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**Selected Judgment No. 23/2012**

**IN THE SUPREME COURT FOR ZAMBIA SCZ Appeal No. 137/2010**

**HOLDEN AT LUSAKA**

**(Appellate Jurisdiction)**

**CHARLES HABEENZU APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

**CORAM: CHIBESAKUNDA, MUYOVWE AND MUSONDA, JJJS.**

**On 14th February 2012 and 14th August 2012**

***For the Appellant: Mr. A. Ngulube – Acting Director of the Legal Aid Board***

***For the Respondent: Ms. R. N. Khuzwayo – Deputy Chief State Advocate***

**J U D G M E N T**

**Musonda, JS, delivered the Judgment of the Court.**

***Cases Referred To:***

1. ***R V Robinson (1915) 2 KB 342.***
2. ***Gregory V R (1972) 1 WLR 991.***
3. ***Kapowezya V The People (1967) ZR 42.***

***Legislation Referred To:***

1. ***Sections 134, 137 and 138 of the Penal Code Chapter 87 of the Laws of Zambia.***

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1. ***Section 181 (2) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia.***

The appellant was charged in the Subordinate Court of attempted rape contrary to Section 137 of the Penal Code Chapter 87 of the Laws of Zambia. The statement of offence read defilement Contrary to Section 138 of the Penal Code. He was convicted of indecent assault, which was characterized as a minor offence in accordance with Section 181 (2) of the Criminal Procedure Code.

The particulars of the offence were that Charles Habeenzu (the appellant) on the 23rd day of November 2005 at Kalomo in the Kalomo District of the Southern Province of the Republic of Zambia, did attempt to have carnal knowledge of a woman namely Fides Muchindu without her consent. The particulars were for attempted rape.

The prosecution case centred on the evidence of four witnesses. PW1 was Fides Muchindu (complainant). She testified that on 23rd November 2005 at 21:00 hours, she was sleeping when

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she heard someone open the door and enter the house. The intruder went straight to the bedroom where she was. Her husband was at work. The complainant stated that, since there was no light in the house, she asked that person to identify himself. It was her evidence that the intruder identified himself as Charles. The complainant asked what he wanted and he replied that he wanted to have sexual intercourse with her. She woke up and he got hold of her in the waist and tried to push her down. She was half naked. She shouted for help while struggling with the intruder. When the intruder tried to escape she got hold of his shirt, which came off from his body. PW4 went to her rescue and found both in the sitting room. After the shirt was grabbed from the intruder, they went outside and she recognized the intruder as Charles Habeenzu her neighbour. She managed to identify him as there was enough moonlight outside.

The complainant explained to PW4 what had transpired before he arrived. She later discovered that the appellant had left a pair of

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tropical sandals in her bedroom. She sustained bruises on both arms during the struggle with the appellant.

The husband PW2 returned at 23:00 hours and she narrated her ordeal to him and later reported to Kalomo police station, where she was issued with a medical report. She was treated at Kalomo hospital. In the trial court she identified the shirt, a pair of tropical sandals and a medical report. She identified the appellant in court as her assailant.

PW2 was Macbest Mwaanga, the complainant’s husband. He testified that on 23rd November 2005 he arrived at home at 23:00 hours and found complainant crying. She explained to him what had happened in his absence. The complainant showed him some bruises on her arms which she sustained as the appellant attempted to have sexual intercourse with her. He was shown a shirt and a pair of tropical sandals which the appellant left in his home. The witness accompanied the complainant to Kalomo police station, where a medical report form was issued to her. He

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identified the medical report form, the shirt and the pair of tropical sandals.

PW3 was detective Constable Sendoi, who was allocated a docket of attempted rape on 28th November 2005. After making inquiries, he arrested the appellant for the subject offence and he denied the charge.

During his investigations he came across a medical report form, a pair of tropical sandals and a shirt, which he identified in court.

PW4 was Brighton Simasiku, who was a neighbour to the complainant. He testified that on 23rd November 2005 at about 21:00 hours, he heard the complainant shouting for help. He went to the complainant’s house and found the complainant and the appellant’s wife removing the appellant from the house. The complainant was holding the shirt belonging to the appellant.

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When the appellant saw the witness he ran away. He saw that the complainant had bruises on both arms.

The appellant gave evidence in his defence in the Subordinate Court. He testified that on 23rd November 2005, he went to ask for a K10,000 which the complainant had borrowed from him. The complainant was cooking supper, when he stood, she held him and shouted that he wanted to rape her. The appellant came out of the shirt he wearing and it remained in PW1’s hands. The appellant reported the matter to Kalomo police station and later went home. Around 20:00 hours whilst at home PW2 (the complainant’s husband) went to his house and started fighting him and was joined by the complainant. The appellant went back to the police and reported.

DW2 was Anyway Muchimba, the appellant’s wife. She testified that on unknown date, and month, but in 2005 at around 19:00 hours, the appellant told her that he was going to Mwaya Compound. A short while later she heard the complainant shouting

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that there was someone in the house. She went there and found the complainant holding the appellant by the shirt. She asked the complainant why she was holding the appellant, but she did not answer. She advised the appellant to remove his shirt and he did so. She later accompanied the appellant to Kalomo police station where the matter was reported. Later after returning home PW2 started fighting the appellant and was joined by the complainant. After the fight the appellant went to the police and reported the matter.

The learned trial magistrate found the following facts: on 23rd November 2005, the appellant entered the complainant’s bedroom; the appellant held the complainant in the waist, while she was in a state of half nakedness; the appellant tried in vain, to force her on the ground.

The learned Magistrate followed ***R V Robinson***(1), where it was held that:

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***“To constitute an attempt the act done must be immediately, and not remotely, connected with the commission of the offence. In other words, it must be something more than mere preparation for the commission of the offence”***

The learned trial magistrate was of the view that:

***“Having held the prosecutrix in the waist, the accused while dressed tried, in vain, to force her to the ground. In my view this act is not directly connected with rape. What the accused did to the prosecutrix was not enough to constitute the offence of attempted rape. Although I find that there is insufficient evidence to prove attempted rape, I find that the evidence proves a minor offence. Section 181 (2) of the CPC provides that when an accused is charged with an offence and facts are proved which reduce it to a minor offence he may be convicted of the minor offence although he was not charged with it. For these reasons I find the accused guilty of indecent assault on female contrary to Section 137 (1) of the Penal Code”***

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Mr. Ngulube the acting Director of the Legal Aid Board filed two grounds of appeal. Ground one was that the conviction of the appellant was unsafe as the trial proceeded with an irregularity. Ground two was that the court below erred in fact and in law by convicting the appellant for indecent assault as the conviction was unreasonable due to the absence of evidence on which to base such a conviction.

It was argued in ground one that the statement of offence briefly described the offence, but did not specify the offence by section and subsection of the provision of the law that was contravened. It only referred to Section 138 of the Penal Code, which has four subsections. The statement of offence was defective. The particulars dealt with attempted rape, which was not in the statement of offence. Given the late stage, at which the amendment was made it caused injustice. There was potential of misleading the appellant more so that the appellant was not even convicted of attempted rape. The conviction was unsafe and it should be

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quashed. The case of ***Gregory V R***(2), was cited for that proposition of the law.

In ground two, it was argued that on the available evidence a court properly directing itself could not have therefore convicted for attempted rape. It was also not reasonably possible to sustain a conviction for indecent assault, which can be an alternative verdict as the allegation of attempted rape impliedly includes both an allegation of an assault and an allegation of indecency. In this case there is doubt as regards any assault on PW1 by the appellant and there is doubt as regards any act of indecency on the part of the appellant towards PW1. The point Mr. Ngulube was making was that there was only an element of indecency and not assault. The offence was therefore not complete.

Ms. Khuzwayo Deputy Chief State Advocate for the respondent supported the conviction. She contended that there was evidence to support indecent assault. The complainant (PW1) testified that while lying half naked, the appellant struggled with her and she

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was bruised. The medical report supported that fact. The identity of the appellant was established by PW1 and corroborated by PW4, who found the appellant in PW1’s house. The appellant’s wife also corroborated the story.

The appellant’s wife said immediately the appellant left their house, she heard screams. She went to rescue the complainant and found the intruder to be her husband. The appellant ran away when PW4 arrived at the scene. This negates the story that he went to collect his debt. Running away is not consistent with an innocent person. In the lower court the statement of offence reads defilement. The trial court was on firm ground to convict the appellant on a minor charge.

We have considered the grounds of appeal and submission by both counsel. In our view ground one deals with a trial defect. The court is being asked to nullify the trial. It is only a procedural defect that can nullify the trial. The learned trial magistrate relied

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on Section 181 (2) to convict the appellant of a minor offence of indecent assault. The section is couched in these terms;

***“181 (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it”***

The forerunner to this court had occasion to interpret this Section, which was then known as Section 168 (2) of the Criminal Procedure Code in the case of ***Kapowezya V The People***(3). The then Court of Appeal reviewed similar provisions in the Indian and Ugandan Penal Codes, Tanganyika and Ugandan Criminal Procedure Codes. Their Lordships said that:

1. ***The point which we stress and which may be in danger of being overlooked is, that the minor offence must be of a cognate character. Where an accused person is charged with an offence he may be convicted of a minor offence although not charged with it, if that offence is***

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***of a cognate character, that is to say of the same genus or species.***

1. ***The accused should have a fair opportunity of making his defence to the alternative charge.***

We are of the view that indecent assault, rape, defilement are offences of the same genus. Indecent assault is also minor to attempted rape. The appellant held the complainant in the waist, when she was half naked, he struggled with her and she sustained minor injuries evidenced by the medical report which was tendered in evidence. To hold a woman’s waist who is not your spouse when she is half naked with the intention of having sex with her is indecent assault, it could not be attempted rape. Rape constitutes penetration no matter how slight in the vagina.

However, in international criminal law rape is defined broadly, as it includes slight penetration in the mouth, anus, even if an instrument is used, it includes sexual violence, i.e. piercing the vagina with a spear.

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It is quite clear that, the appellant was not near penetration to constitute attempted rape. For example, if the complainant’s pants were torn the appellant was on top, but short of penetration.

The question is, is attempted rape a major offence to indecent assault to trigger the application of Section 181 (2)?. Under Section 134 of the Penal Code the maximum sentence for rape is life. Section 137 (1) of the Penal Code prescribes the sentence for indecent assault as fifteen years minimum and maximum twenty years.

In our view by the legislature limiting the maximum sentence, in indecent assault, the intention was to treat the offence as minor to attempted rape, for which the convicted person may serve beyond twenty years. This can be rationalized by the fact that indecent assault constitutes less sexual abuse than attempted rape.

The question that arises is did the appellant have an opportunity to defend himself to the alternative charge so as not to

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offend the fairness of the trial in compliance to Article 18 of the Constitution. In any case for attempted rape to be committed, facts must have gone beyond indecent assault. As graciously conceded to by Mr. Ngulube when he said:

***“Allegation of attempted rape impliedly includes both an allegation of an assault and an allegation of indecency”***

The appellant for what we have said had an opportunity to defend himself to the alternative charge so as not to offend the fairness of the trial in compliance to Article 18 of the Constitution. Ground one lacks merit.

Ground two, as we understand is dealing with credibility of the evidence on which the learned trial magistrate relied on to convict the appellant for indecent assault. We agree with Mr. Ngulube that the offence of indecent assault is conjunctive meaning one offence is created. Mr. Ngulube in this ground tried to highlight contradictions in the prosecution’s evidence. We have examined the

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record, to see whether there are grounds for us to interfere with the learned trial magistrate’s findings of fact. We are of the view that the findings of fact were not perverse to the evidence on record. The appellant was caught in the act, even by his own wife. There was medical evidence of injuries sustained by the complainant. The appellant’s wife was put in a position where she had to defend the husband and to say the truth at the same time. We find no reason to interfere with the findings of fact. Ground two equally lacks merit.

The learned sentencing Judge imposed the minimum sentence of fifteen years. We intend not to interfere with that sentence. The appeal against conviction is dismissed.

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L. P. Chibesakunda E. N. C. Muyovwe

**SUPREME COURT JUDGE SUPREME COURT JUDGE**

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P. Musonda

**SUPREME COURT JUDGE**