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IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 37 OF 2007
HOLDEN AT KABWE
(Criminal Jurisdiction)

B E T W E E N:

MAYBIN NG'UNI APPELLANT

AND

THE PEOPLE RESPONDENT

CORAM: SAKALA, CJ, SILOMBA AND MUSHABATI, JJS
On the 7th August, 2007 and 9th September, 2008

For the Appellant: Mr. A.D. NKAUSU, then Principal Legal Aid Counsel
For the Respondent: Mr. P. MUTALE, Principal State Advocate

JUDGMENT

SILOMBA, JS delivered the judgment of the Court.

This appeal is against the Order of the High Court dated the 6th November, 2006 in which the Appellant was sentenced to 20 years imprisonment with hard labour after he was tried and convicted by the Subordinate Court. The Appellant was charged with defilement of an imbecile contrary to Section 139 of the Penal Code, Chapter 87 of the Laws. The particulars of the offence alleged that on the 25th day of January, 2006 at

Mpika, in the Mpika District of Zambia the Appellant did have unlawful carnal knowledge of Miriam MVULA knowing her to be an imbecile.

The case was tried in the Subordinate Court of the First Class holden at Mpika and the evidence in support of the charge was that on the 25th January, 2006, around 1230 hours, PW 1, Mildred KALOLA, saw a man with a girl pass by the window of her house. At the time, PW 1 was inside her house. She knew both the man and the girl and in particular she knew the girl as an imbecile. PW 1 then left her house and followed them. She saw them entering some bush and while in the bush the imbecile was the first to take off her clothes.

When she reached the scene she found the Appellant having sex with the imbecile. PW 1 asked the Appellant what he was doing and instead of responding to the question he started running away. At that point in time PW 1 was joined by PW 3, Nellia NAKAONGA. After dressing up the imbecile, PW 1 took her to the police station where they were referred to the hospital for a medical report.

The evidence to confirm that the prosecutrix was an imbecile came from her mother, Esther Shula, PW 2. PW2 told the trial Court that her daughter was confused and was in the habit of walking about anyhow; that she became confused when she was in Grade III and that she had become

worse as at the time of trial. The mother knew the Appellant as a shoe repairer. From the observation of the trial Magistrate, the prosecutrix was indeed an imbecile.

In his defence, the Appellant gave an unsworn statement. He testified that on the material date, he came into contact with the imbecile and asked her to help him carry the radio. Together they walked up to some place and sat down; they put batteries in the radio and that was when PW 1 and PW 3 found them. They asked them what they were doing. According to the Appellant, he walked away.

The trial Magistrate analysed the evidence before him and found as a fact that the Appellant and the prosecutrix were found together by PW 1 and PW 3 having sexual intercourse and that when they were confronted the Appellant ran away while holding his trousers; the prosecutrix was naked and had to be dressed up. On the medical report, the trial Magistrate found that the victim had recent sexual intercourse. He concluded that the foregoing events constituted ***'something more'*** to confirm that sexual intercourse took place and convicted the Appellant. On sentence, the trial Magistrate referred the case to the High Court for sentence.

There were two grounds of appeal that were canvassed by the Appellant at the hearing of the appeal. These were:

1. **That the learned trial Judge erred in principle when he sentenced the Appellant as a first offender above the minimum sentence;**

2. **That the learned trial Judge erred in law and fact when he convicted the Appellant on insufficient evidence.**

The Appellant's Counsel submitted that the Appellant was a first offender and that there were no aggravating circumstances to warrant a sentence above the minimum of 15 years. He submitted that the medical report was in his favour in that the victim had no injuries and was not infected with any disease. He also submitted that the Appellant was advanced in age and a sentence of 20 years was heavy.

On the second ground, Counsel submitted that the evidence was inadequate to prove the charge. He submitted that the trial Court convicted the Appellant on the basis of the medical report which stated that the imbecile's vagina was wide with the hymen missing. However, the same report indicated that the imbecile had several sexual encounters in the past not specifically with the Appellant. The evidence before Court was that the Appellant was seen running away from the scene while holding his trousers while the imbecile was found lying down and as far as Counsel was concerned such evidence did not suggest that the Appellant had sex with the imbecile. He urged us to reverse the conviction.

In response to the Appellant's Counsel's submission, the Respondent's Counsel supported the conviction on the ground that there was sufficient evidence establishing that the Appellant had defiled the imbecile. We were referred to the evidence of PW 1, which showed that the Appellant and the imbecile were together having sex. The evidence, according to Counsel, satisfied the ingredients of the case. On sentence, Counsel argued that 20 years imprisonment was not excessive in view of the increase in defilement cases in Zambia.

We have carefully considered the evidence in the record of appeal, which was tendered before the trial magistrate sitting at Mpika. We have also gone through the judgment of the trial Magistrate and agree with his findings of fact that the appellant was found with the imbecile in the bush by PW1 and PW 3. We also accept his finding that the Appellant was found having sex with the imbecile by PW 1 for if that was not the case, one would want know why the Appellant ran away from the scene while holding his trousers and why the girl was found lying down undressed.

Both PW 1 and PW 3 knew the Appellant very well in which case a case of mistaken identity does not arise. In fact this was never an issue at trial as well as on appeal. It was never an issue also that the prosecutrix was an imbecile. In the circumstances of this case, the trial Magistrate cannot be

faulted for convicting the Appellant in view of the overwhelming evidence before him. The second ground has no merit and it is dismissed. The conviction is upheld.

On sentence, we take note that it was common knowledge that the prosecutrix was an imbecile. The Appellant, from his own testimony, knew as well that his victim was an imbecile. As an imbecile, the prosecutrix needed to be protected because she was not in a position to decide what was good or bad for her on her own. But this is the person the Appellant chose not to protect but to exploit in satisfaction of his sexual appetite. If the Appellant was looking for an aggravating circumstance this is the one and a very serious one for that matter.

In view of the foregoing, we take the view that the 20 years imprisonment by the learned trial Judge is reasonable and does not come to us with a sense of shock. Ground one is dismissed.

On the whole, the appeal has no merit and it is dismissed.

E.L. Sakala
CHIEF JUSTICE

S.S. Silomba
SUPREME COURT JUDGE

C.S. Mushabati
SUPREME COURT JUDGE