IN THE COURT OF APPEAL OF ZAMBIA **Appeal No.99/2022**
HOLDEN AT LUSAKA and NDOLA
(Criminal Jurisdiction)

BETWEEN:

KELLY MWEBE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga JJA

ON: 17th January 2023 and 15th November 2023

For the Appellant: **MK Liswaniso, Senior Legal Aid Counsel, Legal Aid Board**

For the Respondent: **A Kennedy-Mwanza, Senior 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. Zico Kashweka and Lawrence Muyunda Chimbinde v The People, SCZ Judgment No. 5 of 2007
2. Jeffrey Godfrey Munalula v. The People 1982 Z.R. 55
3. Credland v. Knowler 35 Cr App R. 48
4. Ives Mukonde v. The People SCZ Judgment No.11 of 2011
5. Nsofu v. The People [1975[Z.R. 287
6. Philip Munsala Mwanamubi v. The People, SCZ Judgment

No. 9 of 2013

7. Belemu v. The People [1973] Z.R. 41,
8. Muvuma Kambanja Situna v. The People [1982] Z.R. 115
9. David Zulu v. The People [1977] Z.R. 151

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Evidence Act, Chapter 43 of the Laws of Zambia

INTRODUCTION

[1] The appellant appeared before the Subordinate Court (Honourable D. Makalicha), charged with the offence of defilement contrary to **Section 138(1) of the Penal Code.**

[2] He denied the charge and the matter proceeded to trial.

[3] At the end of the trial, he was convicted as charged, and committed to the High Court for sentencing.

[4] In the High Court (Sunkutu, J.), sentenced him to 15 years imprisonment with hard labour.

[5] He has appealed against the conviction.

CASE BEFORE THE TRIAL COURT

[6] On the evening of the 27th of May 2020, the prosecutrix and her siblings, escorted their mother to a funeral house where she was going to spend the night.

[7] On their way back, they met the appellant and they proceeded home after greeting him. Just as they were about to get to their house, the prosecutrix informed her siblings that she was going back to the funeral house. She did not come back until just before midnight.

[8] When the prosecutrix's mother returned home the following morning, she was informed that the prosecutrix returned home very late the previous night. On being questioned by her mother, the prosecutrix denied that it was the case.

[9] Two days later, on the 29th of May 2020, following further questioning, the prosecutrix informed her mother that she delayed returning home because she had gone to the appellant's house.

[10] The matter was reported to the police where the prosecutrix told the police officers that the appellant had sexual intercourse with her, the night she delayed

returning home. The prosecutrix was then taken to the hospital, where a doctor confirmed that she had recently had sexual intercourse.

[11] In court, the prosecutrix's siblings testified that on their way home, the prosecutrix branched off and went towards the appellant's house. She only got home just before midnight and told one of them that the appellant had sexual intercourse with her.

[12] There was also evidence from the prosecutrix's father that on three occasions, pastors from a church where the appellant ministered, contacted him proposing that they discuss the matter concerning the appellant.

[13] In addition, an official from Airtel was called to give evidence in court. He produced phone records that showed that the appellant sent messages to the prosecutrix. One of them read "just stand with no and everything will be alright"

[14] When the prosecutrix was called to the stand, she admitted going to the appellant's house that night, but said nothing happened. The public prosecutor then applied to have her declared a hostile witness.

[15] The trial Magistrate granted the application, and declared the prosecutrix a hostile witness. He then allowed the prosecutor and the defence counsel, to cross examine her.

[16] Further, during the trial, the prosecution sought to produce a confession statement which was made by the appellant. A trial within a trial was conducted following an objection.

[17] Although the objection to the production of the statements was sustained after a trial within a trial, the police witnesses were allowed to recount what the appellant told them during the recording of the statement.

[18] In his defence, the appellant admitted meeting the prosecutrix that evening, but denied having sexual intercourse with her.

FINDINGS BY THE TRIAL MAGISTRATE

[19] The trial Magistrate found that the prosecutrix was below 16 years and was defiled.

[20] He also found that the appellant was incriminated by the evidence from the prosecutrix's sister that the prosecutrix told her that he had sexual intercourse

with her. This evidence was supported by evidence from the prosecutrix's siblings that they met the appellant on the way home.

[21] The trial magistrate also found that the appellant had the opportunity to commit the offence because he was with the prosecutrix that evening.

PROCEEDINGS IN THE HIGH COURT

[22] Satisfied that the case against the appellant had been made out, and noting that he was a first offender and that there were no aggravating factors, the High Court Judge sentenced the appellant to 15 years imprisonment with hard labour.

GROUNDS OF APPEAL

[23] Two grounds of appeal have been advanced in support of this appeal.

[24] The first ground of appeal is that having declared the prosecutrix a hostile witness, the trial Magistrate erred when he proceeded to consider her evidence when determining the appellant's culpability.

[25] The second ground of appeal is that the trial Magistrate erred when he found that the period that the appellant spent with the prosecutrix that evening, was

corroborative because he had the opportunity to commit the offence.

ARGUMENTS IN SUPPORT OF THE TWO GROUNDS OF APPEAL

[26] In support of the 1st ground of appeal, the cases of **Zico Kashweka and Lawrence Muyunda Chimbinde v. The People**[1] and **Jeffrey Godfrey Munalula v. The People**[2], were referred to and it was submitted that the prosecutrix having been declared a hostile witness, the trial Magistrate should not have considered the incriminating evidence she gave against the appellant.

[27] Coming to the 2nd ground of appeal, it was submitted that it is not always that 'opportunity' is corroborative. Counsel referred to the cases of **Credland v. Knowler**[3] and **Ives Mukonde v. The People**[4] and pointed out that since there was evidence that the appellant lived with two other men, the offence could have been committed by the other men.

ARGUMENTS IN RESPONSE TO THE GROUNDS OF APPEAL

[28] In response to two grounds of appeal, it was conceded that the evidence of the prosecutrix, who had been declared a hostile witness, should not have been

considered by the trial Magistrate when he was deciding the case.

[29] However, it was submitted that there was other evidence which corroborated the commission of the offence and identity of the offender.

[30] The medical report corroborated the commission of the offence.

[31] As regards the identity of the offender, the appellant's admission that the prosecutrix visited his house that evening, is evidence that he had the opportunity to commit the offence. The cases of **Nsofu v The People**[5], **Philip Munsala Mwanamubi v The People**[6] and **Ives Mukonde v The People**[4] were referred to in support of the proposition that an opportunity to commit an offence, can be corroborative.

COURT'S CONSIDERATION OF THE APPEAL AND DECISION

[32] The two grounds of appeal are concerned with whether the prosecution evidence proved the charge against the appellant to the required standard. That being the case, we will deal with both grounds of appeal at the same time.

[33] But before we do so, it is appropriate that we say something on two procedural issues that arose during the trial. These are the declaration of the prosecutrix as a hostile witness and the receipt of incriminating evidence during the trial within a trial.

[34] Mrs. Kennedy-Mwanza has rightly conceded that the prosecutrix having been declared a hostile witness, her evidence should not have been taken into account when considering the case against the appellant.

[35] Of concern to us, is that having declared the prosecutrix a hostile witness, the trial Magistrate allowed both the prosecutor and the defence counsel to cross examine her.

[36] In the celebrated case of **Jeffrey Godfrey Munalula v. The People**[2], the procedure for declaring a witness hostile, was set out.

[37] The first stage, is the application by the prosecutor, to treat the witness as hostile. With that application, the prosecutor avails to the court the inconsistent statement, previously made by the witness.

[38] The statement, should, *prima facie*, show that the witness's testimony in court is different from what the

witness told the police when the statement was being recorded.

[39] If it does not, the prosecutor must continue examining the witness in chief, unless the prosecutor decides not to elicit any further evidence from the witness, in which case the witness becomes open to cross examination.

[40] But where the court concludes that there is a basis for the application, because of there being a material difference between the witness's testimony in court, and the statement previously given to the police, the prosecutor is allowed to cross-examine the witness. The defence counsel is not allowed to cross-examine.

[41] The cross-examination is for the purpose of obtaining an explanation for the difference between the testimony in court, and the statement to the police.

[42] After that cross-examination, the court must then decide whether the witness has justified the difference, and where not, whether the difference is on account of the witness not intending the truth.

[43] If the court accepts the explanation for the difference, the witness can continue testifying in examination in chief.

[44] But where the court concludes that the difference is on account of the witness's decision not to tell the truth, the court proceeds to declare the witness hostile.

[45] Further, in the case of **Jeffrey Godfrey Munalula v. The People**[2], it was made clear that the court should not to place any reliance on the evidence that was given in court by a witness who was subsequently declared hostile. In other words, the court should proceed as if that witness never gave evidence in court.

[46] In this case, the trial Magistrate should not have declared the prosecutrix a hostile before she had been cross-examined by the prosecutor.

[47] Further, having declared the prosecutrix a hostile witness, the trial Magistrate should not have allowed the prosecutor or defence counsel, to cross-examine her. This is because once a witness has been declared

hostile, no further evidence is received from such a witness.

[48] The next issue we will deal with is the reception of incriminating evidence during the trial within a trial.

[49] In the case of **Belemu v. The People**[7], the Court of Appeal, the forerunner of the current Supreme Court, held that where a confession is objected to on the ground that it was involuntary, a trial within a trial is held to determine whether the confession was voluntarily made.

[50] Since the purpose of a trial within a trial is determine whether the confession was voluntarily made, the evidence of the prosecution witnesses is limited to the circumstances, or atmosphere that was prevailing, at the time the accused person made the confession.

[51] The court should not allow prosecution witnesses to recount the actual contents of the confession statement during the trial within a trial.

[52] Similarly, in the cross-examination of the accused person during the trial within a trial, he cannot be asked questions other than those relating to the

circumstances in which the confession statement was made.

[53] It follows, that the trial Magistrate erred when he allowed the witnesses who recorded the statement from the appellant, to divulge the contents of the confession statement during 'the trial within a trial'.

[54] Reverting to the appeal before us, we have already indicated that having declared the prosecutrix as a hostile witness, no reliance should have been placed on what she said in court. In effect, there was no evidence given by her.

[55] Consequently, her siblings' evidence, the evidence of her mother and the police officers, of what the prosecutrix told them or said, was all rendered hearsay.

[56] In the case of **Muvuma Kambanja Situna v. The People**[8], the Supreme Court had the following to say about hearsay evidence:

> **"Hearsay evidence which does not fall within the exceptions to the rule and which does not come within s.4 of the Evidence Act, Cap.170, is inadmissible as evidence of the truth of that which is alleged"**

[57] **Section 4 of the Evidence Act,** is concerned with the admissibility of certain trade, business or professional records in criminal proceedings. The evidence of the prosecution witnesses in this case, does not fall under any category of the evidence covered by the provision.

[58] The trial Magistrate, should therefore not have placed any reliance on the evidence of any of these witnesses on what the prosecutrix told them.

[59] That being the case, the admissible evidence that was before the trial Magistrate can be summarised as follows; on the 27th of May 2020, in the evening, as he prosecutrix and her siblings were returning from escorting their mother, they met the appellant who greeted them. They then proceeded home. Just as they were about to get home, the prosecutrix turned back saying she was going back to the funeral house. She returned just before midnight. Two days later, the prosecutrix was taken to the hospital and on being examined by a doctor, it was discovered that she had a tear on the hymen and bruises on the posterior fourchette, that were healing. On about three

occasions, pastors from the church where the appellant ministered, contacted the prosecutrix's father proposing that they discuss the matter concerning the appellant and his daughter. Finally, there was evidence that the appellant sent messages to the prosecutrix urging her to deny and everything was going to be ok.

[60] With the prosecutrix's testimony having been excluded and no person having seen the appellant commit the offence, the case against the appellant was anchored on circumstantial evidence.

[61] The question of corroboration which ordinarily arises when a victim of sexual abuse testifies, and the principles espoused in the cases **Nsofu v The People**[5], **Philip Munsala Mwanamubi v. The People**[6], **Ives Mukonde v. The People**[4], which relate to the same issue, are of little or no significance to this case.

[62] In the case of **David Zulu v. The People**[9], it was held that it is competent for a conviction to be premised on circumstantial evidence, where a trial court is satisfied that **"the circumstantial evidence has taken the case out of the realm of conjecture so that it**

attains such a degree of cogency which can permit only an inference of guilt".

[63] It is our view that the evidence that was before the trial court fell far short of evidence on which a trial court could have drawn a conclusion that the case against the appellant had been made out and that the only inference that could be drawn on it is that appellant defiled the prosecutrix on the 27th of May 2020.

[64] The evidence against the appellant is that he met the prosecutrix on the material night and two days later a medical examination showed that she had been defiled two to three days earlier.

[65] The fact that the defilement happened earlier or after she met the appellant, cannot be ruled out.

[66] We note that pastors from the appellant's church, attempted to meet the prosecutrix father and that there was an sms from the appellant to the prosecutrix, urging her to maintain a "no".

[67] On the evidence on record and in the absence of the testimony of the prosecutrix, one can only speculate what the meeting or sms, was about.

[68] In the circumstances, we are of the view that the threshold set in the case of **David Zulu v. The People**[9] and other cases on convictions based on circumstantial evidence, was not met.

[69] We find that the appellant's conviction is unsatisfactory.

VERDICT

[70] We find merit in the appeal and we allow it.

[71] We set aside the conviction and quash the sentence.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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B.M. Majula
COURT OF APPEAL JUDGE

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K. Muzenga
COURT OF APPEAL JUDGE