IN THE COURT OF APPEAL OF ZAMBIA: APPEAL NO 13/2019
HOLDEN AT KABWE
(Criminal Jurisdiction)

ALFRED MAUMA **APPELLANT**

V

THE PEOPLE **RESPONDENT**

CORAM: MAKUNGU, MULONGOTI AND SIAVWAPA JJA
On 21st and 24th May 2019

FOR THE APPELLANT: MR. H.N. MWEEMBA, PRINCIPAL LEGAL AID COUNSEL

FOR THE RESPONDENT: MR. F.M. SIKAZWE, SENIOR STATE ADVOCATE

J U D G M E N T

SIAVWAPA, JA; delivered the Judgment of the Court

Cases referred to:

1. ***Emmanuel Phiri v The People (1982) ZR 71(SCZ)***
2. ***Machipisha Kombe v The People (2009) ZR 282 (SCZ)***
3. ***Saluwema v The People (1964)ZR 2004 (SCZ)***
4. ***Sikaonga v The People (2009) ZR 192 (SCZ)***

5. ***Kingstone Makungu v The People CAZ Appeal No. 184/2017***
6. ***Justronich, Schutte and Lukin v The People (1965) ZR 9 (CA)***
7. ***Kaambo v The People (1973) ZR 132 (SCZ)***

Legislation referred to:

Criminal Procedure Code chapter 88 of the Laws of Zambia

The Appellant was charged with and convicted of one count of incest and sentenced to 35 years in prison with hard labour by the High Court. The facts of the case disclose that on a date unknown but between April and 17th May 2017, the Appellant had carnal knowledge of the prosecutrix aged 15 years at the time and who to his knowledge was his brother's daughter, or niece.

The evidence before the trial court was mainly that tendered by the prosecutrix who stated that the act occurred on 19th May 2017. She said that the Appellant waylaid her as she was returning from the hammer mill on a bicycle and grabbed her and dragged her into the bush where he forcibly had sexual intercourse with her lasting about twenty minutes.

After the act, the Appellant got back to the road, picked up the bicycle and carried the prosecutrix home where he left her together with the bicycle. He warned the prosecutrix that he would kill her if she told anybody about the sexual act between them. She resisted telling anybody on account of the threats but on the third day, a

Sunday, she opened up to her mother when she questioned her upon noticing that she could not sit properly.

On Monday the 22nd May, 2017, her father, took her to Monze Hospital for examination after her mother told him about the incident. Thereafter he reported the matter to the police.

On 27th May 2017, he returned to the village with the prosecutrix and went to the Appellant's house. When he asked him about the incident, he admitted having had sexual intercourse with the prosecutrix. He then asked the Appellant to reduce his admission into writing which he did. The admission was signed by the Appellant, PW1, the father to the prosecutrix, PW3, the mother to the prosecutrix and Dyna Mauma.

According to the evidence of PW2, the prosecutrix, she felt pain during and after the intercourse. She confirmed PW3's testimony that the Appellant admitted having sexual intercourse with her in her presence. As for the bruises on her legs, she said she sustained them as the Appellant was dragging her into the bush and that during sexual intercourse she sustained an injury on her vagina.

PW4, the mother to the Appellant and PW1 said that the admission took place at her home when after the prosecutrix had narrated how the Appellant had sex with her on three occasions, his only response was that it would be foolish for him to deny as what the prosecutrix had said was the truth. She also confirmed that the Appellant voluntarily reduced the admission into writing

When the Appellant was referred to a warn and caution statement and the admission document, he denied giving any statement and authoring the admission document. This was according to the evidence of PW5, the arresting officer.

In his defence, the Appellant conjured a narrative that tended to establish a basis of acrimony between him and his elder brother PW1, the father to the prosecutrix and her mother PW4. He claimed that he and PW1 had agreed to sell family land for K2, 000.00 but that PW1 did not give him a share of the money.

The two later agreed that PW1 would pay him in kind through bags of maize but that his mother, PW4 said that PW1 and his family would starve if he gave him the maize. Further, he said that PW1 and PW5 took cattle from the family herd saying they were part of dowry payment for PW1's marriage. When he asked for cattle to pay damages for the girl he had impregnated, the request was rejected.

He claimed that on 10th June, 2017, PW1 lured him to the police station where he was arrested after telling him that they were going to meet a cattle buyer. He also accused PW1 of having grabbed a field from him after he had tilled it and that PW1 turned his house into a pig pen.

In his Judgment, the learned trial magistrate found as a fact that someone did have sexual intercourse with the prosecutrix and this finding of fact was corroborated by the medical report that confirmed the absence of the hymen from the prosecutrix. The trial

court went on to rely on the identification evidence of the perpetrator as given by the prosecutrix and the fact that the incident occurred during the day. He ruled out honest mistaken identity as the Appellant is her uncle who is well known to her.

The Appellant advanced two grounds of appeal one against conviction and the other against sentence. The ground against conviction argues that there was no corroboration of both the commission of the offence and the identity of the perpetrator. The ground against sentence argues that the 35 year sentence was harsh for want of aggravating circumstances. They both filed heads of argument upon which they largely relied save for brief oral submissions to augment.

In their arguments both parties relied extensively on the law relating to corroboration in sexual offences as set out in the cases of Emmanuel Phiri v The People[1] and Machipisha Kombe v The people[2]. Both decisions of the Supreme Court of Zambia state that corroboration as to the commission of the offence and the identity of the offender is a prerequisite to a conviction in sexual offences. This is in order to eliminate the danger of false complaint and implication and failure by the court to warn itself of the danger is misdirection.

In the case of Machipisha (supra), the Court went on to define what corroboration is not and what it is that firstly it is not equal to

[1] (1982) ZR 71 (SCZ)
[2] (2009) ZR 282 (SCZ)

independent proof and neither is it conclusive evidence. It is said to be independent evidence which confirms the truthfulness of what a witness has said as to the commission of the offence and the identity of the offender.

In arguing the first ground, the Appellant has paid particular attention to the lack of certainty as to the date of the commission of the offence both in the charge sheet and the fiat from the Director of Public Prosecutions as well as the disparity in the dates appearing on the medical examination report. It is argued that whereas the charge sheet and the fiat state that the offence was committed between April and 17th May 2017, the evidence of PW2 is that the offence was committed on 19th May 2017.

It has been argued that the said inconsistencies ought to be resolved in favour of the Appellant in line with the case of Saluwema v The People[3]. It was further argued that the absence of the hymen can be caused by other factors such as riding a bicycle and climbing trees and that the injury on the vagina purportedly seen by the mother was not supported by PW2's testimony who only testified of seeing white stuff and not blood.

On the trial magistrate's reliance on the admission statement exhibited, it was argued that since the Appellant had disputed authoring it, the same should have been subjected to examination by a handwriting expert.

[3] (1964) ZR 204 (SCZ)

On the arguments relating to the second ground, the case of Sikaonga v The People[4] was called into aid in so far as it holds that in an ordinary case of defilement, the minimum sentence of fifteen years in prison should be imposed unless it is shown that the victim was also infected with a sexually transmitted disease. This holding is said to be equally applicable to the offence of incest where the minimum sentence of twenty years in prison ought to be imposed in the absence of aggravating circumstances.

We were also referred to the case of Kingstone v The People[5], which is our decision in which we maintained the minimum sentence of twenty years in a case of incest and we have been urged to maintain consistency in sentencing where the circumstances of the cases are similar. Other cases were cited whose import is to emphasize the desirability of uniformity in sentencing. See Justronich, Schutte and Lukin v The People[6] and Kaambo v The People[7].

In opposition, the Respondent has submitted that PW2's testimony of the commission of the offence and the identity of the perpetrator was corroborated by the medical report and the admission made in the presence of PW4, the Appellant's mother, PW1 and PW2. As regards the date inconsistencies, it was submitted that the same were not prejudicial to the Appellant and reference was made to section 213 (2) of the Criminal Procedure Code chapter 88 of the Laws of Zambia. The said section provides as follows;

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[4] (2009) ZR 192 (SCZ)
[5] (Appeal No. 184/2017 (CAZ)
[6] (1965) ZR 9 (CA)
[7] (1973) ZR 132 (SCZ)

"variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by the law for the institution thereof"

With regard to ground two, it was submitted that the sentence of thirty five years was not made in error considering that the maximum is life imprisonment. In addition it was submitted that the fact that the prosecutrix was fourteen years old, that she was abused on three occasions with accompanying threats of death to her and being in a position of trust as the father (uncle) to the girl are all aggravating circumstances.

We have given much thought and consideration to the arguments in this appeal and the Judgment by the court below sought to be impugned and we accordingly give our views hereunder:

It is beyond debate that corroboration in sexual offences is cardinal and no conviction can stand if the trial Court has not adequately dealt with it in the Judgment. As held in a plethora of cases including the ones cited in this judgment, corroborative evidence is merely something independent that tends to support the evidence of a witness that the alleged offence was committed and the accused person is the one who committed it.

In this appeal, the trial court found corroboration of PW2's evidence as to the commission of the offence in the medical report which recorded the absence of the hymen although no further findings are recorded. In our view, the exhibited medical report fell short of providing the requisite standard of corroboration to the offence of incest because, as argued by Mr. Mweemba, the absence of a hymen alone is not corroboration of sexual intercourse.

Other factors such as presence of semen, tenderness of the vaginal lining, or bruises in addition to the absence of the hymen can amount to corroboration of recent sexual activity.

But the Court had the opportunity to look elsewhere for corroboration and one such source, is the evidence of the girl's mother, PW3, who on the third day noticed that the girl had difficulties sitting down and when she asked her, she revealed what had happened. Upon examining her genitalia, she noticed a cut on the vagina. This piece of evidence is equally not sufficient corroboration as there is no medical evidence to show that the cut on the vagina was due to sexual intercourse.

The last piece of evidence that was considered is the admission which was produced before the trial court. Although the Appellant denies authoring or signing the said document, the trial court wondered why PW4, the mother to the Appellant who was keeping him could falsely implicate him in such an offence. The trial court accepted the document as having been authored by the Appellant.

We accept the trial court's finding that the admission was given by the Appellant and that the narrative given by the Appellant tending to establish a motive for false implication by his mother, brother, sister in law and his niece, was an after- thought. The admission therefore, provides sufficient corroboration to the testimony of PW2 both as to the commission of the offence and to the identity of the Appellant as the offender.

As regards the issue of the date of the commission of the offence, we note that Mr. Mweemba's submission is that the inconsistencies in the dates on the documents cited bring into question the credibility of the charge.

Our view is that the varying dates on the documents are the usual case of failure of human memory after a long period and human typographical slips. Looking at the charge sheet and the fiat, the two are consistent. However, in evidence, the prosecutrix and the other witnesses are consistent with 19th May 2017 as the date the offence was committed.

As regards the dates on the medical report, we notice the consistency in the dates on the two date stamps on top and at the bottom at page 53 of the Record of Appeal. What is different is the handwritten date which states the month as June (6) while the day and the year are consistent. We believe the hand written date was an error which does not go to the root of the offence.

Further, we also take the view that the fact that the charge sheet and the fiat have not captured the date of the offence in the particulars does not render the charge ineffective as the actual date was revealed by the witnesses at trial. We are satisfied that these variances are captured by section 213 (2) of the Criminal Procedure Code as cited earlier in this judgment.

We therefore, find no merit in ground one of the appeal and we dismiss it accordingly.

Ground two which attacks the sentence for being excessive rests on two factors namely; that it offends against the need for consistency in sentencing and that there are no aggravating circumstances that should make the minimum mandatory sentence inappropriate. We accept that there must be consistency in sentencing in offences committed in similar circumstances.

We also acknowledge the guidance given by the Supreme Court in the authorities cited and of particular interest is the case of Phiri (supra) in which the Supreme Court stated the need to treat first offenders with leniency as circumstances of each case may permit. The rider given however is that, this is to be done where it is hoped that a stiffer sentence is not necessary.

We however, also recognize that whenever, the Legislature prescribes a minimum mandatory sentence, it leaves the Court with the discretion to impose a sentence within the legal boundaries which it considers suitable in the circumstances of the case. Being

a first offender does not as of right entitle the offender to the minimum sentence unless the Court considers it appropriate.

We also note that the offence of incest is premised on the assumption that the sexual intercourse is between consenting adults. So when it is committed against a child below the age of sixteen then it is open to the trial court to consider the age of the victim as an aggravating factor.

Although the Court below did not expressly state in passing sentence that the 35 year sentence was based on the girl's age, it is on record at page 51 that the learned Judge took into consideration the fact that the girl was aged fourteen years while he was thirty five years old and the girl was the Appellant's elder brother's daughter.

The next issue to consider is whether the sentence is so unreasonably low given the facts that it comes to us with a sense of shock. In the case of Sikaonga (supra), the Supreme Court expressed a sense of shock at the sentence of forty years for defilement which carries a minimum sentence of fifteen years and a maximum of life imprisonment. It subsequently imposed a sentence of 25 years imprisonment.

The offence of incest carries a minimum sentence of twenty years and a maximum of life imprisonment. We find that given the circumstances of the case as set out by the court below, the sentence of thirty five years imprisonment does not come to us with

a sense of shock for being inadequate or excessive. We therefore, find no merit in ground two and dismiss it accordingly.

The sum total of our Judgment is that this appeal fails in its entirety and we dismiss it accordingly.

C.K. MAKUNGU
COURT OF APPEAL JUDGE

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

M.J. SIAVWAPA
COURT OF APPEAL JUDGE