**IN THE COURT OF APPEAL OF ZAMBIA** **Appeal No.58/2020**
**HOLDEN AT LUSAKA AND NDOLA**
(Criminal Jurisdiction)

**B E T W E E N:**

**MATHEWS CHITUPILA CHALWE** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**



**CORAM: Mchenga DJP, Ngulube and Siavwapa, JJA**

**On 23rd September 2020 and 20th November 2020**

**For the Appellant: K. Muzenga, Acting Director, Legal Aid Board**
**For the Respondent: M. Muyoba Chizongo, State Advocate, National Prosecution Authority**

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# J U D G M E N T

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**Mchenga DJP**, delivered the judgment of the court.

**Cases referred to:**

1. Alubisho v The People [1976] Z.R. 11
2. Benai Silungwe v The People [2008] Z.R. 123
3. M.S. Syakalonga v The People [1977] Z.R. 61
4. Jutronich, Schutte and Lukin v The People [1965] Z.R. 11

**Legislation referred to:**

1. The Penal Code, Chapter 87 of the Laws of Zambia

## 1. Introduction

**1.1** The appellant, appeared before the Subordinate Court (Hon. F. Sato), charged with the offence of incest, contrary to **section 159(1) of the Penal Code.**

**1.2** He denied the charge and the matter proceeded to trial. At the end of that trial, he was convicted and committed to the High Court for sentencing.

**1.3** In the High Court (Limbani J.), a sentence of 45 years imprisonment with hard labour was imposed on the appellant.

**1.4** He has now appealed against the sentence only.

## 2. Evidence before the trial court

**2.1** In November 2018, the appellant's daughter, Loveness Chalwe, aged 18 years, was found to be pregnant. On being questioned by her mother and aunt, she pointed at the appellant as being the person responsible. She told them that he had sexual intercourse with her, on a number of occasions, at the fields. Prior to the encounters, he would threaten her.

**2.2** In court, Loveness Chalwe told the trial magistrate that beginning in early 2018, the appellant, had sexual intercourse with her in the fields on multiple occasions. The appellant also told her, that he would kill her, if she told her mother about it.

**2.3** In his defence, given through an unsworn statement, the appellant did not deny having sexual intercourse with his daughter. He claimed that he started having sexual intercourse with her after she insisted, on the ground that since there was a rumour in their village, that he was sleeping with her, no one would marry her.

## 3 Sentencing in the High Court

**3.1** The High Court judge took a dim view of the appellant's conduct, noting that despite having a wife at home, he had sexual intercourse with his daughter and impregnated her.

**3.2** He went on to say, to deter others from committing the same offence, he would impose a deterrent sentence. The appellant was then sentenced to 45 years imprisonment with hard labour.

## 4 Ground of appeal and argument in support

**4.1** The sole ground of appeal is that the learned trial judge misdirected himself in law and fact when he sentenced the appellant to 45 years imprisonment, in light of him being a first offender.

**4.2** In support of the sole ground of appeal, Mr. Muzenga referred to the case **Alubisho v The People**[1] and submitted that since the appellant was a first offender and there were no aggravating factors, the sentence of 45 years imprisonment, should come to this court with a sense of shock, as being excessive.

**4.3** Mr. Muzenga also argued that it was wrong for the judge to impose a more severe sentence because the prosecutrix was his daughter, because the offence of incest was all about a man having sexual intercourse with female relatives, including daughters. Similarly, he argued that being impregnated, is not an aggravating factor, because it is a natural consequence of sexual intercourse between two consenting adults.

**5 States response**

**5.1** In response, Mrs. Miyoba-Chizongo indicated that she supported the sentence. She submitted that the judge was entitled to take the prevalence of the offence into account. She also argued that the pregnancy of the prosecutrix in this case, is an aggravating factor, that the judge was entitled to take into account, when imposing the sentence.

**6 Courts consideration of the appeal**

**6.1** In the case of **Benai Silungwe v The People**[2], it was held, inter alia, that:

> **'unless the case has some extraordinary features which aggravates the seriousness of the offence, a first offender ought to receive the minimum sentence'**

**6.2** First of all, we agree with Mr. Muzenga's view that the fact that an offender had sexual intercourse with his daughter, should not in itself, attract an adverse sentence in a charge of incest. This is because the offence is concerned with an offender having sexual intercourse with certain female relatives, including a daughter.

**6.3** We equally agree with his argument that a pregnancy that is conceived in an incestuous relationship, cannot be an aggravating factor, for adult persons having a consensual sexual relationship, can be taken to be aware that, pregnancy is a probable consequence of such a liaison.

**6.4** However, the facts of this case point at something different from the ordinary. The appellant's daughter, according to the evidence accepted by the trial magistrate, did not consent to having sexual intercourse with the appellant. He forced himself on her, and thereafter threatened to kill her, if she brought the relationship to the attention of her mother. As it has turned out, it was not once but on multiple occasions.

**6.5** That being the case, the pregnancy in this case was rightly classified as an aggravating factor, because it was not a product of a consensual liaison between the appellant and his daughter. Further, the use of threats of death, to procure sexual intercourse, further

aggravated the circumstances in which the offence was committed in this case.

**6.6** The other factor that the sentencing judge took into account is the prevalence of the offence. In the case of **M.S. Syakalonga v The People**[3], the Supreme Court, held that:

> **'It is perfectly proper to refer to the prevalence of an offence and to use that prevalence as a basis for imposing a deterrent sentence.'**

It was therefore within the trial judge's discretion, to take into account, the increased number of cases in which men are sexually abusing their daughters when imposing the sentence, because it is a fact of public notoriety.

**6.7** What remains to be resolved is, should we tamper with the sentence? In the case of **Jutronich, Schutte and Lukin v The People**[4], the Court of Appeal, held, *inter alia*, that in dealing with appeals against sentence, the appellate court should ask itself these three questions:

> **(1) Is the sentence wrong in principle?**
> **(2) Is the sentence so manifestly excessive as to induce state of shock?**
> **(3) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?**

6.8 Given that the incestuous sexual relationship between the appellant and his daughter was procured by threats and resulted in a pregnancy, which are aggravating factors, the sentence of 45 years, does not come to us with a sense of shock, as being excessive. On the facts of this case, we are satisfied, that the sentencing judge, exercised his discretion judiciously, when sentencing the appellant.

6.9 That being the case, the sole ground of appeal fails.

**7 Verdict**

7.1 The sole ground of appeal having failed, this appeal is unsuccessful and we dismiss it. The sentence imposed by the High Court, is upheld.

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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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**M. J. Siavwapa**
**COURT OF APPEAL JUDGE**