

IN THE COURT OF APPEAL OF ZAMBIA

Appeal No. 91/2024

HOLDEN AT LUSAKA AND NDOLA

(Criminal Jurisdiction)

BETWEEN:

DOUGLAS AARON SIMUKONDA



APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Mchenga DJP, Majula and Muzenga, JJA

13th January 2026 and 25th March 2026

**For the Appellant: Mr. C. Siatwinda, Senior Legal Aid Counsel,
with Ms. M. Chilumbwa, Legal Aid Counsel,
Legal Aid Board**

**For the Respondent: Ms. 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

Legislation referred to:

1. The Penal Code Chapter 87 of the Laws of Zambia
2. Mental Health Act, Chapter 305 of the Laws of Zambia

Cases referred to:

1. M'Bwana v. The Republic 8 MLR 159
2. Maybin Nguni v. The People [2007] Z.R. 27
3. Kashenda Njunga and Others v. The People [1988-1989] Z.R. 1

Works referred to:

1. Black's Law Dictionary

1.0. INTRODUCTION

- 1.1. The appellant appeared before the Subordinate Court (Hon. N. Mututwa), charged with the offence of defilement of an imbecile, contrary to **Section 139 of the Penal Code.**
- 1.2. He denied the charge, and the matter proceeded to trial. He was convicted at the end of that trial, and committed to the High Court for sentencing.
- 1.3. In the High Court (DR. W.S. Mwenda, J.), he was sentenced to 14 years imprisonment, with hard labour. He has appealed against his conviction.

2.0. CASE BEFORE THE TRIAL COURT

- 2.1. On 2nd December 2022, around 16:00 hours, Petronella Mwape of Luanshya's Roan Suburb, sent the prosecutrix, her daughter, to buy cooking oil at a nearby market.
- 2.2. The prosecutrix did not return home that day. She only returned the following morning, around 07:30 hours.
- 2.3. The prosecutrix explained that she had spent the night at the

appellant's house. She said she met him on the way to the market, and that he took her to his house, where he had sexual intercourse with her.

- 2.4.** The incident was reported to the police and the prosecutrix, was examined by a doctor, who found that she had recently had sexual intercourse.
- 2.5.** During the trial, the prosecutrix's mother gave evidence that her daughter was mentally 'retarded'. Although she was 31 years old, she 'did nothing' and had not been to school.
- 2.6.** In his defence, the appellant did not dispute spending the night with the prosecutrix, and having sexual intercourse with her.
- 2.7.** He told the trial Magistrate that he met the prosecutrix two months prior to 2nd December 2022. They got into a conversation and exchanged phone numbers.
- 2.8.** In the days that followed, she contacted him on a number of occasions, with requests for money, which he met.
- 2.9.** On 2nd December 2022, the prosecutrix called him and informed him that she was waiting for him at the hammer mill. He went to the hammer mill, met her and took her to his house.

- 2.10.** While at his house, the prosecutrix cooked for him and they spent the night together. In the course of the night, they had sexual intercourse on several occasions.
- 2.11.** With the appellant's admission that he had sexual intercourse with the prosecutrix, the trial Magistrate narrowed the issue for determination, to whether the appellant was aware that the prosecutrix was a person with a mental illness.
- 2.12.** She dismissed the appellant's story that he had met and interacted with the prosecutrix prior to 2nd December 2022. She concluded that it was an afterthought, because it was only raised it for the first time, during his defence.
- 2.13.** Having seen the prosecutrix in court, the trial Magistrate dismissed the appellant's claim that he did not know that the prosecutrix had a mental illness. She found that even if there was no medical evidence of the prosecutrix's state of mind, it was evident from her ocular observation that she had a mental illness.
- 2.14.** The trial magistrate concluded that the appellant knew that the prosecutrix had a mental illness and convicted him for the subject offence.

3.0. SENTENCING

3.1. The sentencing Judge imposed a sentence of 14 years imprisonment, after concluding that the appellant was entitled to leniency on account of being a first offender.

4.0. GROUND OF APPEAL AND ARGUMENTS BY THE PARTIES

4.1. The sole ground of appeal is that the charge of defilement of an imbecile, was not proved because no evidence was led establishing the fact that the prosecutrix was a person with a mental illness or an imbecile.

4.2. Ms. Chilumbwa drew our attention to **Black's Law Dictionary's** definition of the word 'imbecile' and the **Mental Health Act's** definition of the terms "mental patient", "mental disability" and "mental disorder"

4.3. She also referred to the Malawian case of **M'Bwana vs. The Republic¹**, and submitted that medical evidence should have been led, establishing that the prosecutrix was of unsound mind.

4.4. In response to the appeal, Ms. Mumba submitted that medical evidence is not required in all cases of defilement of an imbecile, to prove mental disability. In appropriate cases, lay persons can

attest to one's mental capacity. She referred to the case of **Maybin Nguni v. The People²** in support of the proposition.

4.5. She urged us to uphold the conviction

5.0. CONSIDERATION OF APPEAL AND COURT'S DECISION

5.1. The offence of defilement of an imbecile or a person with mental disability, is set out in **Section 139 of the Penal Code**. It reads as follows:

Any person who, knowing a child or other person to be an imbecile or person with mental illness, has or attempts to have unlawful carnal knowledge of that child or other person in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the child or other person was an idiot or imbecile commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fourteen years and may be liable to imprisonment for life.

5.2. In order to successfully prosecute a case of defilement of an imbecile or person with mental illness, a prosecutor must prove the following:

- (1) That the accused person had sexual intercourse with the prosecutrix;
- (2) That the prosecutrix was an imbecile or person with mental illness; and
- (3) That the accused person knew that the prosecutrix

was an imbecile or person with mental illness.

- 5.3. Black's Law Dictionary** defines mental illness as follows, "A disorder in the thought or mood so substantial that it impairs judgment, behaviour, perceptions of reality, or the ability to cope with the ordinary demands of life". While the term 'imbecile' is generally taken to be "a person having very low intelligence or an intellectual disability"
- 5.4.** We agree with Ms Chilumbwa that ordinarily, the fact that the prosecutrix is an imbecile or person with mental illness, is best proved, by medical evidence. This is because typically, it is not determinable by 'ocular' observation or by casual interaction. It requires specialist assessment by a psychiatrist or a person with similar qualifications.
- 5.5.** The need for medical evidence is critical in 'borderline' cases. These are cases where the prosecutrix seemingly leads a normal life, yet suffers from mental illness or is an imbecile.
- 5.6.** But we also agree with Ms Mumba that the fact the prosecutrix is an imbecile or a person with a mental illness, can in some cases, be proved in the absence of medical evidence.

5.7. In the case of **Kashenda Njunga and Others v. The People**³, the Supreme Court considered the approach a court should take in a charge of murder, where there was inadequate medical evidence on the cause of death. The court went on to hold as follows:

“It is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Except in borderline cases, laymen are quite capable of giving evidence that a person has died. Where there is evidence of assault followed by a death without the opportunity for a novus actus interveniens, a court is entitled to accept such evidence as an indication that the assault caused the death.”

5.8. It is our view, that the same can be said about the requirement of medical evidence in a charge of defilement of an imbecile or person with a mental illness. The fact that the prosecutrix is a person with a mental illness or an imbecile, can, in some cases be proved in the absence of medical evidence.

5.9. There are cases where there is no medical evidence of the

prosecutrix' mental state but uncontroverted evidence from none medical witnesses that the prosecutrix cannot carry out any logical or sustained conversation; she cannot dress herself; she has to be bathed and fed; she cannot be assigned to do any chore; she is always locked up otherwise she wonders off and fails to find her way back; and other similar conduct, not characteristic of a 'normal person'.

- 5.10.** In such a case, it is our view that even in the absence of medical evidence, a court can rely on the evidence of 'laymen' to come to the conclusion that the prosecutrix is an imbecile or a person with a mental illness.
- 5.11.** The court, can thereafter, come to a conclusion that a person meeting or having an interaction with the prosecutrix, would have noticed that the person was incapable of making rational decisions.
- 5.12.** In this case, the evidence pointing at the prosecutrix' mental state was that given by her mother, who said she was mentally retarded. Other than saying "she does nothing" and that she had not been to school, no details were given of how this disability manifested itself or affected her interaction with other people.

- 5.13.** In addition, the trial magistrate observed, that the prosecutrix appeared disoriented, when she turned up in court.
- 5.14.** In view of the fact that the prosecutrix was a person who could be sent to the market to make purchases, and she was able to answer questions she was asked in the *voir dire*, with apparent ease, this is one of those cases that can be categorised as being 'borderline', and which required medical evidence.
- 5.15.** We are aware that the trial Magistrate noted that prosecutrix appeared disoriented. But in the absence of details, it is our view that this was not enough, because even normal people do display disorientation when they turn up at court.
- 5.16.** In the absence of medical evidence, the mother or any other witness, who was familiar with the prosecutrix, should have given a detailed account of how her disability affected her capacity to communicate and interact with other people.
- 5.17.** Similarly, the trial Magistrate could have given details of observation leading to the conclusion that the prosecutrix was disoriented. Was it her appearance or her conduct?
- 5.18.** On the facts of this case, we take the view that the prosecution evidence did not establish the fact that the prosecutrix was an

imbecile or a person with a mental illness, and consequently that when the appellant interacted with her, he would have known that it was the case.

6.0. VERDICT

6.1. It is our finding that imbecility or mental illness, an essential ingredient of the of defiling an imbecile, was not proved beyond reasonable doubt. This being the case, we find the appellant's conviction to be unsafe.

6.2. We set it aside and acquit the appellant.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


.....
B.M. Majula
COURT OF APPEAL JUDGE


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K. Muzenga
COURT OF APPEAL JUDGE