IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 50/2017**
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

BETWEEN:

GIDEON MUMBA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: MAMBILIMA CJ, WOOD AND MALILA JJS;
On 10th April, 2018 and 5th June, 2018

For the Appellant : **Mr. C. Siapinda, Legal Aid Counsel Legal Aid Board**
For the Respondent: **Mrs. R.N. Khuzwayo, Chief State Advocate**

JUDGMENT

MAMBILIMA, CJ, delivered the judgment of the Court.

CASES REFERRED TO:

1. **BWALYA V THE PEOPLE (1975) ZR 227**
2. **KATEBE V THE PEOPLE (1975) ZR 13**
3. **EMMANUEL PHIRI V HE PEOPLE (1982) ZR 77**
4. **MACHIPISA KOMBE V THE PEOPLE (2009) ZR 282**
5. **BWALYA V THE PEOPLE (1975) ZR 125**
6. **SOLE SIKAONGA V THE PEOPLE (2009) ZR 192**

LEGISLATION REFERRED TO:

a) **The Penal Code, Cap 87 as amended by Act No. 15 of 2005 and Act No. 2 of 2011**
b) **The Criminal Procedure Code Cap 88 of the Laws of Zambia**
c) **The Juveniles Act Cap 53 of the Laws of Zambia**

This is an appeal against a judgment of the High Court, upholding the decision of the Subordinate Court sitting at Chingola, in which the Appellant was convicted of one count of defilement contrary to Section 138 (1) of **THE PENAL CODE**[a]. Particulars of the offence were that the Appellant, on 6th of September, 2011, jointly and whilst acting together with persons unknown, unlawfully and carnally knew the prosecutrix, a child under the age of 16 years.

The prosecution's case was solicited from five witnesses who included the prosecutrix, Patricia Mwila aged fifteen (PW1) a grade 8 pupil. She lived with her aunt, Rosemary Chintu (PW3) at New Plots, Lulamba in Chingola. Around 0600 hours on 6th September, 2011, PW1 was on her way to school. When she reached a place called Kankoko, she was trapped by a rope on her left leg as a result of which she was hoisted up and became suspended upside down. She alleged that the Appellant, in the company of two friends, came on the scene and helped her down. That for some unknown reason, they began to beat her. The beating was so

severe that she lost consciousness. When she came round, she found herself in the hospital. She had been raped.

Meanwhile, PW2, Brian Mwape, was tending to his plot in Kankoko when he got information that there was a dead person by the road side. He went to check, only to find that it was a school girl. She was half naked and without an underpant. Her school bag and books were strewn all over the scene. When he touched her, she produced a sound and he realised that she was still alive. With the help of other people, he rushed her to the hospital.

PW 3, who thought that her niece was at school, got a message around 10.00 hours on the material date, that her niece was at the hospital. She rushed there only to find that her niece was seriously ill. She had been beaten and raped. She went to report the matter to Chiwempala Police Station. She was given a medical report which was duly completed by the medical authorities. She told the trial Court that the prosecutrix was 15 years old, having been born on 6th December 1995. PW 1 stayed in the hospital up to 19th September, 2011.

On 22nd September, 2011, PW 1 went to Lulamba market, in the company of her father and PW 3. She saw the Appellant and

identified him as one of the people who beat her up on 6th September 2011. She told the Court that she knew the Appellant very well as she used to see him around before the incident.

A medical doctor, Kambidiki Mutombo (PW5) told the trial Court that PW 1 was brought to the hospital in an unconscious state around 1200 hours on 6th September 2011. Her face, lips, tongue, neck and lower jaw were swollen and she was bleeding from the mouth. She had bruises on her back and vagina and her hymen was broken by something that was forced into the vagina. She was bleeding, but not from menstruation. He concluded that PW1 had been defiled.

Upon being identified by PW1, the Appellant was arrested and charged with the offence of defilement. Under warn and caution, he denied the charge. He was tried and, upon the close of the prosecution's case, was found with a case to answer and put on his defence, but elected to remain silent. He, however, called his father (DW1) and elder sister (DW2) as his witnesses. Both testified that the Appellant was at home at the time that the alleged offence was committed.

Upon evaluating the evidence that was before him, the learned trial Magistrate found as a fact that while PW 1 had been trapped and was hanging upside down, she clearly saw the three people who came to her rescue, but later beat her. That she contemporaneously pointed to one of the attackers when she saw him at the market. He ruled out the possibility of an honest mistake. He was satisfied that with the help of others unknown, the Appellant carried out the gruesome attack on PW1. The Court dismissed the Appellant's alibi as an afterthought in that it was never raised at the police station to enable the police to investigate it. Also, the trial Magistrate discarded the evidence of DW1 and DW2 because, being the Appellant's relatives, they were witnesses with an interest to serve. The Appellant was thus found guilty and convicted.

The Appellant appealed to the High Court against his conviction. His contention, in the main, was that the trial Court disregarded his alibi. He argued that it was the prosecution's duty to negative the defence. The other issue was that the trial Court convicted him on the uncorroborated evidence of the prosecutrix,

when there was no evidence whatsoever to support PW1's identification of the Appellant as the assailant.

The learned Judge in the High Court held, among others, that although PW1 was a single identifying witness, her evidence could be relied upon because she had known the Appellant prior to the attack and that the incident happened at 06.00 hours in the morning when visibility was good. That PW1, therefore, had an opportunity to see the Appellant when he came to her rescue only to attack her in the end.

The Court held that the learned Magistrate correctly ruled out the possibility of an honest mistake on the ground that PW1 clearly saw her assailants. That she was able to recognize the Appellant and described what he wore on the material day. At the end of the day, the learned Judge upheld the conviction of the appellant by the trial Court and sentenced him to life imprisonment with hard labour.

Aggrieved with this determination, the Appellant has now appealed to this Court against both conviction and sentence. He has advanced two grounds of appeal.

The first ground of appeal is that his conviction is unsafe on account of the possibility of an honest mistake of identification by a sole identifying witness. The learned Counsel for the Appellant argued that PW1 could not have known who defiled her given the traumatic circumstances of the attack and the fact that she was unconscious. He contended that in that state, the issue of who defiled her is a matter of speculation or circumstantial evidence since anyone could have raped her.

He further submitted that the Court, in ruling out the possibility of an honest mistake, did not apply its mind to the circumstances in which observation of the attackers was made. That in the case at hand, the evidence of identification was fragile and therefore required something more, such as the Appellant being seen by a third party in the area where the crime was committed or recovery of the work suit. Further, that possibility of an honest mistake cannot be ruled out in the absence of some connecting link between the Appellant and the defilement, which would have made a mistaken identification too much of a coincidence. To buttress his argument, Counsel relied on the case of **BWALYA V THE PEOPLE**[1] in which we held that usually, in the case of an

identification by a single witness, the possibility of an honest mistake cannot be ruled out unless there is a connecting link between the accused and the offence.

Counsel further submitted that in dismissing the Appellant's defence of alibi as an afterthought, the trial Court did not address its mind to the onus on the prosecution to negative the defence. He argued that there was no onus on the Appellant to establish his alibi. For this submission, he relied on the case of **KATEBE V THE PEOPLE**[2]. Counsel further submitted that the prosecution should have made use of Section 210 of the **CRIMINAL PROCEDURE CODE (CPC) CAP 88**[b] to rebut the evidence of an alibi. This Section reads as follows:-

> **"210. If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the Court may allow the advocate for the prosecution to adduce evidence in reply to contradict the said matter."**

Coming to the second ground of appeal, the Appellant argues that the sentence of life imprisonment imposed on him was excessive and wrong in principle. He argued that as a first offender, he deserved leniency.

At the hearing of the appeal, Mrs. Khuzwayo, Chief State Advocate, submitted that the State was not supporting the conviction in this case on the ground that the identity of the Appellant was not corroborated. That there was need for corroboration of both the sexual act and the identity of the Appellant. That only PW1 places the Appellant at the scene and that this is the person she did not even know before.

We have anxiously considered the evidence on record and the submissions of Counsel.

The thrust of the Appellant's submission is that the identification evidence before the Court was fragile because the crime was committed in traumatic circumstances such that PW1 could not clearly identify her attackers. That the Court did not rule out the possibility of an honest mistake by applying its mind to the circumstances in which the observation of the attackers was made. According to the Appellant there was need for 'something more' to support identification.

As stated above, the State did not support the conviction arguing that being a sexual offence, corroboration was required both as to the commission of the offence and identity of the

Appellant. In the case of **MACHIPISA KOMBE V THE PEOPLE**[4], we defined corroboration as independent evidence which tends to confirm that the witness is telling the truth when he or she says that the offence was committed and it was the accused who committed it. The rationale for the principle is to eliminate the danger of false implication.

The victim, in this case, was a child aged 15. Before 2011, the law, in Section 22 of the **JUVENILES ACT**[C], required that in criminal matters, any evidence of any child of tender years called as a witness should be corroborated 'by some other material evidence implicating..' the accused. Corroboration was thus required as a matter of law. This Section was amended in April 2011 to read:-

> **"122. Where, in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the Court, shall receive the evidence, on oath, of the child if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth."** (underlining ours)

One of the provisos to Section 122 states that if the evidence admitted by virtue of this Section is on behalf of the prosecution, then the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence implicating the accused. By this amendment, therefore, evidence of

a child below the age of fourteen must be corroborated as a matter of law. When the prosecutrix gave evidence in this case, she was aged fifteen. In its submission, not to support the conviction, the State appears to have glossed over the provisions of Section 122 of the **JUVENILES ACT**[c].

As a general rule, evidence of a prosecutrix in sexual offences also requires corroboration as a matter of practice. This is intended to guard against false implication. It is competent for a Court, on special and impelling grounds, to convict on uncorroborated evidence if it finds that the identification of the accused is reliable and the possibility of an honest mistake has been ruled out. We have held, in a plethora of authorities that odd coincidences or an opportunity to commit the offence, among others, can provide the required corroboration. In the 1975 case of **KATEBE V THE PEOPLE**[2] we held that lack of a motive for a prosecutrix to deliberately and dishonestly make a false allegation against an accused person can amount to a 'special and compelling ground' to justify a conviction on uncorroborated testimony. In 1983, we echoed this position in the case of **EMMANUEL PHIRI V THE PEOPLE**[3]. We held inter alia, that:-

"(ii) A conviction may be upheld in a proper case notwithstanding that no warning as to corroboration has been given if there is in fact exists in the case corroboration or that something more as excludes the dangers referred to

(iii) It is a special and compelling ground, or that something more which would justify a conviction on uncorroborated evidence, where, in the particular circumstances of the case there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against an accused."

In the instant case, it is not in dispute that there was corroboration on the first element; that of the commission of the offence. It is not in dispute that PW1 was sexually assaulted. There is evidence of the doctor and the medical report to prove that PW1 was defiled. The contention however is on the second element; that of the identity of the offender.

It is a principle of law that where there is no corroboration, the Court ought to be cautious and warn itself of the danger of false implication. Failure to warn itself is not fatal. As stated above, a conviction can still be sustained if there is **'something more'** or **'a special and compelling ground'** which excludes the danger of false implication. As alluded to above, **'a special and compelling ground'** could be where there can be no motive for the prosecutrix to make a false allegation against an accused.

A perusal of the record shows that the learned trial Magistrate did warn himself of the danger of convicting the accused on the uncorroborated evidence of the Appellant. He stated, at page 20 of the record of appeal:-

> **"From the onset, I remind myself that complainants in sexual cases particularly female complainants have been found by experience to be capable of giving false evidence purely to implicate the accused in a crime which did not occur. As a result of this, the rules of practice require that a Court warn itself against the danger of convicting an accused on the uncorroborated evidence of the complainant."**

Upon evaluating the evidence, the trial Court found as a fact that PW1 was trapped 'legs up and head down'. That she clearly saw the three people who came to her rescue. The Court accepted the evidence of the doctor, PW4, that despite her ordeal, it was possible for PW1 to identify her attackers even though she had been unconscious for some time. The Court also relied on the evidence of PW2, the aunt to PW 1 that the moment PW1 saw the Appellant, she contemporaneously pointed at him as the attacker. The Court concluded that there was no possibility of an honest mistake.

In the High Court, before sentencing the Appellant, the learned Judge rightly observed that the identification of a single witness must be approached with caution and that such evidence

must be weighed against other factors such as lighting and visibility.

In the instant case, we note that the attack occurred around 06.00 hours when there was sufficient light for PW1 to observe her attackers even before she lost consciousness. The attackers approached as good Samaritans to help her down the tree but only attack her when she was safely down. We agree that PW1 had a good opportunity to see these people. PW1 told the Court that she knew the Appellant before. Also, it is on record that when she saw the Appellant at the market, PW did not hesitate but contemporaneously pointed at him. There is, therefore, nothing in the circumstances of this case from which it can be inferred that PW1 falsely implicated the Appellant. In our view, this constituted **'a special and compelling ground'** which entitled the trial Court to convict on the uncorroborated evidence of a single witness and discount false implication. The arguments by the Appellant that the trial Court erred are, therefore, unsustainable.

The Appellant has also argued that the trial Court did not address its mind to the onus on the prosecution to negative a defence of alibi that was raised by the Appellant. The record,

however, shows that the trial Court considered the defence of alibi that was raised by the Appellant. It took guidance from our decision in the case of **KATEBE V THE PEOPLE**[1] where we held that:-

> **"Where a defence of alibi is set up and there is some evidence of such an alibi, it is for the prosecution to negative it. There is no onus on the accused person to establish his alibi."**

The Court discounted the defence as an afterthought because it was never raised at the Police Station to enable the police to investigate it and the two witnesses called by the Appellant to support his alibi were his father and sister, and according to the Court, they were relatives with a possible interest to serve.

In the case in ***casu***, the evidence of alibi was adduced from DW1 and DW2 the Appellant's father and sister. We agree with the trial Court that they were witnesses with an interest to serve. The defence of alibi was only raised when the Appellant was conducting his defence. We cannot fault the trial Court for concluding that the defence was raised as an afterthought. The Court correctly warned itself on the danger of relying on such evidence. As we stated in the case of **BWALYA V THE PEOPLE**[1]; simply saying **"I was in Kabwe at the time"** does not place a duty on the police to investigate an

alibi. In the circumstances, Section 210 of the Criminal Procedure Code cannot be relied upon.

From the foregoing, we find no merit in the first ground of appeal. It is dismissed. The appeal against conviction is hereby dismissed.

The second ground of appeal is against sentence. The Appellant has argued that the sentence of life imprisonment imposed on him was excessive and wrong in principle in that the Appellant was a first offender who deserved lenience. This Court has, in a plethora of cases, held that an Appellate Court will not lightly interfere with the discretion of the trial Court on sentence, unless the sentence comes to it with a sense of shock. In the instant case, the Appellant was given the maximum sentence of life imprisonment. In the learned Judge's view, the Appellant, although a first offender, did not deserve leniency because, according to the Judge, the facts of the case were *"too ghastly and the Appellant was callous and unsympathetic in his attack on the defenceless girl"* .

In the case of **SOLE SIKAONGA V THE PEOPLE**[6] we explained the rationale of the minimum sentence of 15 years and maximum of life imprisonment for defilement in the amended

Section 138 of the **PENAL CODE**[a]. We held that the legislature had given the Court the freedom to impose different sentences according to the facts of each case. The facts, in this case, show that the prosecutrix was brutally and savagely beaten. This is evident from the testimony of PW 2, who told the trial Court that when he was informed that there was a dead body by the roadside, it was only when he touched the body that he discovered that there was still some life in the body of the girl. She had been raped and left for dead. PW4, the doctor, told the Court that PW1 was admitted to the hospital in an ***'unconscious state.'*** These facts are gruesome and show that the girl was left for dead. Against these grizzly facts, the sentence of life imprisonment does not come to us with a sense of shock. We have not been persuaded to interfere with the sentence imposed by the High Court. The appeal against sentence fails.

We find this entire appeal to have no merit. It is dismissed.

I.C. Mambilima
CHIEF JUSTICE

A.M. Wood
SUPREME COURT JUDGE

M. Malila
SUPREME COURT JUDGE