IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 25 of 2021

(Being Criminal Case No. 46 of 2021 in the Senior Resident Magistrate Court sitting at Mchinji)

Between:

INNOCENT IGNACIO SENZO ..... **APPELLANT**

and

THE REPUBLIC ..... **RESPONDENT**

CORAM: Honourable Justice Annabel Mtalimanja

Mr. Khumbo Soko, of Counsel for the Appellant

Mr. Trevor Mphalale, of Counsel for the Respondent

Mr. Saukila, Court Clerk

Mrs. Mpagaja, Court Reporter

JUDGMENT ON APPEAL AGAINST CONVICTION AND SENTENCE

Mtalimanja, J

1. The Appellant, Innocent Ignacio Senzo, was charged in the Senior Resident Magistrate Court sitting at Mchinji, with the offence of Defilement, contrary to section 138 (1) of the Penal Code, Cap. 7:01 of the Laws of Malawi. The particulars of the offence averred that the Appellant defiled BZ, a girl under the age of 16years, during the month of November, 2020, at Masautso village in Mchinji. He was convicted as charged after full trial, and sentenced to a custodial term of 21 years.

2. Aggrieved with the conviction, the Appellant is before this Court on appeal, on the ground that the learned Magistrate erred in law in convicting him when the weight of the evidence was against such a conviction. The Appellant contends that the evidence in the lower Court woefully fell short of proving the charge of Defilement on any standard, let alone the higher standard of proof beyond reasonable doubt.

3. Upon careful perusal of the record of the proceedings and the Judgment of the lower Court that culminated into a finding of guilty against the Appellant, this Court observes that the lower Court properly directed itself on the applicable burden and standard of proof in criminal matters. The lower Court also properly directed itself on the elements of the offence of Defilement. However, this Court further observes that notwithstanding the fact that it so properly directed itself, incredibly and lamentably, the lower Court merely regurgitated the testimony of the witnesses, in particular PW 1 and PW 5, as well as that of the Appellant and his only witness. After the summary of the testimony, the lower Court proceeded to record that

> *"In the long run we think the state has proved beyond reasonable doubt the accused's guilt. He defiled the victim (BZ) in the month of November last year (2020). We so find. Accordingly, we proceed to convict the accused person of the offence of defilement c/s 138 (1) of the Penal Code."* [sic]

4. The record shows that the lower Court did not analyse the evidence before it to determine whether the charge against the Appellant had been established, to the requisite standard of proof. The lower Court also did not indicate the

reasons for the finding of guilt it arrived at. This Court finds that the failure of the lower Court to record the reasons for the finding of guilt was an error of law. This is because section 140 (1) of the CP & EC states that, except where expressly provided by the Code, every judgment should be in writing and shall contain the point (s) for determination and the reason for the decision.

5. The position of the law is settled that when dealing with an appeal from a magistrate Court, the High Court proceeds by way of re-hearing of the case. Therefore, this Court will look at all the evidence that was before the lower Court, in light of the applicable law. This Court will interfere with the verdict if, on the law applicable, the verdict could not be had – see *Pryce v Republic [1971–72] 6 ALR (Mal) 65* and *Mulewa v Rep [1997] 2 MLR 60*.

6. An examination of the record of the proceedings in the lower Court shows that evidence was received from both the State and the Appellant. For the prosecution, 5 witnesses were paraded. PW1, Chisomo Mpona, the mother of the BZ, testified that at the material time she used to stay at Masautso village. She was working at God Embassy, Church of All Nations. She knew the Appellant, a husband to her friend, Rabecca Phiri. In November, 2020, having decided to go to Bunda Mountain in Lilongwe for prayers, she requested her friend Rabecca to keep her two children, BZ and CZ, aged almost 3 years at the material time. She spent 11 days at the mountain, then returned to her home in Mchinji.

7. The morning next to her return, she went to pick up her children. She was in the company of her friend, Grace's mother. She found the Appellant at the house, whom she informed that she had come to collect her kids. The Appellant told her that Rabecca had gone to Mocambique. He asked her to just leave the children there since they were playing. Later he accepted that she could take them.

8. Upon taking the children, after a distance, BZ, who was on her back, started fidgeting. She wanted to relieve herself, but she was just crying as she was struggling to pass urine. When they got home, she and her friend checked

BZ's private parts. They observed that her vagina was widened and there were sperms, sticky, coming out. Grace's mother advised her to take BZ to the hospital.

9. She went to Mchinji District Hospital, where she was referred to the Police to get a Medical Report Form. After getting the Form she went back to the Hospital. At the Hospital, they examined BZ. They felt sorry for she had been injured. The next day, the Appellant called her on the phone and said they should discuss something and resolve it amicably. Thereafter, he called her again 18 times but she did not pickup the phone.

10. From November, 2020, she never went back to the hospital, until February 2021. It was after HRDC and YONECO came in that the Appellant was arrested. After she was informed of his arrest, she went to the Police to have her statement recorded. Then she revisited the Hospital. The Medical Officer did not examine BZ because she was disappointed that she (the mother) had not gone back to the Hospital the day next after the first visit. She then took the matter to the District Health Officer (DHO), but the DHO did not examine the child to her satisfaction so she went to Kamuzu Central Hospital (KCH) for medical examination, where they were assisted.

11. In cross- examination she testified that she used to go to the Appellant's house, that even when something happened at her house, she used to go and stay at the Appellant's house. When she came to pick her children on 23rd November, 2020, the Appellant was uncomfortable and reluctant that she should get them. When she first went to the Hospital, they were not given a report as the Nurse who examined BZ had no pen. She stayed long without going to the Hospital because she had just let go of the issue. She went to all the Hospitals without the Appellant's relations. She delayed the matter because she started receiving threats from her Church. She was convinced that the Appellant was the one who defiled BZ as he called her and said they should solve the matter amicably.

12. PW 2, Detective Sub-Inspector Botha of Mchinji Police Station, testified that on 28th January, 2021, he received a file to investigate an allegation of

Defilement against the Appellant. PW1, who reported the matter, failed to bring medical report results. She was issued with another medical report later. The Appellant was arrested and recorded a statement under caution, in which he denied the charge. PW1 told the Police that Mrs. Ireen Zimba was threatening her. She also stated that the Appellant was apologizing to her.

13. PW 3, Davie White, a Medical Clinician at Mchinji District Hospital, testified that BZ was seen on 23rd December, 2020 by 2 Medical Officers. He saw her on 28th January, 2021 at 9.00am. His findings upon vaginal inspection were that there were no bruises, no lacerations and the hymen was intact. HIV and STI tests came back non-reactive. PW3 tendered his report as EX P2.

14. PW4, Madalitso Banda, testified that he is a Human Rights Activist with the HRDC and is based in Zomba. On 24th January, 2021, he received a WhatsApp message from one Hilda Makonyola. In the evening, her cousin Maureen called him to explain that her niece had been molested in Mchinji. On 26th January, 2021, they went to the Police, only to find out that the matter had not yet been reported. They then went to the get the Appellant and took him to the Police for interviews.

15. PW5, Josephy Banda, a Clinical Officer at KCH, testified that he received PW1 on 4th February, 2021, who reported that she suspected that the incident happened to her daughter BZ on 23rd November, 2020. When he examined her vagina, he noticed that there were no bruises on the external part thereof. There was nothing on the vaginal entrance. When he checked her hymen, he noticed that at her 11 o'clock there was a notch/ bruise that was healing. He concluded that since naturally a hymen is supposed to be intact, the bruise meant that BZ was at some point penetrated. He tendered his report at EX P3.

16. Upon being found with a case to answer, the Appellant testified in his defence as DW1. He testified that he stays at Masautso village in Mchinji. BZ used to come to his house because she was friends with his 2nd born daughter. In March, 2020, BZ's mother brought her to the house to keep her. She stayed with them for about 8 to 9 months. At that time, there were 8 people living in the house, including his wife and their 5 children. Of these, the males were his

son aged 10 years and himself. When PW1 came to pick up BZ upon her return, BZ was fine and had no difficulties walking. She picked her up and went without returning her. He never called PW1 to negotiate to solve this issue amicably. He does not know who did this. He first learnt of the complaint on 24th January, 2021.

17. The Appellant called one Ellena Mtolasonga as DW 2, however she testified that she neither knew the name of the victim, nor what had happened to her.

18. This is the sum of the evidence that was before the lower Court, and on the premise of which, the Appellant was convicted as charged. As indicated, the Appellant was charged with the offence of Defilement, under section 138 (1) of the Penal Code, which provides that any person who carnally knows any girl under the age of sixteen (16) years shall be guilty of a felony and shall be liable to imprisonment for life. To prove this offence, the burden of proof lay on the prosecution, to prove that the Appellant had carnal knowledge, of a girl under the age of sixteen (16) years. This being a criminal matter, the said two elements of the offence had to be proved to the requisite standard of proof, i.e. beyond a reasonable doubt.

19. The age of the victim was not and remains not in dispute presently. Whilst the issue of her age was not specifically addressed, it is clear from the record that she was under 2 years old at the material time. Being under 16 years of age, the charge of Defilement was appropriate.

20. As per *Republic v Mphande [1995] 2 MLR 586 (HC)*, penetration must be proved on a charge of defilement. The question to be determined in the present appeal therefore is whether the evidence in the lower Court established, beyond reasonable doubt, that there was penetration, at the instance of the Appellant.

21. It will be recalled that PW1, the mother of the victim testified that on the material day, after she had picked BZ from the Appellant, she noticed that BZ was having difficulty urinating. This according to her testimony was after she

had picked her from the Appellant's house and had walked a distance away from there. She also testified that an examination of her genitalia showed a widened vagina orifice and semen oozing therefrom. PW 1 testified that upon seeing this she concluded that her daughter had been defiled. She also concluded that it was the Appellant who had defiled her, since he is the one who was with the child when she picked her.

22. It will be observed from PW1's testimony that she did not see the Appellant having carnal knowledge of BZ. It will also be observed that none of the other witnesses saw the Appellant commit the offence. Thus, there was no direct evidence linking the Appellant to the said offence. Since the lower Court did not record its reasons for the verdict of guilty that it arrived at, it is difficult to fathom the basis of the conviction.

23. This Court reminds itself that notwithstanding the absence of direct evidence, guilt can be inferred from circumstantial evidence. The law regarding such evidence is that in order to justify an inference of guilt the Prosecution must establish beyond reasonable doubt that the facts are incompatible with the innocence of the accused and the evidence must be incapable of any other reasonable explanation – *Nyamizinga v Republic 1971 – 71 ALR Mw 258.* A court of law can only convict an accused person if one inference and one inference only, is possible from the circumstantial evidence. Where several inferences are open, some consistent with innocence and others consistent with guilt, it is not open to a court, in the absence of any other evidence, to choose the inferences consistent with guilt and to reject inferences consistent with innocence – *Viyaviya v Rep [2002-2003] MLR 423 (SCA).*

24. This Court observes that the insinuation from the evidence of PW1 that when she and her friend examined BZ they saw that her vaginal orifice was widened and there was semen oozing therefrom was that the Appellant had just defiled the baby when they picked her from him. It is noteworthy that PW1 did not testify that the baby was in distress when she and her friend picked her. She testified that the baby was fine until the moment when she wanted to pass urine later. In this Court's estimation, a baby as young as BZ, fresh from being subjected to penetration by a man as grown as the Appellant, would

immediately manifest physical signs of such violation, at the least, being in distress.

25. It will be observed that the friend who was purportedly in the company of PW1 when she picked and examined the baby was not called to testify. No explanation for her absence was advanced by the State during the trial. This Court reminds itself that by section 212 of the CP & EC, no particular number of witnesses is required to prove any fact. However, presently, the friend who is said to have been in the company of PW1 was a competent and material witness to be called to testify and corroborate PW1's testimony, given the inconsistencies that will be highlighted below.

26. Failure to call a crucial and material witness works against the party that was supposed to call that witness. The court will assume that the only reason why such a witness is not called is that the evidence is adverse to the party who should have called him – *Mpungulira Trading Ltd v Marketing Services Division [1993] 16 (1) MLR 346 (HC)*. Applying this principle to the present circumstances, and in the absence of any explanation why PW1's friend was not called to testify, this Court assumes that the only reason why the said friend was not called is because her testimony would have been adverse to the State's case.

27. It will be recalled that it was PW1's testimony that she took BZ to the Hospital, on the advice of the Police, to whom she had reported the incident, on the same day. She further testified that the Nurse who attended to them and examined BZ remarked that the baby had been injured, but she did not prepare a medical report of her findings because she had no pen.

28. This Court, in agreement with the Appellant, finds it rather incredible that the Hospital failed to produce a medical report in an incident as serious as the present case, for want of a pen. Further to this and most importantly, the Nurse who examined BZ was a crucial witness who would have testified as to the condition of the baby following the alleged incident. Incidentally, this name of this Nurse is not even known to these proceedings.

29. This Court is mindful that penetration cannot only be proved through a medical report - *Republic v Seda [1997] 1 MLR 386*. However, considering the fact that there was no direct evidence of penetration, the testimony of this Nurse would have formed part of the circumstantial evidence towards establishing this fact.

30. This Court observes that no explanation was advanced for the failure of the State to call the Nurse to testify. On the premise of the *Mpungulira* case above this Court concludes that she was not called because her testimony would have been adverse to the prosecutions case.

31. It will also be recalled that apart from the Nurse who was not called as a witness, BZ was examined by 2 other separate medical personnel, albeit on different dates. This Court observes that the testimony of the 2 latter medical witnesses was contradictory. On one hand, PW3 testified that when he examined BZ on 28th January, 2021, his findings were that there were no bruises and lacerations and her hymen was intact, suggesting there had been no penetration. On the other hand, PW 5 testified that when he examined BZ on 4th February, 2021 he observed that there were no bruises on the external part of her vagina. He further testified that he observed that there was a notch (a bruise) on her 11 o'clock that was healing. He concluded that there was some penetration at some point that caused the hymen to have this notch/bruise.

32. It will be observed that not only was the testimony of PW3 contradictory to that of PW5. It also contradicted that of PW1, in so far as PW1 testified that BZ's vaginal orifice was widened, suggesting that there had been penetration. It is also noteworthy that PW 3, who examined BZ earlier than PW5 did not observe any bruises and lacerations, whilst PW5 found a bruise when he examined her a few weeks later. This begs the question whether it is possible that this bruise that PW5 reported to have observed on BZ was inflicted after the examination by PW 3 in January, 2021.

33. As submitted by the Appellant, the lower Court only isolate on the testimony of PW5 in its summary of the evidence before it. The record glaringly shows

that lower Court ignored the testimony of PW3. The lower Court did not take the time to analyse the evidence of PW1, PW3 and PW5 to resolve the contradictions before it arrived at the verdict of guilty. As was stated in the case of *Kagwa v Republic 14 MLR 138 (SCA)*:

> *"The law relating to contradictory evidence given by the prosecution is clear. Where the prosecution lead evidence on a particular matter by two witnesses or more and that evidence is contradictory, any doubt raised by such contradiction must be resolved in the accused person's favour."*

34. Since PW1, PW3 and PW 5 gave contradictory evidence regarding the question whether there was penetration, this contradiction ought to have been and will presently be resolved in favour of the Appellant.

35. Regarding the testimony of PW3 and PW5, it was submitted by the Respondent that the medical reports tendered by these two medical personnel should be disregarded because they did not comply with the conditions set out in section 180 of the CP & EC.

36. Section 180 (1) provides that a report of an expert may be admissible on the mere production of it by any party to proceedings and be admissible in evidence therein to prove the facts and opinions of the expert, if any one of the conditions specified in section 180 (3) is satisfied. This provision operates as an exception to the rule against hearsay, to allow reports of experts to be admitted into evidence, where the expert who generated such report has not been called to testify in person; hence the emphasis on the conditions specified in section 180 (3).

37. It is instructive to note that PW3 and PW5 were called to and did testify in person. It cannot be thus said that their evidence was hearsay. This Court agrees with what was stated by Mzikamanda J, as he then was in the case of *Joseph Njovuyalema v Republic, Criminal Appeal No. 71 of 2007* that it cannot be hearsay if the maker of the document testifies in court on the

contents of the document he or she made. This Court thus finds that the testimony of PW3 and PW5 was admissible since section 180 did not apply to the same, the officers having testified in person.

38. The Respondent contends the medical personnel who testified in the lower Court were incompetent witnesses since they do not fall into the categories of Chief Clinical Officers, Senior Clinical Officers and Clinical Officers as specified in section 180 (2). This Court observes that PW 5 testified that he is a Clinical Officer. Substantively, this Court finds this argument to be misconceived in any event. Section 180 (2) does not restrict medical testimony to the 3 cadres specified. Section 180(2) is drafted in permissive terms by the use of the word "may" to allow the Minister of Health appoint officers who can serve as medical experts. As this Court understands it, this is for expediency and not for any other reason. This Court finds that section 180 (2) does not preclude any medical officer, of whatever grade or qualification to who attended to a testify in criminal proceedings as PW 3 and PW5. This Court thus finds that these two medical personnel were competent witnesses and their testimony was properly admitted into evidence.

39. It will be recalled that PW1 testified that she did not pursue the matter because she was being threatened by Mrs. Zimba and also because the Appellant kept calling her, telling her that the matter should be resolved amicably. This Court observes that there was indication that the purported threats were reported to the Police. This Court further observes that the Appellant denied having made any calls to PW1. His evidence was to the effect that he only became aware of the allegations in January 2021. Having denied making the calls, the burden was on the prosecution to prove that the calls were indeed made. The record shows that no evidence, whether by way of call logs or otherwise, was led.

40. The preceding factors considered in their totality, this Court comes to the conclusion that it cannot be said that the evidence of the prosecution leads to one and only conclusion that BZ was penetrated, by the Appellant. This Court thus finds that the prosecution evidence did not establish to the requisite standard of proof beyond reasonable doubt that the Appellant had carnal knowledge of BZ as alleged.

41. As indicated penetration is an element to be proved in a charge of Defilement. Having failed to establish this element, this Court this finds that indeed the conviction herein is unsafe. It is hereby set aside. That being so, the sentence must of necessity be and is hereby set aside as well. The Appellant will be released from custody forthwith, unless held for other lawful reasons.

42. It is so ordered.

Pronounced in Open Court this 22nd Day of October, 2021.

Annabel Mtalimanja

JUDGE.