Library

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

SCZ APPEAL NO. 124 OF 2014

B E T W E E N:

GILBERT BANDA — APPELLANT

AND

THE PEOPLE — RESPONDENT

CORAM: **WANKI, MUYOVWE, JJS AND LENGALENGA, AG. JS**
On14th October, 2014 and 3rd June, 2015

For the Appellant: Mr. H.M. Mweemba, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. B. Mpalo, Senior State Advocate - National Prosecutions Authority

---

J U D G M E N T

WANKI, JS, delivered the Judgment of the Court.

CASES REFERRED TO:-

1. **Emmanuel Phiri -Vs- The People (1982) ZR 77.**
2. **Katebe -Vs- The People (1975) ZR 13.**
3. **Abel Banda -Vs- The People (1986) ZR 105.**
4. **Woolmington -Vs- DPP (1935) 1 ALL ER 1.**

LEGISLATION REFERRED TO:-

5. **The Penal Code Chapter 87 of the Laws of Zambia.**

The appellant herein was charged with one count of rape contrary to **Section 132 of the Penal Code Chapter 87 of the Laws of Zambia.**

The particulars of the offence alleged that the appellant on 26th September, 2012 at Mayukwayukwa in the Kaoma District of the Western Province of the Republic of Zambia, had unlawful carnal knowledge of the complainant, a woman aged 34 years.

The appellant pleaded not guilty to the charge. He was tried and convicted of the offence by the Subordinate Court. The appellant was thereafter sentenced to 15 years Imprisonment with hard labour by the High Court.

The facts before the trial Court were that the appellant raped the complainant, (PW1) a refugee from Rwanda. The offence was committed at a school where PW1 was, at the material time, the Head Teacher while the appellant was working for the Office of the President. The appellant raped PW1 in her office and she explained that she screamed calling out the name of the office orderly and PW4 heard her and had earlier seen the appellant going into PW1's office. The appellant threatened PW1 with death

if she reported him to the police. PW1 was examined by a clinical officer and was again examined by Dr. Lubasi at Mangango Hospital in the presence of PW3, a police officer. The police carried out investigations into the matter and subsequently charged the appellant with the subject offence which he denied.

The appellant gave sworn evidence. In his testimony the appellant said that his visiting PW1 on 26th September, 2012 was purely a normal routine operation. According to the appellant nothing happened during his visit to PW1's office.

The appellant has appealed against his conviction and has advanced three grounds of appeal as follows:-

1. **The learned Magistrate in the lower Court misdirected himself both in law and fact by failing to consider the conduct of the prosecutrix after the alleged rape and before the alleged offence.**

2. **The learned Magistrate in the Court below erred both in law and in fact when it failed to consider that the semen like substance not examined led to a dereliction of duty on the prosecution which raised an inference favorable to the appellant.**

3. **The learned Magistrate in the Court below fell in grave error and misdirected itself by failing to consider the reasonable explanation of the appellant thereby shifting the burden of proof and further failing to consider the inconsistencies in the manner the prosecution adduced evidence.**

The appellant through his Counsel filed heads of argument in support of the above grounds of appeal. In respect of ground one, Counsel contended that when addressing the issue of consent, the conduct of the complainant both before and after the alleged rape must be considered. It was Mr. Mweemba's argument that the complainant had an opportunity to prevent the rape and her failure to do this could have been taken that she consented to the act. In support of ground two, Counsel submitted that there is no evidence to show that the complainant was examined by Dr. Lubasi. It was further contended that failure on the part of the State to have the appellant examined with regard to the semen purportedly found in PW1's private part was a serious dereliction of duty which must be ruled in favour of the appellant. Regarding ground three, Mr. Mweemba argued that the appellant gave a reasonable and sufficient story which the Court should have relied on. It was contended that the appellant's explanation was reasonably possible. In support of these arguments the appellant relied on numerous decided cases.

On behalf of the respondent, Mr. Mpalo undertook to file a response within 21 days from the date of hearing this appeal. Regrettably at the time of writing this judgment, the respondent had not filed the response.

We have considered the grounds of the appeal; the heads of arguments on behalf of the appellant; the judgment of the trial Magistrate that is the subject of the appeal; and the evidence as contained in the Record of Appeal.

Section 132 of the Penal Code defines Rape as follows:-

> **"Any person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman, by personating her husband is guilty of the felony termed rape."**

As would be noted from the foregoing definition, for rape to be established, it should be proved that the appellant had carnal knowledge of a female without her consent or with her consent, if the consent is obtained by force or threats or intimidation of any kind.

The position that evidence of the victim or complainant in sexual offences requires corroboration has been settled by judicial decisions. In the celebrated case of ***EMMANUEL PHIRI -VS- THE PEOPLE*** (1) we held that corroboration is required both as to the commission of the offence and the identity of the offender so as to eliminate the dangers of false complaint and implication.

Where there are special and compelling grounds a Court is entitled to convict on uncorroborated evidence. See ***KATEBE -VS- THE PEOPLE*** (2) where we held that:-

> **"Where there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against an accused, and the case is in practice no different from any others in which the conviction depends on the reliability of her evidence as to the identity of the culprit, this is a "special and compelling ground" which would justify a conviction on uncorroborated testimony."**

In ground one of the appeal, the appellant has attacked the trial Magistrate to the effect that he failed to consider the conduct of the prosecutrix before and after the alleged rape.

We examined evidence before the trial Court and it is clear to us that the prosecutrix had no desire to have sex with appellant at the material time. We have no doubt from the

evidence that the appellant purposed to have sex with the prosecutrix using all means at his disposal which included office position and force. We have noted from the evidence that the prosecutrix was a refugee and the appellant who was working in the Office of the President was aware of this fact. In the circumstances of this case, threats by the appellant who was a security officer that the prosecutrix will not have peace if she denied him sex deprived her of free will; there was no possibility of consensual sex. We take the view that, the conduct of the prosecutrix was immaterial and therefore the trial Court was entitled to consider the issue of consent in the manner it did. Ground one lacks merit.

In respect of ground two of the appeal, it is clear from the evidence that the semen like substance in question was not subjected to medical examination by the prosecution. It is the appellant's view that this failure by the prosecution should have been resolved in his favour as it amounted to dereliction of duty on the part of the prosecution.

The question we ask ourselves is, can this failure by the prosecution warrant acquitting the appellant? Our immediate answer is in the negative. We take the view that not every dereliction of duty by the State can result in an acquittal.

Granted, that the prosecution's failure to subject the semen like substance to medical examination amounted to dereliction of duty we hold that such dereliction did not prejudice or destroy the prosecution's case. There was other evidence which established the offence herein and connected the appellant thereto. The appellant was seen entering the office of the prosecutrix by PW4; later, he saw her come out with the appellant crying. Our deduction is that the trial Court did not err by resolving the issue in question in the fashion it did. We find no merit in ground two of this appeal.

The appellant in ground three of this appeal has attacked the trial Court for failing to consider what Counsel described as the appellant's reasonable explanation thereby shifting the burden of proof and further by failing to consider the inconsistencies in the manner the prosecution adduced evidence.

It was contended that, it is trite law that in criminal matters, the burden of proving the guilty of the accused lies at all material times on the prosecution and it must be discharged beyond any reasonable doubt. If at any time there is a doubt in the mind of an adjudicator, then it must be resolved in favour of the accused. The case of ***WOOLMINGTON -VS- DPP*** (4) was cited in support.

We have considered ground three of this appeal; the arguments in support and the judgment of the trial Court. We have noted that the trial Court started by reminding itself of the position in criminal cases, at page 66 of the Record it had this to say:-

> **"In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution."**

Therefore, it is not true to argue as argued on behalf of the appellant that the trial Court shifted the burden of proof on the appellant. As to the argument on behalf of the appellant that, the trial Court failed to rely upon the reasonable and sufficient story by the appellant, we have again noted from the judgment of the trial Court that in deciding which version of the testimony

between the complainant PW1 and that of the appellant could be true, the trial Court resolved to determine their credibility. After considering the circumstances which included lack of motive on the part of PW1 to concoct evidence against the appellant a man of his status; the corroboration of PW1's evidence; and that the appellant wanted to apologise to PW1 drew an inference that PW1 did not falsely implicate the appellant. As an Appellate Court, we have no jurisdiction to interfere with a trial Court's conclusion regarding its findings on the credibility of witnesses. As to the argument that the trial Court failed to consider the inconsistencies in the manner the prosecution adduced evidence. Our search of the record of evidence has not revealed any inconsistencies in the manner the prosecution adduced its evidence that go to the root of the appellant's conviction.

In the circumstances, we find no merit in ground three of this appeal. Having found no merit in all the three grounds of this appeal, we accordingly dismiss the appeal against the appellant's conviction. The conviction and the sentence of 15 years

Imprisonment with hard labour that was imposed on the appellant are upheld.

.....

M.E. Wanki,

SUPREME COURT JUDGE.

.....

E.N.C. Muyovwe,

SUPREME COURT JUDGE.

.....

F. M. Lengalenga,

ACTING SUPREME COURT JUDGE.