

IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 64/2018
HOLDEN AT NDOLA AND LUSAKA
(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

AND

ARRON SHAMAPEPE



APPELLANT

RESPONDENT

Coram: Mchenga, DJP, Ngulube and Majula, JJA

On 21st August 2018 and 25th September 2018

For the Appellant: C. Mbewe-Hambayi, Deputy Chief State
Advocate, National Prosecution Authority

For the Respondent: K. Chitupila, Senior Legal Aid
Counsel, Legal Aid Board

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court

Cases referred to:

1. Regina v Samuel Hill [1851] 2 Den. 254
2. Spittle v Walton [1871] LR 11 Eq. 420.

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The High Court Act, Chapter 27 of the Laws of Zambia

3. The Subordinate Courts Act, Chapter 28 of the Laws of Zambia

4. The Juveniles Act, Chapter 53 of the Laws of Zambia

5. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

When this matter came up for hearing at our last sittings in Ndola, Mrs Mbewe-Hambayi, who was appearing for the appellant, indicated that they were abandoning the appeal. We indicated that since the proceedings in the trial court raised an important procedural issue, the reception of evidence from a witness with a mental illness, it was our intention to provide guidance before disposing of the matter.

The respondent appeared before the Subordinate Courts charged with the offence of defilement of an imbecile or person with a mental illness, contrary to **section 138 of the Penal Code**. He denied the charge and the matter proceeded to trial. The prosecutrix's mother gave evidence, which included a revelation that her daughter was an imbecile. After her testimony, the prosecutor

informed the trial magistrate that since the prosecutrix was "of unsound mind", he would only ask her a few questions.

Without being sworn or affirmed, the trial magistrate allowed the prosecutor to examine the prosecutrix. The prosecutor asked for her names, age and if she knew the respondent. In response, the prosecutrix gave her names but said she did not know how old she was. She also said she knew the respondent and proceeded to set out, in sufficient detail, the circumstances in which he defiled and impregnated her. At the end of her testimony, she was cross-examined by the respondent. Thereafter, the prosecutor re-examined her.

Section 43 of the Subordinate Courts Act provides that any person who is required to give evidence in that court, must take the oath. There is a similar provision in **section 28 of the High Court Act**, for persons intending to give evidence in the High Court. In addition, **section**

36(1) (c) of the High Court Act, provides that a witness, can in lieu of taking the oath, affirm.

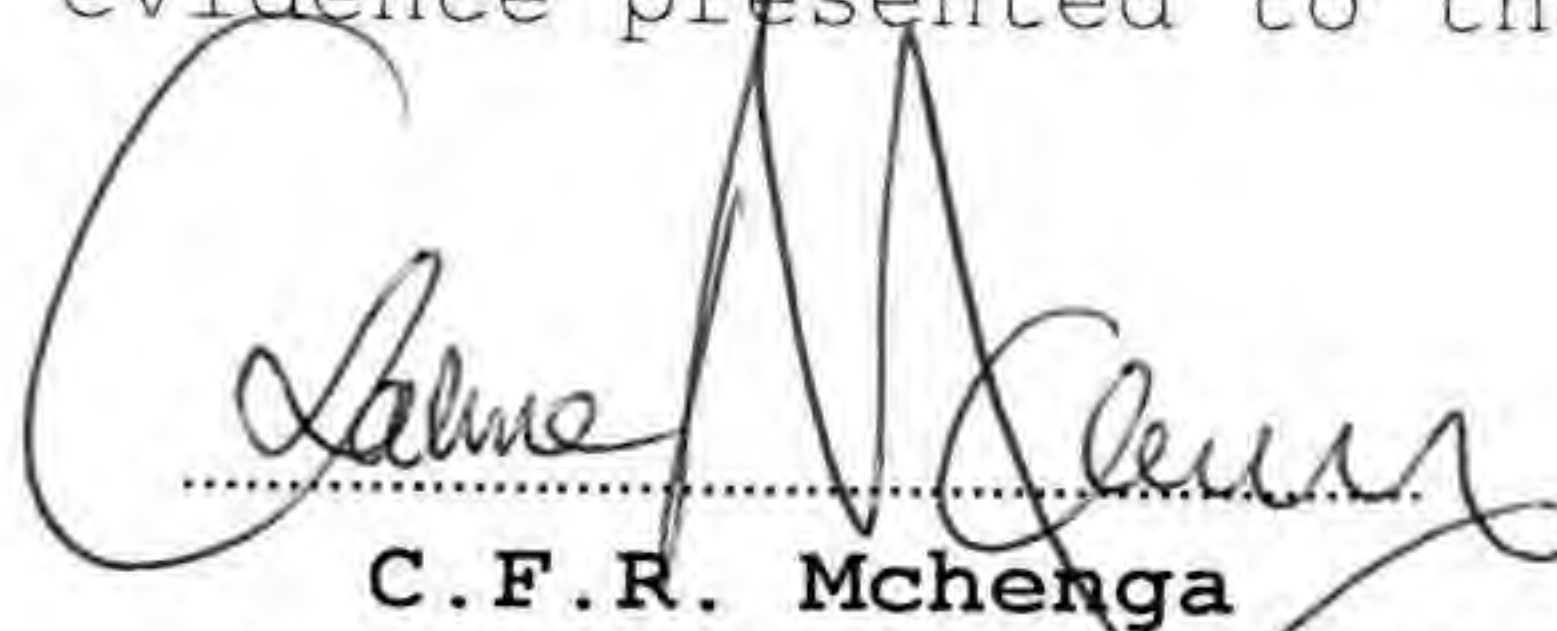
Following **Amendment No. 2 of 2011 of The Juveniles Act**, which abolished reception of unsworn evidence from a child, the only witness who can give unsworn evidence is an accused person who elects to make a statement; see **sections 208 and 291(1) of the Criminal Procedure Code**.


This being the case, it was wrong for the trial magistrate to allow the prosecutrix to give evidence before or without being sworn or affirmed.

Further, in the case of **Regina v Samuel Hill¹**, it was pointed out that the evidence of a person with a mental illness is admissible, if the court is satisfied that he/she understands the questions put to him/her and can respond rationally. Such a witness must also appreciate the effect of taking the oath. It follows, that where there is an objection to a witness giving evidence on the ground that the witness is of unsound mind or suffers

from a mental illness, the trial judge or magistrate, must conduct a *voir dire* before allowing the witness to testify; see the case of **Spittle v Walton**².

We must emphasise that such *voir dire* is not concerned with the circumstances in which the offence was committed but whether the witness is competent to testify. A witness is competent to testify if he/she can rationally give evidence and understands the import of taking the oath. Further, the *voir dire* it is not concerned with whether the witness can give credible evidence, for credibility is an issue that can only be determined after assessing all the evidence presented to the court.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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P.C.M Ngulube
COURT OF APPEAL JUDGE


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B.M. Majula
COURT OF APPEAL JUDGE