**IN THE SUPREME COURT OF ZAMBIA SCZ Appeal No. 132/2010**

**HOLDEN AT KABWE**

**(Criminal Jurisdiction)**

**IN THE MATTER BETWEEN:**

**ACKSON MWAPE APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

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

 **On 1st November 2011 and 10th October 2012**

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

***For the Respondent: Ms. F. C. Shawa Siyuni – 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 Lyons (1921) 15 CR App Rep 144.***
2. ***Sinyinza V The People (2009) ZR 24.***
3. ***Emmanuel Phiri V The People (1982) ZR 77.***
4. ***Kombe V The People (2009) ZR 282.***
5. ***Zulu V The People (1973) ZR 326.***
6. ***Subramanian V Public Prosecutor (1956) 1 WLR 956.***
7. ***Denovan Currin V Republic of South Africa, Mail and Guardian 24th – 30th August, 2012.***

***Legislation Referred To:***

1. ***Penal Code Chapter 87 of the Laws of Zambia.***
2. ***Supreme Court Act, Chapter 25 of the Laws of Zambia.***

 The appellant was charged with defilement Contrary to Section 138 of the Penal Code Chapter 87 of the Laws of Zambia. He was sentenced to the minimum mandatory sentence of 15 years.

 The particulars of the offence alleged that Ackson Mwape on the 4th day of September 2008 at Mazabuka in the Mazabuka District of the Southern Province of the Republic of Zambia did have unlawful carnal knowledge of Jennipher Tembo, a girl under the age of 16 years.

 The prosecution’s case centred on the evidence of five witnesses.

 PW1 was Sarah Musonda, she testified that Jennipher Tembo the prosecutrix was her daughter who was born in 1995 on 11th January in Kitwe. She was in possession of the Antenatal Card. The prosecutrix was staying with her grandparents in overspill compound. On 4th September 2008 around 21:00 hours, police officers went to PW1 as mother of the prosecutrix in the company of her grandmother. The grandmother informed her that the child had been defiled and had already been taken to hospital. The child looked dirty with dust. She was not present during the examination at the hospital.

 PW2 was Jennipher Tembo, the prosecutrix herself aged 13 years. She testified that she born was in Kitwe on 11th January 1995. In June when she came from Livingstone, her grandmother Jennipher Mufwata asked her to stay with her, as she was not feeling well. After staying with her grandmother and grandfather, her grandmother had an attack of high blood pressure and she was taken to hospital. The prosecutrix wanted to go and stay with her grandmother at hospital, but her grandfather, the appellant refused her to go together with her auntie Matildah Mwape.

 Later in the evening, her grandfather went to hospital and came later around 22:00 hours. He found them asleep as she spent the night in the sitting room. When the appellant came, he knocked and she opened for him and retired to bed. After sometime she felt somebody touching her body. She woke up and went outside and knocked at her neighbor, but there was no answer. She went back to sleep and after sometime she felt somebody undressing her, she woke up and woke the children. She did not tell the appellant because when he came from hospital he looked to be very angry so she could not talk to him, since he had also avoided to talk to anyone he found in the house.

 For the second time when the prosecutrix felt somebody was undressing her, she went outside to her parent’s home. She knocked, but there was no answer. It seemed her parents had gone to nurse her grandmother at the hospital. She went back to her grandparents’ house and slept. In the course of her sleep, she abruptly woke up and found that she had been undressed and her pants were underneath of her head together with her skirt, which acted as a pillow. She woke up the kids who had slept in the same room and asked who had undressed her. They said they did not know.

 That was around 04:00 hours and the appellant was now outside preparing to go for work. When the appellant heard the prosecutrix asking the kids, the appellant came and stood at the door. He started saying that they just consume food at his home and they do nothing. The appellant said he tried to have children with her grandmother, but to no avail as such they should not be surprised what he would do to her. He warned her not to tell anybody what she had experienced in the night. He threatened her that he would kill her and her grandmother if she told her grandmother. The appellant then left for work.

 After 3 days, the prosecutrix’s grandmother was discharged from hospital and she informed her what the appellant had said, but she took it as a joke.

 On 1st September 2008, she was confined in the house because it was her initiation ceremony and she was instructed that if she sees anybody entering the house, she had to go and hide in the bedroom of her grandparents.

 On 4th September 2008, around 15:00 hours in the absence of her grandmother, some visitors came at the house, so she rushed in her grandparents’ bedroom. The appellant was preparing to have a bath and he was in the bedroom. The appellant went outside to greet those visitors. When they left she thought of going back into the sitting room, but he met her on the bedroom door. The appellant got hold of her and pushed her on the bed. He went on top of her and unzipped his trousers. When she wanted to scream the appellant got a chitenge material belonging to her grandmother and gagged her mouth. During the ceremony she was not putting on other clothes apart from the half petticoat and a pant and wrapped her body with a chitenge material. The appellant removed what she was wearing and had sex with her and when he finished he ungagged her and gave her back her clothes and a K2,000.

 However, before he could leave her body, her grandmother entered and found the appellant on top of her. The appellant was putting on only a pair of trousers. The grandmother got a lid for the washing basket and started beating the appellant. She shouted for help and the mother to Hellen went running and entered the sitting room. Her grandmother explained what had transpired. Other ladies came and then the neighbourhood watch members came and apprehended the appellant. He was taken to the police and the prosecutrix followed. She gave a statement at the police station and was examined at the hospital accompanied by her grandmother. Before going to the police where she was given a medical report, PW5 the in-charge of the initiation ceremony checked her private parts and she accompanied her to the hospital. After medical examination the medical report was taken back to the police.

 PW3 was Florence Bwalya. She testified that on 4th September 2008 around 15:00 hours, she was home when she heard a voice calling from her mother’s house, Mrs. Mwape. She calls her mother though they are not related to her. She rushed there and was asked by Mrs. Mwape to enter her bedroom and see what was happening. When the witness refused, Mrs. Mwape removed the curtain of the door to the bedroom. The witness saw the appellant seated on the bed and he was naked. She saw the appellant’s granddaughter by the name of Jennipher seated on the bed and she had her pants in the hands and was putting on a half petticoat with a yellowish blouse. She did not see how she appeared as the bedroom was dark. The witness was shy to see the person she respected naked. She went back to her home. She did not talk to the appellant’s wife. She identified the appellant in the dock. She concluded her testimony by saying that, the manner she found the persons in the bedroom, she would conclude that there had been some sexual intercourse.

 PW4 was Donald Kayoba Munsungu. He testified that on 4th September 2008 around 17:00 hours, he was at his stand selling white maize, when he saw many people coming to where he was as a neighbourhood watch member. He then rushed there and talked to Mrs. Mwape (mother of Joseph) who had been in-charge of the prosecutrix’s initiation ceremony. He used to see the prosecutrix in the company of her grandmother. The girl looked distressed. She was dressed in a chitenge material. The grandmother to the girl and mother to Joseph had found the appellant having carnal knowledge with Jennipher (prosecutrix). He rushed to the house and picked the appellant, whom he took to the police station.

 PW5 was Margret Zimba. She testified that the appellant’s wife went to her home at 06:00 hours on 18th August 2008 with K10,000.00. She was asked to be in-charge of the initiation ceremony. The following day she put the prosecutrix and others in the initiation house at Makalanguzu. After 3 days the appellant and his wife went to her and asked her to allow their granddaughter to have her initiation ceremony in their house. Around 17:00 hours the same day appellant and his wife took K5,000.00 to her, to allow them to take their granddaughter. She had known the appellant’s family for a long time and she had initiated 4 of their girl children. On the 1st September 2008, she went to appellant’s house to take water for the girl to bath, but she found people praying in appellant’s house, so she left.

 On 4th September, the appellant’s wife and another woman went to her house around 15:00 hours and informed her that they had found the appellant having carnal knowledge with the prosecutrix. She picked Joyce Bwalya and proceeded to the appellant’s house, but met a lot of people on the way. When she was identified as instructor of the girl she was assaulted and the prosecurix was being beaten at the distance. She collected the prosecutrix to the vigilante’s post, where PW4 rescued them. The appellant was taken from the house, together with the witness and prosecutrix.

 At the police in presence of Joyce, PW5 observed that her opening of the private part had been enlarged and she concluded that she had sexual intercourse. She identified the appellant at trial. PW6 was Jonas Chibanda who produced the arresting officer’s report and the appellant denied the charge.

 The appellant testified on Oath in his defence. He testified that he knocked off from work on 4th September 2008 around 14:00 hours. After reaching home he went into the bedroom and removed his overall and gumboots and the shirt. When he looked on his bed he found a K10,000.00 bank note. He asked his wife who was in the sitting room, why the money was placed on the bed. His wife told him that the money came from the youngman who wanted to marry the prosecutrix who was seated at the time in the sitting room. The appellant’s wife said, **“the youngman as per custom had asked her to allow him to enter the house and talk to the prosecutrix. The appellant told her she had made a mistake, because the girl had been put in an initiation ceremony, no male should have been allowed to talk to her”**.

 The appellant told his wife that, **“he had only forced his wife to bring her back to the house, because at the initiation house, she was wetting her beddings and friends used to beat her”**. the appellant said, **“even he as grandfather was not supposed to see her”**.

 He further testified that, his wife had allowed three men to visit the prosecutrix at his house. The wife responded that, **“he should not interfere as the complainant was his step-granddaughter”**. He got annoyed and reported to the complainant’s mother, who blamed his wife. Back at his home he told his wife that he was going to report to the lady in-charge of the girl’s initiation ceremony.

 While at home in the sitting room playing music, his wife left and the prosecutrix was left in the sitting room. He went into the bedroom to bath. While bathing, the prosecutrix called from the sitting room and asked if he had started bathing. She asked for the body lotion which he gave her and after using it she took it back. He then started bathing. As he was doing so, he heard the voice of his wife alleging that prosecutrix had been having sex with the appellant. His wife started beating the prosecutrix. When he tried to stop her, members of the public went into the sitting room and wanted to beat him. Neighbourhood watch members came and took him to the police.

 The learned magistrate after analyzing the evidence said:

***“I am satisfied that the accused had sexual intercourse with the girl. If at all there had been nothing wrong, the wife to accused could not have shouted and alarmed the neighbours accusing her husband that he had been found with the girl having sex. I don’t think any reasonable wife could implicate the husband for no apparent reasons. Moreover, there is evidence from Florence Bwalya that when she rushed to the scene, she entered the house of accused where she saw him naked seated on the bed of his bedroom, whilst the girl was seated on the bed with her pants in her hands and trying to put on her half-slip. In my view, such circumstantial evidence is ample enough to corroborate the evidence of the prosecutrix and that of the findings of the doctor. I could simply say that accused was found in the act. I therefore find him guilty as charged and I convict him accordingly”***

On behalf of the appellant two grounds of appeal were filed. In ground one, it was contended that the court erred in law by deciding not to conduct a voire dire and proceeding to receive sworn evidence of a child. In ground two, it was contended the court below fell into error, by making the findings of corroboration and finding the appellant guilty as the findings were not supported by the available evidence.

 In ground one, it was argued that when dealing with children who are witnesses in any case, the court must put preliminary questions to enable the court form an opinion on whether the child is possessed of sufficient intelligence and/or understands the nature of an Oath. In support, the cases of ***R V Lyons***(1) and ***Sinyinza V The People***(2) were cited as authorities for that proposition. In ***Sinyinza*** we said:

***“The correct procedure to be adopted in the conduct of a voire dire is to be found in Section 122 of the Juveniles Act. The court must first decided that the proposed witness is a child to tender years, if he is not, the section does not apply, and the only manner in which the witness’ evidence can be received is on Oath. If the court decides that the witness is a child of tender years, it must then inquire whether the child understands the nature of an Oath, if he does, he is sworn in the ordinary way, and his evidence is received on the same basis as that of an adult witness”***

The court below departed from the requirement of conducting a voire dire. At page 5 of the record of appeal lines 6 to 10 the court stated:

***“The witness who is due to give evidence is a girl of tender age. However, she looks to be intelligent and that she understands the importance of telling the truth, I therefore find that she is old enough to give evidence on Oath without conducting a voire dire”***

 It was strenuously argued for the appellant, that the learned trial magistrate having determined that the prosecutrix was a child of tender years, it was mandatory to conduct a voire dire. This was the tenor of our judgment in ***Sinyinza*.**

 In ground two, it was argued that defilement being a sexual offence, corroboration of both commission of the offence and the identity of the offender is required. The requirement of corroboration is meant to eliminate the danger of a false complaint and implication. Our decisions in ***Emmanuel Phiri V The People(3)*** and ***Kombe V The People(4)***, were cited in support. It was canvassed that though the trial court had warned itself of the need for corroboration, nowhere in the judgment did the trial court find corroboration on the identity of the appellant.

 The learned trial magistrate merely stated, **“in the instant case, as I earlier observed, identity of the accused is not in question as the prosecurtrix used to live at the home of the accused as a step-grandfather”**. The identity and the commission of the offence were not corroborated. If evidence of the prosecutrix is disregarded, the entire case collapses. The testimony of PW1 established the age of the prosecutrix, the identification of the antenatal card, the identification of the medical report form. The issue of defilement was merely narrated to her. The evidence of PW3 was attacked as being uncertain, as her testimony only related to the nakedness of the appellant and prosecutrix. The evidence of PW4 was hearsay.

 In conclusion, Mr. Ngulube submitted that in face of all the errors highlighted above and the shortcomings in the evidence, the conviction of the appellant was unsafe and unsatisfactory.

 Ms. Siyuni supported the conviction. She conceded that there was no voire dire. However, the learned trial magistrate had found that the child was of tender years and followed our decision in ***Zulu V The People***(5).

 She submitted that there is no format, though it is desirable that trial courts must conduct a voire dire. In this case, there was evidence of PW3 who was an eye witness, that the appellant and the prosecutrix were naked. PW4 testified that the prosecutrix appeared distressed. The medical evidence was consistent with the prosecutrix evidence.

 We have considered the grounds of appeal filed herein and the response. In respect of ground one, as rightly conceded by Ms. Siyuni, there was no voire dire which is a statutory requirement. There appears to be confusion on how to proceed, especially by magistrates when confronted with a proposed child witness of tender age. We propose to restate what we said in the case of ***Zulu V The People supra,*** that the correct procedure under Section 122 of the Juveniles Act, then Chapter 217 and now Chapter 53 is as follows:

1. ***The court must first decide that the proposed witness is a child of tender years, if he is not, the section does not apply and the only manner in which the witness; evidence can be received is on Oath.***
2. ***If the court decides that the witness is a child of tender years, it must then inquire whether the child understands the nature of an Oath, if he/she does, he/she is sworn in the ordinary way and his evidence is received on the same basis as that of an adult witness.***
3. ***If having decided that the proposed witness is a child of tender years, the court is not satisfied that the child understands the nature of the Oath, it must then satisfy itself that he is possessed of sufficient intelligence to justify the reception of his evidence and that he understands the duty of speaking the truth; if the court is satisfied on both these matters then the child’s evidence may be received although not on Oath, and in that event, in addition to any other cautionary rules relating to corroboration (for instance because of the offence charged is a sexual one) there arises the statutory requirement of corroboration contained in the provision to Section 122 (1). But if the court is not satisfied on either of the foregoing matters, the child’s evidence may not be received at all.***
4. ***Section 15 (2) of the Supreme Court of Zambia Act, 1973 gives the court power in a proper case to order a re-trial where the appeal has been allowed only because of a detective voire dire.***
5. ***Although Section 15 (2) is mandatory in form, the qualification “if the interests of justice so require” renders the power discretionary.***
6. ***It is neither necessary nor desirable to attempt to classify the types of cases in which the court will exercise discretion, but it should not be exercised where the result would be to give the prosecution a “second bite at the cherry” on the merits.***
7. ***Where a voire dire has been inadequate the fault lies with the court, there is no question of the prosecution being given an opportunity to look for further evidence to strengthen its case.***

 It is clear that there was no voire dire, as the trial court did not put any questions to the prosecutrix, though ocular observation can be used. The prosecutrix was 13 years. The learned trial magistrate was alive to the voire dire because that was contained in his ruling. However the learned magistrate did not inquire, whether the child understood the nature of the Oath.

 The question is, does that misdirection necessitate that this court orders a re-trial. Such an order is discretionary. We are of the contrary view as that was not the only evidence tendered at trial. We therefore decline to order a retrial, though there is merit in ground one for reasons that will be apparent when we deal with ground two.

 We agree that while the learned trial magistrate warned himself of the need for corroboration evidence, that was not highlighted in detail in his judgment. He had mentioned medical evidence as corroborative. In this case the appellant was the step-grandfather who lived in the same house with the prosecutrix. The question of identity was not in dispute. PW3 an independent witness saw the appellant naked, seated on the bed and the prosecutrix naked seated on the same bed holding her pants and wearing a half-slip. PW4 gave evidence that the prosecutrix looked distressed, while PW5 examined the girl at the police and found that her private part had been enlarged and she concluded that she had sexual intercourse. There was medical evidence of a torn hymen. This was substantial corroborative evidence. Though the learned trial magistrate did not itemize the corroborative evidence, there was more than sufficient corroboration. This ground lacks merit, as it was competent to convict the appellant without even the evidence of the prosecutrix.

 Mr. Ngulube did submit that the testimony of PW4 was hearsay. We agree that he was told that the appellant had carnal knowledge with the prosecutrix.

 In ***Subramanian V The Public Prosecutor(6)***, which case lays down with clarity, what is hearsay and not hearsay. The Judicial Committee of the Privy Council stated thus:

***“Evidence of a statement made to a witness by (another) person…….may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is purposed to establish by the evidence, not the truth of the statement, but the fact that it is was made. The fact that the statement is made quite apart from its truth, is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement is made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter as the witness or of some other person in whose presence the statement was made”***

However, PW4 perceived the distressed condition of the prosecutrix and that was not hearsay. His statement was partly hearsay and partly perceptive. The distressed state of the prosecutrix was corroborative to PW3’s evidence.

 We also observe that they were odd coincidences in this case. The appellant strongly objected to the prosecutrix nursing her grandmother at the hospital, when she was admitted. He urged the wife that they remove the prosecutrix from the initiation house. These odd coincidences remain unexplained and turn out to be supportive evidence, that he had carefully planned the sexual assault. He therefore wanted an opportunity to execute it.

 We therefore apply the provision to Section 15 (1) of the Supreme Court Act. Our view is that despite the learned trial magistrate not conducting the voire dire, there was no miscarriage of justice. We therefore dismiss the appeal.

 We now come to sentence. We observe that the appellant violated the prosecutrix’s rights. At the age of 13 and being a relation to the girl, the girl was vulnerable. Children are absolute no-go zones for sexual activity of any kind. The prosecutrix had also to endure the secondary trauma of testifying about what had happened. Nothing can undo the horror of this indelible imprint upon the minds of the prosecutrix, her ‘grandmother’, the (wife to the appellant) and PW3 who so much respected the appellant and his wife like her parents, who witnessed the prosecutrix’s humiliation and that of the grandmother.

 The scourge of defilement continues unabated in spite of long terms of imprisonment laid down through minimum sentencing legislation. Policy makers should turn to socio-economic factors to find sustainable solutions to the problem. Yet notwithstanding the risks of long terms of imprisonment, there are no signs that the scourge is abating. Prison population continue to grow ……… the number of defilement cases passing through the courts have not decreased and, in most cases, offenders offer no explanation for committing defilement, not even when they plead guilty. This was Justice Pillay’s statement in the South African Supreme Court of Appeal in the case of ***Denovan Currin V Republic of South Africa Mail(***7), which statement we adopt. That is a country which is similarly circumstanced like our jurisdiction. Despite the courts imposing deterrent sentences, the would be sexual offenders have not been deterred. The problem that confront us cannot only be resolved in the courts.

 Unless the strategy for eliminating defilement uncovers the reason or reasons why defilements occur and addresses those reasons, legislative and judicial interventions will continue to treat the symptoms, not the cause. Legislatively speaking, the end of the road had been reached because the law has imposed 15 year minimum and life as maximum. In many of these cases, the only mitigating factors placed before the court are “everyday factors” and do not constitute reasons to deviate from the legislated sentence.

 However, we still have to look at whether a minimum sentence of 15 years was proportionate to the crime. This defilement was compounded by the appellant breaching his trust that of exercising parental responsibility over the prosecutrix. The appellant abused that trust. We therefore set aside the 15 year minimum sentence as there was an aggravating factor and substitute it with a 20 year hard labour sentence. The appeal against both conviction and sentence 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**