IN THE COURT OF APPEAL OF ZAMBIA **Appeal No 51/2021**
HOLDEN AT LUSAKA AND NDOLA
(Criminal Jurisdiction)
BETWEEN:

DENIS MUNYINYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Sichinga and Muzenga, JJA

18th January 2022 and 22nd February 2023

For the Appellant: **A. Banda, Legal Aid Counsel, Legal Aid Board**

For the Respondent: **M. Tembo-Wedza, Acting Deputy Chief State Advocate, National Prosecution Authority**

J U D G M E N T

Mchenga, DJP delivered the judgment of the Court.

Cases referred to:

1. Gift Mulonda v. The People [2004] Z.R. 135
2. Mwaba v. The People [1974] Z.R. 264
3. Nsofu v. The People [1973] Z.R. 381
4. Solomon Chilimba v. The People [1971] Z.R. 36

Legislation referred to:

1. The Penal Code, Chapter 87 of The Laws of Zambia
2. The Court of Appeal Act, No. 16 of 2016 of The Laws of Zambia

1. INTRODUCTION

1.1. The appellant appeared before the Subordinate Court (Hon. M.C. Mikalile, as she then was), on a charge of defilement contrary to **Section 138(1) of The Penal Code.**

1.2. When the trial Magistrate read out the charge and explained the defence in the proviso, he denied the charge. The case was then adjourned for trial.

1.3. On the trial date, the appellant requested that he retake the plea.

1.4. The charge was then read out to him, but the defence in the proviso was not explained. He admitted the charge.

1.5. However, the trial magistrate retained a plea of not guilty. This was because the appellant indicated that he believed that the prosecutrix was 18 years old at the time he had sexual intercourse with her.

1.6. The matter then proceeded to trial.

1.7. At the end of the trial, the appellant was convicted and committed to the High Court for sentencing.

1.8. In the High Court (Sharpe-Phiri, J., as she then was), he was sentenced to 20 years imprisonment, with hard labour.

1.9. He has appealed against the conviction and the sentence.

2. CASE BEFORE THE TRIAL COURT

2.1. On the 23rd of April 2019, around 19:00 hours, the appellant and the prosecutrix, both residents of Makeni Villa, in Lusaka, went into an incomplete house within the suburb, and had sexual intercourse.

2.2. According to the prosecutrix, who was aged 14 years at the time, the appellant was carrying a knife at the time he took her into the incomplete house.

2.3. Thereafter the prosecutrix returned home.

2.4. Her mother noticed a blood stain on her trousers. On being questioned, she informed her that the

appellant had sexual intercourse with her, at knife point.

2.5. The incident was reported to the police and the prosecutrix was subsequently examined by a doctor who confirmed that she had recently had sexual intercourse.

2.6. In his defence, which was through an unsworn statement, the appellant did not deny having sexual intercourse with the appellant.

2.7. He claimed that the act was consensual and that the prosecutrix was his girlfriend. He called a witness who confirmed the existence of that relationship.

2.8. Further, in his defence, he made no mention of his beliefs on the age of the prosecutrix at the time he had sexual intercourse with her.

2.9. The trial Magistrate considered whether the defence in the proviso, was available to the appellant. She noted that while he had raised it when he was taking his plea, he abandoned it during the trial.

(ii) **The trial Magistrate erred in law and fact when she did not take into consideration the appellant's evidence when he raised the defence in the proviso; and**

(iii) **The sentencing Judge erred in law and fact when she imposed a harsh sentence of 20 years imprisonment without taking into account the fact that the appellant was a first offender who deserved leniency**

5. **ARGUMENTS IN SUPPORT OF THE 1ST and 2nd GROUNDs OF APPEAL**

5.1. The 1st and 2nd grounds of appeal were argued at the same time.

5.2. Ms. Banda referred to the case of **Gift Mulonda v. The People**[1] and submitted that the trial magistrate was obliged to explain the defence in the proviso, to the appellant, the second time he took the plea. The failure to do so greatly prejudiced the appellant.

5.3. She also referred to the case of **Mwaba v. The People**[2], and pointed out that even where a person pleads not guilty, it is desirable that the defence

is explained. She submitted that since the proviso in **Section 138 of The Penal Code**, was not read out to the appellant, he was prejudiced because he did not know of the defence's existence.

5.4. Ms. Banda also submitted that having failed to properly direct the appellant on the defence, it was wrong for the trial Magistrate to conclude that there was no evidence on which she could have considered whether the appellant may have believed that the prosecutrix was above the age of 16 years.

5.5. She pointed out that the since the appellant indicated that he believed that the prosecutrix was 18 years old at the time he was taking the plea, there was evidence on which the availability of the defence should have been considered.

6. ARGUMENTS AGAINST THE 1ST and 2nd GROUNDS OF APPEAL

6.1. In response to the 1st and 2nd grounds of appeal, Mrs. Tembo-Wedza referred to cases, including **Nsofu v. The People**[3], and submitted that the appellant was not prejudiced in any way when the proviso was not read out to him the second time he took the plea.

6.2. She argued that the appellant became aware of the existence of the defence in the proviso when he initially took his plea, as can be noted from the fact that he raised it.

7. COURTS CONSIDERATION OF THE 1ST and 2nd GROUNDS OF APPEAL

7.1. The two grounds of appeal raise two issues. The first being the effect of the failure to read out the proviso to the appellant when the plea was retaken. The other issue, is whether there was evidence on which the defence in the proviso, should have been considered.

7.2. We will first deal with the question whether the failure to inform the appellant of the defence in the proviso when the plea was retaken, was fatal to the prosecution's case.

7.3. The cases of **Gift Mulonda v. The People[1], Mwaba v. The People[2] and Nsofu v. The People[3]**, all make it clear that where a person who is charged with the offence of defilement, is not represented, the defence in the proviso should be brought to his attention at the time the plea is being taken.

7.4. The situation in this case was slightly different.

7.5. When the trial magistrate initially took the plea, she explained the proviso to the appellant. However, when he requested to retake the plea, the proviso was not explained.

7.6. The appellant admitted the charge when the plea was retaken. However, the court recorded a plea of not guilty because the appellant raised the defence in the proviso. He claimed that he believed that the prosecutrix was 18 years old.

7.7. This clearly points to the fact that he was aware of the existence of the defence in the proviso and that is why he was able to raise it.

7.8. In the circumstances, it cannot be said that the appellant was prejudiced when the proviso was not explained to him when he retook the plea.

7.9. Before we deal with the question whether there was evidence on which the defence in the proviso could have been considered, we will say something on Ms. Banda's submission that the appellant was not

properly guided on the availability of the defence in the proviso.

7.10. We have not observed anything wrong with the way the trial Magistrate approached the availability of the defence in the proviso.

7.11. Even though the appellant was not represented, having opted not to say anything about his belief that the prosecutrix was above the age of 16 years, it was not for the trial Magistrate to tell him to say something about it.

7.12. Such an approach, would have been a misdirection as it would have had the effect of suggesting to the appellant that raising the defence was probably desirable, in the circumstances of the case

7.13. Reverting to Ms. Banda's submission that there was evidence on which the trial Magistrate could have considered the availability of the defence in the proviso, Ms. Banda referred to what the appellant said when he was taking his plea.

7.14. Ms. Banda pointed out that the appellant raised the defence because he said he believed that the prosecutrix was above the age of 16 years.

7.15. What an accused person says during the taking of a plea is not evidence.

7.16. That being the case, save for the purposes of determining whether the offender admitted or denied the charge, what the offender said when taking the plea, cannot be used to assess or determine his guilt or innocence, at the end of the trial.

7.17. Neither can it be used to determine the credibility of his testimony. To this end, where an accused person decides to testify during his defence, he cannot be cross examined on what he said when he was taking the plea for the purposes of discrediting his testimony.

7.18. It follows, that when there is talk about there being evidence sufficient for the consideration for any defence, reference is being made to evidence given by witnesses, be it prosecution or defence witnesses.

7.19. It also encompasses evidence given by the accused person when he takes the stand as a witness.

7.20. Having examined the record of proceedings in the trial court, we are satisfied that the trial Magistrate was correct when she concluded that there was no evidence before her on which she could have considered the availability of the defence in the proviso.

7.21. We therefore find no merit in both the 1st and 2nd grounds of appeal, and we dismiss them.

7.22. This being the case, we uphold the appellant's conviction for the offence of defilement.

8. ARGUMENTS IN SUPPORT OF THE 3RD GROUND OF APPEAL

8.1. In support of the 3rd ground of appeal, Ms. Banda referred to the case of **Solomon Chilimba v. The People**[4], and submitted that there being no extraordinary fact that aggravated the circumstances in which the offence was committed, the appellant should have received the mandatory minimum sentence.

8.2. She argued that in the circumstances of this case, having in mind that the appellant was a first

offender, the sentence of 20 years imprisonment, should come to this court with a sense of shock as being excessive.

9. ARGUMENTS AGAINST THE 3RD GROUND OF APPEAL

9.1. In response, it was submitted that since a knife was used when the appellant committed the offence, there was an aggravating factor and the sentence imposed by the High Court should not come to us with any sense of shock.

10. COURTS DECISION ON THE 3RD GROUND OF APPEAL

10.1. In so far as it relates to an appeal against sentence, **section 16(5) of The Court of Appeal Act** guides as follows:

> **"The Court may, on an appeal, whether against conviction or sentence, increase or reduce the sentence, impose such other sentence or make such other order as the trial court could have imposed or made, except that—**
>
> **(a) in no case shall a sentence be increased by reason of or in consideration of evidence that was not given at the trial; and**
>
> **(b) the court shall not interfere with a sentence just because if it were a trial court it would have imposed a different sentence, unless the sentence is**

wrong in principle or comes to the Court with a sense of shock."

10.2. When imposing the sentence, the sentencing Judge found that the appellant's use of a knife when committing the offence, was an aggravating factor.

10.3. She also took the view that it was necessary to impose a deterrent sentence because of the prevalence of the offence.

10.4. She consequently found that it would be inappropriate to impose the mandatory minimum sentence, even if the appellant was a first offender.

10.5. Having regard to what the sentencing Judge considered before imposing the sentence, we do not find the imposition of a 20 years sentence on an offender who was carrying a knife when he defiled a child, to be wrong in principle.

10.6. This being the case, the sentence does not come to us with a sense of shock as being excessive.

10.7. As a result, we find no merit in the 3rd ground of appeal and we dismiss it.

11. VERDICT

11.1. Having found no merit in all the three grounds of appeal, we dismiss the appeal against both conviction and sentence.

11.2. However, the matter doesn't end there.

11.3. When imposing the sentence, the sentencing Judge ordered that the sentence should run from the date on which the appellant was arrested, which was the 23rd of February 2019.

11.4. The order that the sentence should run from the date of arrest, was wrong in principle. This is because the appellant was released on bail soon after his arrest.

11.5. A sentence should only run from the date of arrest where an offender was not admitted to bail following his arrest.

11.6. In this case, the appellant was only taken into custody following his conviction on the 20th of December 2019.

11.7. We set aside the order that the sentence should run from the date of arrest. In its place, we direct

that the sentence shall run from the date of the appellant's conviction, which was the 20th of December 2019.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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D.L.Y. Sichinga SC.
COURT OF APPEAL JUDGE

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K. Muzenga
COURT OF APPEAL JUDGE