IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 81/2020**

HOLDEN AT LUSAKA

(*Civil Jurisdiction*)

BETWEEN:

COSHENT MUCHINDU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Kondolo, Chishimba and Sichinga, JJA.
On 19th January, 2021 and 26th March, 2021

For the Applicant:	*Ms. E. I. Banda, Senior Legal Aid Counsel- Legal Aid Board*
For the Respondent:	*Ms. M. T. Mumba, Chief State Advocate- National Prosecutions Authority*

JUDGMENT

Sichinga, JA delivered the Judgment of the Court:

Cases referred to:

1. ***Emmanuel Phiri v The People (1982) ZR 77***
2. ***Mwabona v The People (1973) ZR 28***
3. ***Yokoniya Mwale v The People- SCZ appeal No. 285 of 2014***
4. ***Musupi v The People (1978) ZR 271***
5. ***Kambarage Mpundu Kaunda v The People (1990-92) ZR 215***
6. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)***
7. ***Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People (1988 - 1989) Z.R. 163***
8. ***Machipisha Kombe v The People (S.C.Z Judgement No. 27 of 2009)***

9. ***Nsofu v The People (1973) Z.R 287***
10. ***Daniel Banda v The People- Appeal No. 137 of 2018, Court of Appeal***
11. ***R v Baldrey (1852) 2Don Cr. 120***

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **The Penal Code (Amendment Act) *Act No. 15 of 2005***

1.0 Introduction

This appeal is against a judgment of the Subordinate Court at Livingstone (M. Mulalelo) dated 29th July, 2019 pursuant to which the appellant herein was convicted of defilement, contrary to ***section 138 (1) of the Penal Code***[1] as read with ***Act No. 15 of 2005***[2].

1.1 The particulars of the offence alleged that the appellant, on 20th March, 2018, at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia, had unlawful carnal knowledge of RC, a girl under the age of 16 years. He was sentenced to 25 years imprisonment with hard labour.

1.0 Prosecution evidence

1.2 PW1 (the prosecutrix) aged 14, gave evidence on oath after a *voire dire* was successfully conducted. She testified that on 20th March, 2018 (hereafter "the material day"), she was heading to Maramba to see her grandmother when she met the appellant's wife around 19:00 hours, whom she referred to as Aunty Moment. As they walked together, the said Aunty Moment parted with PW1, proceeded to go to Ngwenya and asked her husband, the appellant herein, to escort the prosecutrix. The prosecutrix and the appellant

proceeded together and were later joined by the appellant's friend, with whom the prosecutrix was not familiar.

1.3 The prosecutrix testified further that the said friend of the appellant then suggested that they use a short cut through a bush. When they got there, the appellant pushed her to the ground, pulled her skirt up, removed her pant, opened his zip to remove his penis, which he inserted in her vagina and had sexual intercourse with her. Meanwhile, the accused's friend squeezed her throat to stop her from screaming. PW1 testified further that thereafter, the appellant's friend also proceeded to have sex with her in the same manner, and she experienced pain in her vagina.

1.4 The prosecutrix further told the court that the two men only had sex with her once, and thereafter the appellant told her not to narrate what had happened to his wife. The two then left and the prosecutrix ran into a nearby yard where she knocked but there was no answer. She then went into a bathroom and stayed there until morning, for fear of another attack.

1.5 The prosecutrix testified that the next morning, she went to Potter's- a vegetable market, to look for Aunty Moment and when she found her, she narrated how the appellant and his friend had defiled her the previous day. The appellant's wife then suggested that the appellant be taken to the police but when they went to his house, they found that his belongings were no longer there. A search party was sent out to look for the appellant and he was later apprehended at a rail line and taken to Mbita Police station.

1.6 The prosecutrix concluded her testimony by saying that she was given a medical form at the police station and proceeded to her grandmother's place. She was later taken to the hospital by her parents, where some tests were carried out, and a medical report was issued.

1.7 PW2 was the prosecutrix's mother. Charity Simunji, whose testimony was to the effect that on the material day, she left her daughter at home when she went to work at 9:00 hours and when she returned at 22:00 hours, the prosecutrix was not home. She then recalled that the prosecutrix had earlier on said she would go and see her grandmother. PW2 called her mother, but the phone was off. When she finally managed to call her mother the following morning, her mother told her that the prosecutrix had not visited her the previous day.

1.8 After efforts to try to locate her missing daughter failed, PW2 decided to report the matter to the police and as she was preparing to leave, her mother called her and informed her that the prosecutrix had just arrived at her place. PW2 told the court further that she went to her mother's residence and found the prosecutrix, who narrated to her how she had been raped by two men, one of whom was the appellant. She then took her daughter to the hospital, where some tests were carried out and returned the medical report to the police.

1.9 Regarding the identity of the appellant, PW2's testimony was that she had known him for almost 3 years, as he once worked at her bar as a door bouncer. That he later quit his job and when he returned, their relationship was not good. She stated that she could not falsely implicate the appellant.

1.10 PW3 was Chimpwaya Mathews, a teacher at Highcross Primary School in Livingstone. He testified that the prosecutrix was a pupil in his class when she was in her seventh grade, before she was transferred to another school. The witness produced an attendance register indicating names, dates of birth and addresses of pupils, among other details. The details of the prosecutrix were also listed in the same register.

1.11 Kanene Chimunya (PW4), a police officer, testified that on the material day, he took a docket relating to a case of defilement where one Moment Junta reported on behalf of R. C. aged 14 that her husband and another male had unlawful carnal knowledge of the girl. At the time, the appellant was already in police custody. That upon interviewing the victim, she narrated to him the events of the ordeal as set out in the summary of her testimony at paragraphs 1.2 to 1.3 above.

1.12 The witness testified further that having warned and cautioned the accused in Tonga language, he gave a free and voluntary reply admitting the charge.

1.13 Clayton Choonga was PW5. His testimony was that on 21st March, 2018, the appellant's wife and PW1 approached him and the appellant's wife told him that the appellant had defiled PW1. That when he asked where the appellant was, the appellant's wife responded that he got his clothes from the house and left. She then asked him to go and apprehend the appellant. PW5 told the court that he found the appellant in the bush and apprehended him. When asked why he defiled PW1, the appellant admitted and added that he was not alone but with his friend and the two took turns.

2.0 Defence

2.1 DW1- the appellant, stated in his defence that on the material day while he was at work at Potter's, PW1 approached him and asked him if her mother had given him the money that he had worked for at Mbita Bar, and the appellant responded that she had not given him, as the matter was still in court. That PW1 then told him that her mother had chased her and she had relocated to another compound. He said she asked if she could spend the night at the appellant's place, and he responded in the negative because his house only had one room.

2.2 The appellant further told the court that PW1 left and returned around 19:00 hours, saying she had been chased from where she was staying. He then knocked off and the duo went to see his wife at a bar, and the couple later escorted PW1. The appellant testified that they then met PW1's boyfriend along the way and PW1 said when she fought with her mother, she usually slept at her boyfriend's place. He then handed her over to the said boyfriend.

2.3 DW1 denied having sex with PW1 and told the court that he was apprehended on 21st March, 2018, at 09:00 hours by some gentlemen who told him that his wife had reported him to the police. That at the police station, he was told that he had raped PW1 with his friend, but he did not make a statement nor sign any document.

3.0 The decision of the subordinate court

3.1 The learned Magistrate found that that the prosecutrix was aged 13, based on an affidavit produced by PW2 and the school register produced by PW3. The court below also found, based on the medical report, that the prosecutrix was defiled, and that the evidence of the medical report also corroborated the prosecutrix's testimony that she was defiled by the appellant.

3.2 The trial Magistrate further found that the prosecutrix's testimony was also corroborated by PW2 that she told her mother when she found her at her grandmother's house that the appellant and his friend had sexual intercourse with her, by which time she had already reported the matter to the police and a medical report had already been issued.

3.3 As regard's the appellant's defence, the trial court found that the appellant contradicted himself when he denied having met the

prosecutrix on the material day around 19:00 hours, but also admitted having escorted her on the same date and around the same time in the company of his wife.

3.4 In addition, the lower court came to the conclusion that there was no reason as to why the prosecutrix would falsely implicate the appellant, or PW5 who apprehended the appellant, which shows that there was a complaint from the prosecutrix before a complaint was lodged with the police. On this basis, the trial court found that the evidence against the appellant was overwhelming, and accordingly convicted him.

4.0 The appeal

4.1 Dissatisfied with the judgment of the lower court, the appellant launched this appeal advancing the following ground of appeal:

1. *The learned court below erred in both law and fact when it convicted the appellant when it failed to warn itself on convicting the appellant on the uncorroborated evidence of PW1 and PW2 being witnesses whose evidence was suspect.*

5.0 Appellant's arguments

5.1 Ms. Banda, learned senior legal aid counsel, argued on behalf of the appellant that the evidence implicating him was that given by the prosecutrix and her mother- PW2 and that in its analysis of the evidence, the trial court failed to warn itself of this category of witnesses, thereby misdirecting itself and failed to guard against the dangers of false implication. She argued further that the evidence implicating the appellant as the offender should have been corroborated as a matter of law and submitted in this regard that there was no independent evidence to this effect, other than that of the afore-mentioned witnesses. The case of ***Emmanuel Phiri v The People***[1] was cited to support the position that the law requires

corroboration of both the commission of the offence and the identity of the offender.

5.2 Counsel noted that the trial court vaguely addressed its mind to the need for corroboration but misapplied the law and as such, misdirected itself when it found that the medical report was independent evidence that corroborated PW1's evidence, and yet the said medical report only points to establish that the prosecutrix was defiled, but does not establish the identity of the perpetrator.

5.3 With regard to the trial court's finding that PW1's evidence was corroborated by that of PW2, it was argued on behalf of the appellant that the court should have warned itself that PW1 and PW2 were suspect witnesses whose evidence could not be relied upon as a basis for a conviction unless there were compelling reasons to do so. ***Mwabona v The People***[2] was cited to this effect, wherein it was held that:

> ***"The evidence of a biased witness should be treated with caution and suspicion and failure to regard him as such is a misdirection on the part of the court, which may lead to a conviction being quashed. In order to eliminate apparent bias from a relative or a family member, there is need of independent evidence or "something more."***

5.4 On this basis, counsel submitted that *in casu*, there was nothing to mitigate or offset the apparent bias and prejudice to the appellant, as there was no independent evidence pointing to the appellant as being the person who committed the alleged offence.

5.5 We were also urged to follow ***Yokoniya Mwale v The People***[3] on the subject of witnesses with an interest to serve. In addition,

counsel cited a holding in the case of ***Musupi v The People***[4] where the Supreme Court stated as follows:

> ***"The critical question is not whether the witness does in fact have an interest or a purpose of his own to serve but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case may have a motive to give false evidence."***

5.6 On this premise, it was counsel's submission that the evidence of PW2 could not corroborate that of the prosecutrix, as she fell in the ambit of a witness with her own interest to serve. The case of **Kambarage Mpundu Kaunda v The People**[5] was also cited on the issue of suspect witnesses.

5.7 Our attention was drawn to the evidence of PW2 to the effect that she and the appellant had a misunderstanding which led to a dispute in the Local Court. Counsel submitted based on this evidence that PW2 had reason to falsely implicate the appellant.

5.8 In conclusion, Ms. Banda pointed out an inconsistency in the evidence of the prosecutrix where she testified that the appellant and his friend only had sex with her once, and yet PW4 testified that the prosecutrix told him that when the appellant finished having sex with her, he ran away, leaving his friend, who had a second turn with her. That based on this and other gaps in the prosecution's case, it was wrong for the trial court to convict.

6.0 Respondent's heads of argument

6.1 Ms. Mumba submitted on behalf of the state that the evidence of the prosecutrix was sufficiently corroborated both as to the commission of the offence and the identity of the offender. We were directed to the evidence that the appellant was with the prosecutrix

on the material day around 19:00 hours, and that the appellant himself testified that at some point, him and his wife escorted the prosecutrix. He also confirmed the presence of a third person, although he referred to this person as the prosecutrix's boyfriend.

6.2 The state further noted that after stating that he escorted PW1 with his wife, the appellant said, *"I handed over R. C. to the boyfriend"* instead of, *"We handed over R. C. to the boyfriend."* Learned counsel submitted that this indicates that the appellant was alone with PW1 at some point in the absence of his wife, which corroborates the evidence of PW1 that the appellant was tasked with the responsibility of escorting her after which he took advantage of the situation by committing the offence as the evidence of PW1 shows.

6.3 The respondent submitted further that the evidence of PW5 corroborates that of PW1 to the extent that it is the appellant who committed the offence. In this regard, reference was made to PW5's testimony that when he apprehended the appellant as instructed by the appellant's wife, the appellant told him that he was not alone but with his friend, with whom he took turns having sex with the prosecutrix. That this evidence corroborates that of the prosecutrix, and there is no evidence on record to suggest that PW5 was a biased witness.

6.4 It was further argued that PW5 corroborated PW1's testimony that the day after the offence was committed, the appellant packed up his clothes from his matrimonial home, which raises a question as to why he left in a haste. Counsel submitted in this regard that the reasonable conclusion is that he was trying to escape the consequences of his act the night before.

6.5 With regards to the suspicion of PW2's evidence, the state submitted that PW1 went straight to the appellant's wife the

morning after the offence was committed, and only met her mother at her grandmother's place after the appellant had been apprehended and the matter had been reported to the police. That as such, PW2 had no chance to concoct a story against the appellant, and the court was therefore on firm ground when it proceeded to convict the appellant.

6.6 In supporting the conviction, the state submitted that the trial court addressed its mind on the need for the court to warn itself of the dangers of false implication where witnesses are friends or relatives of the prosecutrix as set out in the case of ***Kambarage Mpundu Kaunda v The People***.[5] Thereafter, the court proceeded to assess the evidence on record and concluded that it found no reason why PW1, or indeed PW5, would implicate the appellant.

6.7 Counsel went on to submit that although the trial court did not specifically state in its judgment that it had warned itself, it clearly addressed its mind to the need for warning itself as to corroboration in sexual offences where the evidence is adduced by witnesses who are friends or relatives of the prosecutrix. She argued that notwithstanding the foregoing, a court can still convict and to this effect cited ***Emmanuel Phiri v The People***[1] where it was held that:

> ***"A conviction can be upheld in a proper case not withstanding that no warning as to corroboration has been given if there in fact exists in the case corroboration or that something more as excludes the dangers referred to."***

6.8 Based on this holding, Ms. Mumba submitted that the trial court's judgment shows that the court did not only rely on the evidence of PW2 to arrive at the decision to convict the appellant, but found that there was corroboration, as earlier stated.

7.0 Our decision

7.1 This appeal raises one primary question for determination, that is; whether the evidence of the prosecutrix was sufficiently corroborated to implicate the appellant as the one who committed the subject offence. The appellant contends that the only evidence to the effect that he committed the subject offence was that given by PW1 and PW2, who were suspect witnesses and as such, the evidence of PW2 could not corroborate that of PW1 for purposes of implicating the appellant as the one who committed the subject offence.

7.2 A reading of the submissions by both parties reveals that there is no dispute that PW1 was defiled and as such, the finding of the lower court to this effect remains unchallenged. This being said, we will now proceed to examine the evidence on record and interrogate the basis upon which the trial court found that the facts disclosed corroborative evidence relating to the identity of the appellant as the offender.

7.3 The trial Magistrate stated at page J7 of the judgment that:

> ***"The prosecutrix was defiled according to the medical report marked P2. Which corroborates PW1's testimony that she was defiled by the accused person. PW1's testimony is also corroborated by PW2 that she told her mother when she found her at her grandmother's house that the accused person and his friend had sexual intercourse with her."***

7.4 We must hasten to first point out that it was a serious misapprehension on the part of the trial court to infer that the

medical report corroborates PW1's testimony that she was defiled by the appellant. The medical report is indeed corroboration of PW1's testimony that she was defiled but does not corroborate the identity of the appellant as the one who defiled PW1. We therefore agree, with no hesitation, with the appellant's submission that the medical report only points to the fact that PW1 was defiled but does not establish the offender.

7.5 We are of the view that the circumstances of this case warrant our reversal of this finding of the trial court and we so do, guided by the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***[6] as the same is perverse, for reasons earlier stated.

7.6 The trial court also found corroborative value in PW2's evidence that PW1 told her when they were at PW1's grandmother's house that the appellant and his friend had sexual intercourse with her.

7.7 What the appellant is challenging is the propriety of the trial court's reliance on or acceptance of PW2's evidence without warning itself of the category of witnesses to which PW2 belongs, thereby failing to guard against the danger of false implication, unless there were compelling reasons to do so.

7.8 We note from the record and from the respondent's submissions that the lower court at page J7 of its judgment made reference to the case of ***Kambarage Mpundu Kaunda v The People*** *supra* and cited the holding in that case that where witnesses are relatives or friends, the court must warn itself of the dangers of false implication.

7.9 In the same vein, the appellant argued that although the trial court did point out the issue of witnesses who are related, it did not analyse which evidence amounted to something more for purposes of mitigating and offsetting the apparent bias and prejudice to the

appellant. The question that we now find ourselves confronted with is whether or not the danger of false implication was properly excluded, in relation to the evidence of PW2.

7.10 As we seek to resolve the effect of the omission of the trial court to analyse which evidence had the effect of offsetting possible bias or prejudice to the appellant, if any, we are guided by the case of ***Boniface Chanda Chola, Christopher Nyamande And Nelson Sichula v The People***[7] where the Supreme Court stated thus:

> ***"In the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognize this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe. Once this is a reasonable possibility, the evidence falls to be approached on the same footing as for accomplices."***

7.11 In our view, after citing the ***Kambarage*** *case,* the trial court made two omissions. Firstly, he did not warn himself that PW2 being PW1's mother, belonged to a category of witnesses who may have a motive to give false evidence. Secondly, the trial court did not satisfy itself that the danger of false implication had been excluded and it was safe to rely on the evidence of PW2. The effect of these omissions is that the evidence of PW2 remained to be treated as being in the same category as that of an accomplice. As such, we find that it was not safe to rely on her evidence for purposes of corroborating PW1's evidence as to the identity of her defiler.

7.12 For this conviction to stand, there should be something more from the record, which confirms or could have confirmed, had the trial Magistrate properly applied the law, that PW1 was telling the truth when she said it was the appellant who defiled her. We are guided in this regard by ***Machipisha Kombe v The People***[8] where it was stated:

> ***"...True, the trial Magistrate did not refer to corroboration in her evaluation of the evidence. But we are of the view that had she evaluated the evidence in relation to the above stated legal principles, she would have held that there was enough corroboration as to the identity of the appellant as the culprit. Therefore, we dismiss the appeal."***

7.13 This brings us to another aspect of the evidence on record that we reckon was worthy of consideration by the trial court- that is evidence of opportunity. The Supreme Court, and indeed this Court has in a number of cases given guidance on how in befitting circumstances, evidence of opportunity may be of corroborative value as to the identity of the perpetrator.

7.14 There is evidence to the effect that at some point on the material day, the appellant was alone with the prosecutrix after his wife left him to escort the prosecutrix. The only variance in the appellant's evidence from PW1's testimony is that he claimed to have handed her over to another male who he referred to as her boyfriend, while PW1 said the appellant and she were joined by his friend and the two males later had sex with her.

7.15 One of the leading authorities on the principle of evidence of opportunity amounting to corroboration is the case of ***Nsofu v The People***[9]. The Supreme Court stated therein that:

> ***"Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case. In Credland v Knowler [2] Lord Goddard, C.J., at page 55 quoted with approval the following dictum of Lord Dunedin in Dawson v Mackenzie:***
>
> > ***"Mere opportunity alone does not amount to corroboration but... the opportunity may, be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may, be such as in themselves to amount to corroboration"***

7.16 We applied this principle in ***Daniel Banda v The People***[10] and stated that for such opportunity to be said to have corroborative value, there should have been something unusual or out of the ordinary as to raise suspicion of the interaction of the accused with the prosecutrix.

7.17 In the ***Daniel Banda*** case, the appellant and the prosecutrix were cousins who lived in the same house when the offense of defilement was allegedly committed. We found that this alone could not amount to corroboration as to the identity of the appellant as the one who defiled the prosecutrix because there is nothing unusual or indeed suspicious about cousins living in the same house in a family setting, nor did these circumstances satisfy the element of locality. In addition, there was no evidence that closed out the possibility of anyone else to have defiled the prosecutrix at the alleged time, as the opportunity was not confined to the appellant alone.

7.18 *In casu*, our analysis of the evidence on record in relation to the concept of opportunity for purposes of corroboration is as follows: PW1 and the appellant were walking together on the material day shortly before the alleged defilement. Although the two knew each other, there is nothing on record to suggest that they usually took walks together or spent time together.

7.19 In our view, their walking together, especially that it was for the specific purpose of the appellant escorting PW1, amounted to an unusual occurrence. Evidence suggesting that the two were together near the place that the defilement took place also satisfies the element of locality. The uncontested evidence to the effect that the prosecutrix reported the incident to the appellant's wife the morning after the material day diminishes the possibility of her having been exposed to another male.

7.20 Based on the aforesaid and guided by the case of ***Machipisha Kombe v The People***[8] as outlined in paragraph 7.12 above, we find that had the trial Magistrate properly evaluated the evidence in relation to the above stated legal principles relating to evidence of opportunity, she would have found that there was evidence of opportunity amounting to corroboration as to the identity of the appellant as the culprit. This amounted to 'something more' other than the testimony of PW1 confirming that it was the appellant who defiled her.

7.21 Notwithstanding the above stated, we accept Ms. Mumba's submissions that the evidence of PW5 corroborated that of the prosecutrix on the identity of the offender. PW5 testified that when he went into the bush with others, he found the appellant and apprehended him. He questioned the appellant as to why he had sex with the prosecutrix to which the appellant admitted the charge saying he was not alone but was with a friend and

they took turns in having sex with PW1. This testimony of the appellant's alleged confession went unchallenged in cross-examination. PW5 was an independent witness who was not a person in authority. In the case of ***R v Baldrey***[11] it was held that where a confession is proved it is the best evidence that can be produced. We find that this evidence sufficiently corroborates PW1's testimony that the appellant was the offender.

7.22 Therefore, we find that the conviction must stand, and we accordingly dismiss this appeal.

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M. M. Kondolo, SC
COURT OF APPEAL JUDGE

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F. M. Chishimba
COURT OF APPEAL JUDGE

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D. L. Y. Sichinga
COURT OF APPEAL JUDGE