

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

APPEAL No. 135/2017

BETWEEN

MARTIN SINYINZA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Muyovwe, Hamaundu, and Chinyama, JJS
On 10th July, 2018 and 7th August, 2018

FOR THE APPELLANT: Mrs. M. Marebesa-Mwenya, Legal Aid
Counsel

FOR THE STATE: Mrs. M. Chitundu, Deputy Chief State
Advocate and Mrs. Angelica Kennedy-
Mwanza, Senior State Advocate

J U D G M E N T

Hamaundu, JS delivered the judgment of the court.

Cases referred to:

1. **Chisha v The People (1980) Z.R. 36**
2. **Emmanuel Phiri v The People (1982) Z.R. 77**
3. **Dorothy Mutale and Richard Phiri v The People (1997) Z.R. 227**
4. **Murono v The People (2004) Z.R. 207**
5. **Nsofu v The People (1973) Z.R. 287**
6. **Machipisa Kombe v The People (2009) Z.R. 232**

7. **Kanyama v The People, Appeal No. 145 of 2011**
8. **Wilson Masuso Zulu v Avondale Housing Project (1982) Z.R. 172**
9. **Bernard Chisha v The People (1980) Z.R. 36**

The appellant appeals against his conviction by the Subordinate Court of the offence of defilement contrary to section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia. The appeal is based on the solitary ground that the trial court erred in convicting the appellant in the absence of any evidence of circumstances that provided corroboration as to his identity as the perpetrator of the offence.

The story that the prosecution presented before the trial court through the testimony of witnesses was this:

The victim, a girl aged nine years when the incident occurred, was living with her grandmother in Isoka at the material time. This was in 2011. The appellant was an uncle to the victim, namely, being the younger brother of the victim's mother.

Around the month of October, 2011, the victim's grandmother discovered some sores on the victim's private parts. The victim was taken to the District Hospital where medical examination revealed

that the victim had been defiled; and that the sores on her private parts related to sexually transmitted diseases. The victim, upon further examination, was found to be HIV positive. It is then that the victim revealed that the appellant had previously defiled her on a number of occasions.

According to the prosecution's testimony, the appellant, who up to that time had been living with the victim and her grandmother, fled Isoka; and was at large until he was apprehended in Nakonde in April, 2013.

The story presented by the appellant before the trial court, through his testimony, was in the form of an alibi. The story was this: That, indeed, he, at some time, had been living with his mother, (the victim's grandmother) in Isoka, but that this was in 2009 when he had fallen very ill; That, at that time, the victim was living with her mother in Nakonde. And, that, in 2011, when the victim was living with the grandmother, he had already gone back to Nakonde.

The trial court rejected the appellant's defence of alibi on the ground that he did not raise it in time for the police officers to investigate it; and also on the ground that the prosecution's evidence pointing to his identity was so overwhelming as to negative that defence. The trial court accepted the prosecution's version of the story, namely, that the appellant was living with the victim and her grandmother in Isoka at the time of the defilement and that he fled Isoka when the defilement was revealed by the victim. The trial court had no difficulty in finding that the victim was indeed below sixteen years, there being no dispute that she was nine years old at the time of the incident. The trial court also had no difficulty in finding that the victim had been defiled, as this fact was corroborated by medical evidence. Coming to corroboration of the victim's allegation that it was the appellant who had defiled her, the trial court relied on the fact that, from the testimony that had accepted, the appellant had opportunity to commit the offence; and the fact that the appellant has run away from Isoka when the defilement was revealed. The trial court further found corroboration in the medical evidence which showed that the victim was found to be HIV positive and that appellant was HIV positive as

well. Finally the trial court found corroboration in the fact that, the appellant being related to the victim and the prosecution witnesses, there was no motive for the witnesses to falsely accuse the appellant. Thus, the trial court convicted the appellant of the offence. Upon committal to the High Court for sentence, the appellant was sentenced to 40 years imprisonment with hard labour. The appellant then appealed to this court.

The appeal was argued entirely on written heads of argument. On behalf of the appellant, reliance was placed heavily on our judgment in the case of **Chisha v The People**¹ where we explained the reasons why the evidence of a child witness requires to be corroborated. Reliance was also placed on **Emmanuel Phiri v The People**² where we held that in a sexual offence there must be corroboration of both the commission of the offence and the identity of the offender: and, also, that where there can be no motive for a prosecutrix to deliberately and dishonestly make a false allegation against an accused, that is a special and compelling ground which would justify a conviction on uncorroborated evidence. It was then

submitted that there was absolutely no evidence on record to show that the evidence of the victim in this case was corroborated with regard to the identification of the appellant as the offender. Learned counsel for the appellant submitted that the trial court fell in error when it concluded that it was the appellant who committed the offence on the ground that the appellant was HIV positive and the victim was infected with HIV at the time that the appellant and the victim were living in the same house. It was learned counsel's argument that there was no evidence to show that the victim had previously been HIV negative and that the only way in which the victim contracted HIV was through sexual intercourse with the appellant. Counsel argued that there were many inferences that could be made as to how the victim could have contracted HIV. Counsel suggested that the victim could have contracted HIV at birth or could have contracted it through other ways than sexual intercourse. Relying on the case of **Dorothy Mutale and Richard Phiri v The People**³, counsel argued that, faced with these multiple inferences, the trial court should have adopted those which were more favourable to the appellant. Finally, counsel argued that the prosecution's failure to provide a nexus between the victim's HIV

status and the appellant created a doubt as to the appellant's guilt; which doubt was fatal to the prosecution's case. According to counsel, this meant that the prosecution had failed to discharge its burden to providing that the appellant had defiled the victim. Citing the case of **Murono v The People**⁴ where we held that the burden of proving every element of the offence and, ultimately, the guilt of the accused lies from beginning to end on the prosecution, counsel urged us to uphold this appeal.

In response, the State supported the conviction of the trial court. In doing so, the State concurred with what the trial court considered and accepted as constituting corroboration. Learned counsel for the State submitted that the prosecution witnesses had testified that the appellant himself, in his testimony, confirmed that he had been living with his mother, thereby placing himself at the scene. Counsel then argued that this gave the appellant opportunity to commit the offence. We were referred to the case of **Nsofu v The People**⁵ where we regarded opportunity as capable of providing corroboration in an appropriate case.

Counsel also concurred with the trial court that the evidence that the victim and the appellant were both found to be HIV positive was an odd coincidence that provided corroboration. Counsel submitted that that odd coincidence amounted to "something more" as we stated in the case of **Machipisa Kombe v The People**⁶. Counsel submitted that if, indeed, the victim was born HIV positive, such information would have been availed; and that, in any case, the appellant did not raise the issue with either the victim's mother or grandmother.

Counsel went on to argue that there was no motive for the victim to deliberately make false allegations against the appellant. According to counsel, this was another special and compelling ground which provided corroboration, as was held in the case of **Emmanuel Phiri v The People**². Finally the case of **Kanyanga v The People**⁷ was cited where we applied the grounds upon which an appellate court may interfere with the findings of fact made by the trial court which we had stated in the case of **Wilson Masauso Zulu v Avondale Housing Project**⁸. It was then submitted that the trial court had the opportunity of seeing and hearing the witnesses

and that, therefore, it was best placed to make the findings of fact upon which it came to only one conclusion; that the appellant committed the offence of defilement.

'With those arguments, we were urged to dismiss the appeal.

In **Bernard Chisha v The People**¹, which has been cited extensively by the defence, the main issue that arose was whether the sworn evidence of a child is to be treated like the sworn evidence of any other witness. The following is part of what we said in that case:

"As it is necessary to heed the warning, corroboration of the sworn evidence of a child is, in practice, usually looked for. There need not now be a technical approach to corroboration: evidence of something more suffices."

In **Machipisa Kombe v The People**⁶ we stated that the *provisio* to section 122 of the Juveniles Act requires that there be corroboration of the evidence of a child before there can be a conviction. We then said the following:

"Law is not static; it is developing. There need not now be a technical approach to corroboration. Evidence of "something more", which, though not consisting corroboration as a matter of strict law, yet (*satisfies*) the court that the danger of false implication has been excluded and that it is safe to rely on the evidence implicating the

accused (*will suffice*). Odd coincidences constitute evidence of "something more". They represent an additional piece of evidence which the court is entitled to take into account. They provide a support of the evidence of a suspect witness or an accomplice, or any other witness whose evidence requires corroboration. This is the less technical approach as to what constitutes corroboration. Further, odd coincidences can, if unexplained, be supporting evidence."

Having said the foregoing in that case, we proceeded to identify corroboration evidence in the form of four odd coincidences and upheld the conviction.

The two cases that we have cited make it clear that the evidence of a child can be corroborated by evidence of "something more"; which may be even in the form of odd coincidences.

In this case the defence have only attacked the court for placing reliance on the medical examination which showed that both the victim and appellant were HIV positive. The appellant's argument on this issue is that the mere finding that the appellant was HIV positive and that the victim was also found to be HIV positive was not conclusive of the fact that it was the appellant who

infected the victim with the HIV virus. In other words, the appellant's argument is that this piece of corroborative evidence ought to have been conclusive. We dealt with a similar argument in the case of **Nsofu v The People**⁵. In that case, this is what we said;

Mr. Zamchiya submits that these three items of evidence all showed that the appellant had the opportunity to commit the offence. Miss Mwachande meets this argument by saying that although the appellant certainly had such opportunity the evidence was insufficient to establish that no one else equally had such opportunity and therefore this evidence is insufficient to afford corroboration that it was the appellant who committed the offence.

Miss Mwachande's argument seems to assume that unless the evidence which is relied upon as corroboration is sufficient in itself to prove the fact in issue it cannot be corroborated. This approach misconceives the character of corroborative evidence. If it were necessary for such evidence to be conclusive in itself then the question of corroboration would not arise; it would then be possible to convict without relying on the evidence of the prosecutrix. Corroboration must not be equaled with independent proof; it is not evidence which needs to be conclusive in itself. Corroboration is independent evidence which tends to confirm that the prosecutrix is telling the truth when she says that the offence was committed and that it was the accused who committed it. As Lord Diplock put it in *D.P.P v Esther* at page 1073g:

What is looked for under the common law rule is confirmation from some other source that the suspect witness is telling the truth in

some part of his story which goes to show that the accused committed the offence with which he is charged.

The matter is placed in proper perspective if the wording of the cautionary rule is borne in mind, namely that it is dangerous to convict on the uncorroborated evidence of a prosecutrix in such cases. The necessity for corroboration does not alter the fact that the evidence on which the conviction is based is that of the prosecutrix; the corroborative evidence serves *(only)* to satisfy the court that it is safe to rely on that of the prosecutrix” (word in bracket added for clarity).

This passage was ably summarised by the editors of the law report in which that case is reported into three holdings, two of which we subsequently applied in **Machipisa Kombe v The People**⁶.

Going by our explanation in **Nsofu v The People**⁵, it can be said in this case that the conviction of the appellant was based on the testimony of the victim. The evidence of the HIV status of the victim and the appellant, the evidence of opportunity, the evidence of the appellant having fled Nakonde when the defilement was revealed and the finding of lack of motive on the part of the prosecution witnesses to falsely implicate the appellant were pieces of evidence that merely served to satisfy the trial court that it was

safe to rely on the testimony of the victim. Therefore, it was not necessary for those pieces of evidence to be conclusive in themselves.

For the above reasons we find no merit in the arguments on behalf of the appellant; and since that was the only issue which was argued, there is no merit in the appeal. We uphold the conviction and dismiss the appeal.



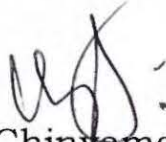
E.C. Muyovwe

SUPREME COURT JUDGE



E.M. Hamaundu

SUPREME COURT JUDGE



J. Chinyama

SUPREME COURT JUDGE