IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 33/2022
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

PAUL MAKOLE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Chishimba and Muzenga JJA
On 21st September, 2022 and 15th December, 2022

For the Appellant: Mr. I. Yambwa – Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Ms. M. Kamwi Senior State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Emmanuel Phiri v The People (1983) ZR 77 (SC)**
2. **Goba v The People (1966) ZR 113**
3. **Daddly Fichite v The People – SCZ Appeal No. 21 of 2017**
4. **Trampa Moonga v The People – Court of Appeal No. 19 of 2018**
5. **Robson Chizike v The People – CAZ Appeal No. 94 of 2020**
6. **Nsofu v The People (1973) ZR 287**

7. **Justus Simwinga v The People – Selected Judgment No. 20 of 2018**
8. **Richard Daka v The People – SCZ Judgment No. 23 of 2013**
9. **Patford Mwale v The People – CAZ Appeal No. 23 of 2013**
10. **Gift Chipunde v The People – CAZ Appeal No. 109 of 2021**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Juveniles Act, Chapter 53 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The appellant was charged with one count of the offence of incest, contrary to **Section 159 of the Penal Code[1] as read together with The Penal Code (Amended) Act, No. 15 of 2005.** The particulars of offence allege that the appellant, on an unknown date but between the 1st day of June, 2020 and the 31st day of December, 2020, at Livingstone, in the Southern Province of Zambia had unlawful carnal knowledge of a girl of tender age, whom to his knowledge was his daughter. Subsequently, the appellant was convicted and sentenced to 35 years imprisonment with hard labour. (Before Mrs. Justice C. B. Maka-Phiri).

2.0 EVIDENCE IN THE COURT BELOW

2.1 The prosecution called five witnesses. The first prosecution witness was Philip Monze, who was two years old at the time. After a *voire dire,* he told the trial court that on a particular day he saw the appellant having carnal knowledge of the prosecutrix, in his bedroom.

2.2 The eleven-year-old prosecutrix testified as PW2. After a *voire dire,* she narrated that the appellant who is her father had been having carnal knowledge of her at Mukuni Village, Kazungula and in Mazabuka where they were staying. She told the trial court that she felt pain in her private parts every time the appellant had sex with her. She went on to narrate that whenever she refused to have sex with him he would threaten to beat her. She narrated that on one occasion, PW1 and another person called Paul saw them and he went to tell her mother. In turn, her mother went to report the matter to the police.

2.3 Isabel Siame, the mother to the prosecutrix testified as PW3. She told the trial court that on 26th December, 2020 while in Livingstone, her son Paul (PW1) told her that the appellant who is his father was having sexual intercourse with PW2. She narrated that she asked the prosecutrix whether what PW1 had said was true and she agreed. She

then enquired from them where this was happening from and she was told that it was happening from their house. The following day she called the prosecutrix who detailed her ordeal. She then tricked the appellant to come home where he was questioned about the prosecutrix's allegations. He accepted having had sex with the prosecutrix. She narrated that she later took the appellant to his parents who questioned him and he refused knowing anything. His parents advised her to report the matter to the police.

2.4 The appellant was later apprehended and taken to the police by the vigilantes. At the police, she was issued a medical report form which she took to the hospital. At the hospital, the prosecutrix was examined and after the examination, the doctor told her that her daughter's hymen was broken and that there were no sperms present in her vagina. She went on to say that after one day she got a call from the police informing her that her daughter had tested HIV positive and medicine been prescribed for her.

2.5 She told the trial court that when the prosecutrix was born she was HIV negative and that she only found out that she was HIV positive when she was pregnant with PW2.

2.6 The fourth prosecution witness was Sergeant Hope Cheelo a police officer. At the time of the arrest of the appellant, she was stationed at One-Stop Centre, a Gender Based Violence Clinic in Livingstone. She stated that on 6th January, 2021, she was allocated a docket of incest to investigate. She stated that the matter had been reported at Victoria Falls Police Post and the incident was alleged to have occurred at Mukuni Village.

2.7 She went on to interview the appellant who admitted abusing his daughter. Thereafter, they went to the scene of the crime where the appellant, the prosecutrix, the appellant's wife and the appellant's aunt were present. The prosecutrix demonstrated how the appellant abused her though she could not remember the exact number of times she was abused. She also stated that after being abused, the appellant would threaten her or give her coins and maize snacks.

2.8 She told the trial court that after a warn and caution statement she proceeded to charge and arrest the appellant of the subject offence.

2.9 The last prosecution witness was Sergeant Peter Chipita of Livingstone Central Police Station. He was present at the time PW4 was recording a warn and caution statement from the appellant. He told the trial

court that it happened at the police station and no weapons were present and neither was the appellant beaten or threatened. He told the court that after recording the warn and caution statement, it was read to him and he later signed it.

2.10 This marked the end of the prosecution case.

2.11 After considering the evidence of the prosecution witnesses, the trial court found the appellant with a *prima facie* case and was placed on his defence. He opted to give evidence on oath and called no witnesses.

3.0 DEFENCE

3.1 In his defence, the appellant told the trial court that he had been falsely implicated. He denied having done anything to her daughter and that whatever he said in the warn and caution statement is because he was beaten and threatened.

4.0 **FINDINGS AND DECISION OF THE LOWER COURT**

4.1 The trial court considered the evidence on record and found that the prosecutrix's evidence had been corroborated by the medical report and the testimony of PW1 who saw the appellant having sex with the prosecutrix in the bedroom. The trial court noted that PW1 and PW2

had no reason to implicate their father in this matter. The trial court concluded that the state had proved its case beyond all reasonable doubt.

4.2 In conclusion, the trial court found the appellant guilty as charged. Subsequently, the appellant was sentenced to 35 years imprisonment with hard labour.

5.0 GROUNDS OF APPEAL

5.1 Embittered by the conviction, the appellant filed two grounds of appeal couched as follows:

(1) The learned trial court erred when it convicted the appellant in the absence of corroboration of the commission of the offence.

(2) The trial court erred when it accepted and considered the evidence of PW3, being a child of tender age, whose evidence was accepted after a defective *voire dire.*

6.0 APPELLANT'S ARGUMENTS

6.1 At the hearing of this appeal on 21st September, 2022, learned counsel for the appellant Mr. Yambwa informed the Court that he will rely on the filed heads of arguments.

6.2 In support of ground one of the appeal, it was contended that the trial court convicted the appellant in the absence of corroboration of the commission of the offence and the identity of the offender. We were referred to the case of **Emmanuel Phiri v The People**[1] where it was held that:

> **"In a sexual offence there must be corroboration of both the commission of the offence and the identity of the offender in order to eliminate the danger of false complaint and false implication."**

6.3 It was contended that PW1 and PW2's evidence was not corroborated in a material particular. It was counsel's further contention that the medical report on record is unclear thus making it impossible for the same to provide any form of corroboration to the evidence of PW1 and PW2. It was further contended that the prosecutrix was sexually abused in Livingstone and Mazabuka between 1st June and 31st December, 2021, and the possibility that the prosecutrix could have been sexually abused by another person other than the appellant cannot be ruled out since there are other people whom she came into contact with during the above period and in those places. That there are no special and compelling grounds to rule out inherent dangers of

false implication. It was submitted that such doubt should be resolved in the appellant's favour.

6.4 In support of ground two of the appeal, it was the counsel's submission that the trial court erred when it accepted the evidence of PW1 and PW2, children of a tender age, after conducting a defective *voire dire.* It was submitted that the purpose of a *voire dire* is to determine that a child of tender age possesses sufficient intelligence to justify the reception of evidence on oath and that the child understands the duty to tell the truth.

6.5 It was contended that on the contrary, the court below in its findings after the *voire dire,* was that the children possessed sufficient knowledge to justify the reception of the evidence on oath and left out the part of the duty to speak the truth.

6.6 On the strength of the holding in the case of **Goba v The People**[2] we were urged to discount entirely the evidence of PW1 and PW2.

7.0 RESPONDENT'S ARGUMENTS

7.1 On behalf of the respondent, learned Counsel Ms. Kamwi indicated that the state supports the conviction and the sentence of the appellant. It was contended that the trial court was on firm ground when it found

that the medical report was sufficient corroborating evidence as to the commission of the offence. In support of this proposition, we were referred to the case of **Emmanuel Phiri v The People *supra.*** Counsel went on to contend that the presence or absence of injuries on the prosecutrix is a non-issue and that what is of paramount importance is that the medical report did indicate that the hymen of the prosecutrix was torn at 4 o'clock and at 6 o'clock which is an indication that she had suffered an injury.

7.2 Counsel referred us to the case of **Daddly Fichite v The People**[3] in which the Supreme Court held that **"the offence of defilement does not necessarily depend on the absence or presence of inflammation or bruises around the vagina or an intact hymen."** Further, it was contended that there is medical evidence that PW2 had been infected with HIV and PW3 confirmed that the child was HIV-negative at birth. Counsel submitted that the evidence of the commission of the offence was properly corroborated by the medical report.

7.3 With respect to corroboration as to the identity of the perpetrator, we were referred to the case of **Trampa Moonga v The People**[4] where

we held that **"it is trite law that the evidence of a child cannot corroborate that of another child."** It was counsel's argument that while the evidence of PW1 and PW2 cannot corroborate each other, there are special and compelling grounds. Counsel went on to contend that even though we held in the case of **Robson Chizike v The People**[5] that **"Section 122 of the Juveniles Act, requires that the evidence of the prosecutrix must be corroborated. This is a matter of law. Thus the magistrate was wrong to rely on the cautionary rule."** In the case of **Nsofu v The People**[6] the Supreme Court held that **"mere opportunity does not amount to corroboration, but . . . the opportunity may be of such a character as to bring in the element of suspicion. That is, circumstances and locality of the opportunity may be such as in themselves amount to corroboration."** It was contended that the appellant had an opportunity to commit the offence.

7.4 In responding to ground two of the appeal, it was contended that the *voire dires* conducted by the trial court were not defective. That the trial court asked the two witnesses questions which they properly answered and that the findings of the court may be defective but the

record is clear that the inquiry was hinged on whether PW1 and PW2 possessed sufficient intelligence to justify the reception of their evidence on oath and that they understood the duty to speak the truth.

7.5 In summation, it was submitted that the lower court properly conducted the *voire dires.* We were urged to dismiss the appeal and uphold the conviction and sentence.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 We have pedantically considered the evidence on the record, the arguments by both parties and the Judgment sought to be assailed.

8.2 We shall consider ground two first because of the position we have taken in this appeal.

8.3 It is trite that according to **Section 122 of the Juveniles Act,**[2] now repealed, before a court can receive the evidence of a witness below the age of 14, a *voire dire* must be conducted. The purpose of the *voire dire* is to determine if the witness is possessed of sufficient intelligence to warrant the reception of the evidence on oath and understands the duty to tell the truth (See the case of **Justus Simwinga v The People**[7]).

8.4 PW1 and PW2 were witnesses below the age of 14 and the learned trial court rightly proceeded to conduct *voire dires* before receiving their evidence. Counsel for the appellant took issue with the rulings of the trial court after conducting the *voire dires.* With respect to PW1, the Ruling was as follows:

> **"This witness possesses sufficient intelligence to allow me receive his evidence on Oath pursuant to Section 123 of the Juveniles (Amendment) Act No. 3 of 2011."**

8.5 The ruling in respect of PW2, the prosecutrix was as follows:

> **"I will receive this witness testimonies on Oath as she possesses sufficient intelligence to allow me receive her evidence on Oath pursuant to Section 123 of the Juveniles (Amendment) Act No. 3 of 2011."**

8.6 The Supreme Court in the case of **Richard Daka v The People**[8] underscored the importance of a ruling rendered by a court after *voire dire.* The apex court stated that:

> **"In the instant case, the *voire dire* in contention is found at pages 10 and 11 of the record of proceedings. The court concluded that the child possessed sufficient intelligence to give evidence on oath but it did not specifically state that the child understood the importance of telling the truth. Therefore, from the requirements of the law under section 122 of the Juveniles (Amendment) Act, 2011, we are satisfied that**

the *voire dire* was defective. We, therefore, allow this third ground of appeal."

8.7 In the case of **Patford Mwale v The People**[9] upon conducting a *voire dire,* the trial court rendered its Ruling in the following words, **"the prosecutrix has sufficient intelligence to warrant receiving the evidence on oath."** We found the *voire dire* to be defective on account of the defective Ruling.

8.8 In a more recent case of the **Gift Chipunde v The People**[10]**,** we equally found a *voire dire* to have been defective on account of the Ruling. We stated at page J7 that:

> **"It is therefore evident, that the trial court did not make a finding in conformity with Section 122 of the Juveniles Act. We are satisfied that the *voire dire* was in fact defective, and as such the evidence of the prosecutrix is discounted entirely, meaning it is *void ab initio.*"**

8.9 There is no doubt therefore that the *voire dires* conducted by the trial court herein are defective and the evidence of PW1 and PW2 must be discounted entirely. We allow ground two of the appeal. We quash the conviction and set aside the sentence imposed on the appellant. It is our considered view that the circumstances of this case warrant a re-trial.

8.10 We thus find it unnecessary to consider ground one of the appeal.

9.0 CONCLUSION

9.1 We allow ground two of the appeal. We order a retrial before another Magistrate. The appellant shall remain in custody until bail is granted to him.

C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

F. M. CHISHIMBA
COURT OF APPEAL JUDGE

K. MUZENGA
COURT OF APPEAL JUDGE