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IN THE SUPREME COURT OF ZAMBIA APPEAL NO.91 OF 2007
HOLDEN AT KABWE SCZ Judgment No. 35 of 2008
(CRIMINAL JURISDICTION)

BETWEEN:

CHARLES MWANSA APPELLANT

VS

THE PEOPLE RESPONDENT

CORAM : Chitengi, Silomba and Mushabati, JJS.
On 6th November, 2007 and 6th May, 2008

For the Appellant : W. K. Cheelo – Legal Aid Counsel

For the Respondent: C.F.R. MChenga – Director of Public Prosecutions

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JUDGMENT

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

Legislation referred to:

Criminal Procedure Code, Cap.88 – S.217(1)

Juveniles Act, Cap. 53-S.122(1)

Penal Code, Cap.87 – S.137 and 138(1)

Supreme Court Act, Cap.25 – S.15

This is an appeal against sentence only. The appellant was charged with two counts of defilement contrary to ***Section 138 of the Penal Code.***

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The particulars of the first count alleged that the appellant on 20th February, 2006 at Mufulira in the Mufulira District of the Copperbelt Province of the Republic of Zambia had carnal knowledge of a named girl under the age of 16 years.

The second count alleged that on the same day at Mufulira the appellant unlawfully and indecently assaulted another named girl.

He pleaded not guilty to both counts. He was tried and convicted of both offences and was committed to the High Court in terms of ***Section 217(1)*** of **Criminal Procedure *Code, Cap. 88 of the Laws of Zambia*** for sentencing. The High Court sentenced him to 20 years imprisonment on the first count and 15 years imprisonment on the second count.

The appeal is against the sentence imposed against the appellant in respect of the 1st count. On the second count no appeal lies against such sentence. The mandatory minimum sentence for the offence of unlawful indecent assault is 15years and this was the sentence which was imposed against the appellant.

The ground of appeal was that the learned trial Judge misdirected herself in imposing a 20 year jail sentence with hard labour against

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the appellant when the circumstances did not warrant such a sentence.

In arguing the appeal, Mr Cheelo said the offence of defilement carries a minimum sentence of 15 years imprisonment for a first offender and he felt that the sentence of 15 years imprisonment is in itself severe. As a first offender, the Appellant ought to have been accorded the leniency given to first offenders. He urged us to reduce the sentence to the mandatory minimum sentence.

The Director of Public Prosecutions, when called upon to address the court, said he was leaving the matter to the discretion of the court.

We have perused through the record and found that the age of the prosecutrix was only 6 years. The appellant is or was at the time of committing the offence aged 72 years.

We have no doubt that the victim of this heinous offence was far below the age of consent which is 16 years. In our considered view the tender age, of the prosecutrix in itself, was an aggravating factor. The law had to be amended to protect the victims of this despicable offence. The sentence was enhanced to a minimum of 15 years imprisonment. We feel the appellant in this case, though a

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first offender, does not deserve a minimum mandatory sentence only.

On the other hand we are of the opinion that a sentence of twenty years imprisonment was slightly on the higher side. However, before we decide on the appropriate sentence, we wish to comment on the convictions.

As the appeal before us is only in respect of sentence we are unable to delve into the propriety of the convictions because the issue is not properly before us. ***Section 15 of the Supreme Court Act, Cap. 25 of the Laws of Zambia*** which gives this court wide powers in criminal appeals does not give us powers to look into such issue. In our considered view we feel the court below, which has wider powers both on appeal and in its revisory jurisdiction, ought to have critically considered the correctness of the conviction of the appellant in light of the evidence on record.

A voire dire was conducted in this case and from the answers given by the prosecutrix it is clear to us that she (the prosecutrix) understood the nature of the oath. So she should have been allowed to give her evidence on oath. However, the trial court, without reasons directed that the prosecutrix should give an unsworn

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statement. Curiously same questions put to P.W1were put to P.W.2 and P.W2. gave same answers as P.W.1 but P.W.2 was allowed to give evidence on oath. The trial court ought to give reasons for allowing a child to give evidence on oath or as unsworn statement. We are unable to delve into this matter further than this but we hope we have guided the courts below, as we have done before in many cases, on the need to hold proper "**voire dire"** when the need arises and also to look at the provisions of ***Section 122 (1)* of the *Juveniles Act, Cap. 53*** especially the provisio.

Having said what we have said above we now come back to the question of sentence. We have already said above that a sentence of 20 years in this case was a bit on the higher side. We are therefore, setting aside this sentence and impose one of 18 years I.H.L. This sentence shall run concurrently to the sentence imposed on him in respect of the second count and it shall be with effect from the date of arrest 1st March, 2006. To that extent the appeal is allowed.

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P.Chitengi
SUPREME COURT JUDGE

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S.S. Silomba
SUPREME COURT JUDGE

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C.S. Mushabati
SUPREME COURT JUDGE