by the prosecution. She referred us to the case of *Kenious Sialuzi v The People*[4] where it was held as follows:

> *"There is no obligation on an accused person to give evidence, but where an accused person does not give evidence, the court will not speculate as to possible explanations for the event in question. The court's duty is to draw the proper inferences from the evidence it has before it".*

[20] It was counsel's contention that the inferences drawn by the trial court on how the appellant allegedly entered the lodge and the room of the prosecutrix and also left the premises without being noticed are not supported by the evidence before the court. She accordingly urged us to allow the appeal.

[21] In response to grounds one, two and three, counsel for the respondent submitted that the trial court was on firm ground when it convicted the appellant of the offence of indecent assault. She argued that the evidence of PW2 that the appellant

took her to BCM guest house was corroborated by PW4 who confirmed that the appellant was the one who took PW2 to the guest house. She relied on the case of *Gideon Mumba v The People*[5] where this court held that:

> *"An opportunity to commit an offence, among others, can provide the required corroboration".*

[22] We were also referred to the case of *Nsofu v The People*[6] where it was held as follows:

> *"Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case".*

[23] Counsel contended that the evidence of PW2, PW3 and PW4 shows that the appellant was at the scene on the material day and from these circumstances he therefore had an opportunity to commit the offence. She also called in aid the case of *Emmanuel Phiri v The People*[2].

[24] Counsel pointed out that there is evidence of PW1 that he hired the appellant to take PW2 to Samfya High School and that the evidence of PW2 was that the appellant did not take her to that School. Instead, the appellant took PW2 to BCM lodge and on the material date, PW2 was indecently assaulted. Further, there is evidence of PW5 that the appellant had disappeared from

Samfya soon after the matter was reported to the police and was only taken to the police on 13th June 2012 by his father. Additionally, the evidence of PW1 was that the appellant's family approached him to ask for forgiveness and have the matter settled outside court. According to counsel, all these odd coincidences represented additional evidence and therefore the trial court was on firm ground by taking it into account as corroboration. She relied on the case of *Mkandawire and Others v The People*[7] where it was stated that:

> *"Odd coincidences can, if unexplained, be supporting evidence".*

[25] She also referred us to the case of *Machipisa Kombe v The People*[8] where it was held as follows:

> *"Odd coincidences constitute evidence of something more, they represent an additional piece of evidence which the court is entitled to take into account".*

[26] On the failure by PW2 to make an early complaint, counsel referred us to the case of *Anthony Mwaba Mpundu v The People*[10] where it was held that:

> *"While it is trite that a late complaint will affect the weight to be attached to a complainant's testimony, it should be borne in mind that this rule was designed primarily for adult complainants in sexual offences".*

[27] She argued that the *Ndakala* case cited by the appellant is distinguishable from the present case. In that case, the complainant was an adult who after being raped did not immediately report about the rape whereas in the present case, the prosecutrix was a child aged 17 years old who narrated what had happened to her the next morning when she met PW3. According to counsel, PW2 reported to PW3 at the earliest possible opportunity and cannot be said to be late reporting and should not work to the detriment of the state's case.

[28] She also contended that the fact that PW2 was narrating what happened to her to PW3, a person whom she really did not know justifies why she was crying while narrating about a traumatic event to a stranger. That the crying is evidence of someone who could be distressed and traumatized by sexual violence, and this can be used as corroboration as to the commission of the offence. Thus, the trial court was on firm ground in finding this evidence as corroboration.

[29] In response to ground four, counsel submitted that as much as the trial court drew an inference of how the appellant could have possibly entered the guest house in the absence of evidence to

support such inference being drawn, the totality of evidence was still sufficient to sustain the conviction. She argued that even if the court wanted to resolve the inconsistence in favour of the accused, the other evidence on record is still sufficient and the court was on firm ground to convict the appellant. She accordingly urged the court to dismiss the appeal and uphold the appellant's conviction and sentence as the prosecution in the court below, in her contention, discharged its burden beyond all reasonable doubt.

Consideration of the appeal by this court and decision

[30] We have considered the record, the judgment appealed against and the heads of argument which were orally augmented by counsel for the respective parties at the hearing of the appeal. As we see it, the overarching issue in this appeal is whether there was corroboration of the commission of the offence and the identity of the appellant, the appellant having been charged with a sexual offence.

[31] In the case of *Emmanuel Phiri v The People*[2] we laid down the principle that in sexual offences, there must be corroboration of both the commission of the offence and the identity of the

offender in order to eliminate the dangers of false complaint and false implication.

[32] The appellant's contention is that the danger of falsely implicating him was not eliminated and there was no corroboration as to the commission of the offence. Specifically, the appellant assails the trial magistrate for finding as corroboration the conduct of the prosecutrix when she reported to PW3 that she had been indecently assaulted by the appellant; being the person she thought was reliable and could confide in her; the crying by the prosecutrix, when she was narrating to PW3 that she had been indecently assaulted by the appellant, in PW2 asking for PW3's cell phone so that she could report to her parents what happened to her; and in PW2 failing to answer PW3 when she was greeting her in the morning but could only afford a cosmetic smile.

[33] We cannot agree more with the appellant that what the trial magistrate found as corroboration in this case does not constitute 'corroboration' as envisaged in *Emmanuel Phiri v The People*[2] and various other decisions of this court, on which the appellant's conviction could have been safely anchored. The

matter, however, does not end here as this was not the sole basis upon which the appellant was convicted.

[34] We find that on the totality of the evidence deployed before the trial magistrate, there was sufficient material on which the appellant could be and was safely convicted. Our opinion is fortified by our decisions in *Gideon Mumba v The People*[5], *Nsofu v The People*[6], *Mkandawire and Others v The People*[7] and *Machipisa Kombe v The People*[8] cited by counsel for the respondent. In the first case we said that an opportunity to commit an offence can also provide the required corroboration. In the second case, we observed that whether evidence of opportunity is sufficient to amount to corroboration depends on the facts of a particular case. In the third case, we stated that odd coincidences can be supporting evidence if they are not explained. In the last case, we enunciated the principle that odd coincidences constitute evidence of 'something more' which a court is entitled to consider as additional evidence.

[35] In this case the undisputed evidence is that the appellant was hired by PW2's parents to take her to Samfya Secondary School. He did not. The testimony of PW2 at pages 4 – 5 of the trial

magistrate's judgment was that:

> *"When we arrived in Samfya at the station, I also came out. Chama the one in that dock (Accused) told me to go back into the car because I had not yet arrived.*
> *I entered the car again since everyone came out. I thought he was taking me to school. On the way his car was booked by some girls and an old man. He then took them with me in the car to where they were going. Then Chama and I started coming back. That was about 20:00 hours. I asked if he was taking me to school, he said it was late, he would take me the following day. When I insisted, he said my parents placed me under his care hence it was safer for me to report during day time.*
> *He suggested to book me a room at a guest house and take me the following day. We went to the guest house where he talked to the guard. They got my luggage and put it in the room then the accused told me that he would pick me the following morning. It was room number 12 that the guard showed me.*
> *I entered the room. I slept in the room. The guard later came to knock on the door. He asked for an empty crate. I opened and he got it. He knocked for the second time and asked for bottles and he got them. The third knock came, I thought it was the guard.*
> *I only saw accused enter. He switched off the light, locked the door and removed the keys from the door."*

[36] The trial magistrate found at page J6 of the judgment that:

> *"The accused person and PW4 (guard) are the only men on record who knew the room where Dorcas slept.*
> *The accused is the one who helped PW4 to take PW2's luggage to room 12 and left them at the entrance. The record does not show that there were other people who saw PW2 go to room 12. It is only PW4 and the accused who knew.*

Therefore, the assailant can only be PW4 or the accused person. However, PW2 clearly identified the accused as the person who entered the room and indecently assaulted her.

He cannot say he did not know the room where PW2 slept because when he took her to the guest house, PW4 said only one room remained and he took them to the entrance of room 12 where they left the luggage."

[37] We agree with the trial magistrate's finding that it is the appellant who entered room 12 and indecently assaulted PW2. From the evidence on record, we are satisfied that the appellant had an opportunity to place himself at the scene of the crime. There can be no doubt that the appellant was no stranger to PW2. They had been together from 18:00 hours when they left Mansa up to 20:00 hours when they arrived in Samfya and up to the time the appellant took PW2 to the guest house. PW2 was therefore able to recognise the appellant when he came to the room before switching off the lights. We may add that she was, for the same reason, also able to recognize the appellant's voice during the encounter as she had been hearing his voice when they were travelling from Mansa to Samfya.

[38] Furthermore, the undisputed evidence of PW5 is that when she visited the guest house, she saw that the bigger gate had a

smaller gate on it and only the smaller one had a locking system but the bigger one was not lockable at all. According to the trial magistrate, the appellant could have entered the premises by opening the bigger gate if it was not lockable. When all the facts of this case are considered, it is difficult to fault the inference drawn by the trial Magistrate.

[39] Counsel for the appellant contends that the fact that PW2 reported the alleged indecent assault to PW3 1 hour 30 minutes after leaving the guest house to look for a taxi is not conduct consistent with a person who has been indecently assaulted. We do not agree. On the facts of this case, we accept the argument by counsel for the respondent that PW2 reported to PW3 at the earliest opportunity, not least because PW3 was a stranger to her as they were both co-passengers in the taxi the previous day. We also agree with the respondent that the **Ndakala** case is inapplicable to this case where the prosecutrix was only 17 years old. We opine that she could not be expected to be as courageous as a full-grown adult to easily narrate such a traumatic ordeal to PW3 who was a stranger.

[40] From the foregoing discourse, we are satisfied that the appellant

had an opportunity to place himself at the scene of the crime. It inevitably follows that he also had an opportunity to commit the offence.

[41] Moreover, the evidence of PW1, which was corroborated by PW3, was that when he and his wife arrived at the police station they found the appellant's family there. That the appellant's father approached him for a reconciliation but he rejected the request. Quite clearly, the appellant's father could not have made such a request if the appellant was innocent.

[42] In addition, the undisputed evidence of PW5 is that she had difficulties apprehending the appellant because he was at large. That he was only apprehended when he was brought to the police station by his father. The record shows that the offence was committed on 25th May 2012 and the appellant was only apprehended on 13th June 2012, more than two weeks later. We have no hesitation in opining that this is not the conduct which is consistent with an innocent person. This behaviour clearly shows that the appellant was guilty and constitutes 'something more' which satisfied the trial court that the danger of falsely implicating the appellant had been excluded.

[43] What we have highlighted in paragraphs 41 – 42 above clearly demonstrates unexplained odd coincidences which, in our opinion, amount to further corroboration that the appellant committed the offence he was charged with. The view we take is that there was corroboration of both the commission of the offence and of the appellant's identity.

[44] We are therefore satisfied that the trial magistrate was on firm ground to convict the appellant for indecently assaulting PW2.

Conclusion

[45] In the result, this appeal lacks merit and we accordingly dismiss it. The record shows that the appellant was sentenced to 15 years imprisonment with hard labour but he was admitted to bail pending appeal. In the circumstances, the sentence takes effect from the date of this judgment.

E. M. HAMAUNDU
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE