SCZ NO.7 OF 2007

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.104 OF 2006.**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

TIMOTHY NGULUBE	-	**APPELLANT**
Vs.		
THE PEOPLE	-	**RESPONDENT**

Coram: Lewanika, DCJ., Chibesakunda and Mushabati, JJS.

On 16th January, 2007 and 6th February, 2007.

For the Appellant: A. C. Nkausu - Principal Legal Aid Counsel.

For the Respondent: F. L. Shawa-Siyunyi (Mrs.) – Deputy Chief State Advocate.

JUDGMENT

Mushabati, JS., delivered the judgment of the Court.

Cases referred to:

1. *Chewe vs. The People (1974) Z.R. 18.*
2. *Chisha vs. The People (1980) Z.R. 36.*
3. *Phiri vs. The People (1975) Z.R.* 30.

Legislation referred to:

Criminal Procedure Code, Cap.88 – S.7 (iv)

(75)

Penal Code, Cap. 87 – S.138 (1)

Juveniles Act, Cap.53 – S. 122 (1)

The appellant was charged and convicted of one count of defilement of a girl under the age of 16 years Contrary to Section 138 (1) of the Penal Code by a magistrate of first class.

The particulars of offence alleged that the appellant on the 25th day of April, 2003 at Nyimba in the Nyimba District of the Eastern Province of the Republic of Zambia did defile a named girl under the age of 16 years.

Upon conviction the appellant was sentenced to 3 years imprisonment with hard labour by the trial court. On appeal the conviction was confirmed and the sentence was enhanced to 15 years I.H.L.

The evidence in support of the charge was that when the appellant came back from beer drinking he attempted to set his house on fire after which he chased away the defiled girl and her brother (P.W.3) from home. He later called them back to the house. The prosecutrix went straight to bed where the appellant followed her and sat on her bed. He held and told her that he becomes sexually active when he was drunk. He then forced himself on her and sexually abused her after undressing himself and her. The matter was reported to P.W.2 the grand-father to P.W.1. The appellant was apprehended and taken to the Police. Later he and P.W.1 were both medically examined and were both found with some bruises on their private parts. The appellant was then arrested for the subject offence by P.W.6 Constable Lazarous Sakanya.

(76)

The appellant gave evidence on oath saying he had a quarrel with his mother for stopping her from going to the field. It was his mother who reported him to the neighbourhood watch members on account of his taking/stealing some rice from the house. When he was being taken to the Police his mother advised the members of the neighbourhood watch, who had apprehended him, to report him for defilement. He and the prosecutrix were taken to the hospital where they were treated after some medical examinations.

These are the brief summaries of the evidence adduced in the court below.

When we heard this appeal the learned Deputy Chief State Advocate indicated to us that the state did not support the appellant's conviction on the ground that the proviso was not explained to him. In fact it should have been on the ground that no proper **voire dire** was conducted because the proviso was explained to the appellant. The trial court recorded as follows, at page 17, when taking the plea: **The provison (sic) explained to the accused.** We are therefore satisfied that the proviso was duly explained to the appellant.

The main evidence against the appellant was that of P.W.1, the prosecutrix who was a 13 year old girl. Corroboration was found from the medical evidence and from the appellant's own evidence which proved that he and P.W.1 had some bruises on their private parts.

The question before us is whether P.W.1's evidence was, by law, acceptable for a conviction. The appellate court of first instance did say in its judgment at page 8 that : **"It is essential and mandatory that as soon as the court decides that a child is a child of tender years, a proper voire**

dire must be administered, recorded and a finding made, failure to which that child's evidence must be rejected."

The High Court did not reject this evidence but instead relied on this Court's earlier decision in the case of **Chewe vs. The People (1)** in which we had said: **It would unquestionably be far more satisfactory if the legislature were to lay down the specific age below which the provisions of Section 122 (1) (of the Juveniles Act) were to be applied; in the absence of such legislation the decision must be made by the Court in each case. In the present case the record is completely silent on the point and we must assume, on the basis of the standard presumption that procedural matters of this kind have been correctly carried out, that the court was satisfied that this child was not a child of tender years. The child was duly sworn on the Bible in Nyanja.**

This was what happened also in this case and on that basis the learned judge confirmed the appellant's conviction.

The provisions of Section 122 (1) are statutory and their observance is mandatory.

The question of who a child is was sufficiently clarified in our later judgment in the case of ***Chisha vs. The People (2)*** at page 40 lines 13 to 18 where we said: **There is a degree of uncertainty as to whether a particular witness should be treated as a child for the purpose of deciding whether his evidence requires corroboration. However, courts will no doubt be guided by the statutory definition of a "child" which, in Zambia, means a person who has not attained the age of sixteen years.**

The question of who a 'child' having been clarified in the above case there is no doubt that P.W.1 was a child and so a proper ***voire dire*** ought to have been conducted by the trial court before allowing P.W.1 to give her evidence on oath.

In the case of ***Phiri vs. The People (3)*** at page 31 lines 38 to 45 we said as follows:

The effect of Section 122 of the Juvenile Act (Cap.217) has been set out by this Court in a number of recent cases (see for instance Zulu vs. The People (1) and the cases there cited) and we do not propose to set out again the proper procedure and tests as explained in those cases. It seems necessary however to urge that these cases be studied; in the instant case the voire dire examinations of the two juvenile witnesses were defective, and had their evidence been necessary this would have been fatal to the prosecution case.

P.W.1's evidence in this case was very necessary for a conviction, so the omission by the trial magistrate to conduct a **voire dire** was fatal to the prosecution case. P.W.1's evidence would have been relied upon for a conviction if it were given in compliance with the provisions of **Section 122 of Juveniles Act.**

We must consider the possibility of ordering a retrial in this case. In so doing we wish to consider the sentence of 15 years imprisonment which was imposed by the High Court on appeal. The trial magistrate, being one of first class, had powers to sentence the appellant to a maximum of 5 years as per ***Section 7 (iv) of the Criminal Procedure Code.*** We have said before in other cases that an appellate court cannot impose a sentence that is greater

than the trial court is empowered to impose unless the person is committed for sentencing. The learned High Court Judge should therefore not have increased the appellant's sentence to more than 5 years. He therefore misdirected himself when he set aside the sentence of three years and chose to impose one of 15 years.

Had the appellant been sentenced to 5 years on appeal he would have already served a substantial part of his sentence, possibly, with his remission, he would have already been set free.

In the ordinary course of events we were going to order a retrial but in view of what we have said about the sentence it would not be in the interest of justice to do so at this stage.

We are therefore, allowing the appeal.

D. M. Lewanika
DEPUTY CHIEF JUSTICE

L. P. Chibesakunda
SUPREME COURT JUDGE

C. S. Mushabati
SUPREME COURT JUDGE