IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CONFIRMATION CASE NO. 406 OF 2021

(Being Criminal Case No. 108 of 2021 before the First Grade Magistrate Court sitting at Chiradzulu)

THE REPUBLIC
V
MASAUTSO NAKAPA

Coram: Justice Vikochi Chima
Mr Mkweza, Senior State Advocate
Mr Mpombeza, Chief Legal Aid Advocate
Mrs Moyo, Court Clerk

ORDER IN CONFIRMATION

Chima J

1. The accused, who is aged 21 years, was convicted of defilement contrary to section 138 (1) of the Penal Code and was sentenced to ten years imprisonment with hard labour. When taking plea, the convict had said he indeed had sexual intercourse with the girl but also stated that the girl had told him that she was eighteen years old. The magistrate recorded a plea of guilt and the facts of the case were presented. He was then convicted on that plea of guilt. The reviewing judge set the matter for consideration of the propriety of the plea of guilt.
2. The facts were that the girl, a fifteen year old and a Standard 6 pupil, had been disappearing from her home for some periods of time until the last time when she disappeared for about two to three weeks. The parents reported the matter to the police and the police discovered the girl at the convict's house. The girl revealed that she was in a love relationship with the convict and that he had had sexual intercourse with the convict on several occasions.

3. Section 138 of the Penal Code provides that:

> '(1) Any person who carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life...
> Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court...**before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.'**

4. It is clear from the charging section that for one to be convicted of the offence one must have had sexual intercourse with a girl under the age of sixteen years of age and there must be no basis on which the accused could have founded a reasonable belief that the girl was underage. Thus the moment an accused person brings in the issue that they thought the girl was above the statutory age at plea stage, that spells a plea of not guilty, for they are denying one of the elements of the offence: that they lacked reasonable belief that the girl was underage. Their claim of reasonable belief then needs to be investigated based on the evidence to be brought both by the prosecution and the defence.
5. Section 251 (2) of the Criminal Procedure and Evidence Code states that for the court to record a plea of guilt, it should be satisfied that the accused is admitting the offence without qualification of the truth of the charge.
6. It was therefore wrong for the court to record a plea of guilt under the present circumstances. The conviction cannot stand and it is quashed and the sentence is set aside.
7. On whether this court should order a retrial, I will be guided by what the Supreme Court of Appeal stated in *Banda (P) et al v Rep*,[1] where it stated as follows:

> 'Before the court orders a retrial it must be satisfied that there has been an error in law or some irregularity as is not cured by s. 5 of the Criminal Procedure and Evidence Code. The power can be exercised in respect of a great number of faults, for example, misjoinder of charges, defective charges generally, improper rejection of evidence, the admission of or reliance on inadmissible evidence, failure to tell the accused that he may call witnesses, the wrongful admission of evidence of bad character, misdirection on the ingredients of the offence or on the burden of proof, and misdirection on corroboration. The list is not intended to be exhaustive and, in our view, the power can be properly exercised in respect of a great variety of errors. Before it is used on an appeal arising from a conviction after trial, however, the court should be satisfied that, leaving aside the error, the evidence discloses a case against the appellant in respect of the offence charged or some other offence. A retrial should not be ordered to enable the prosecution to fill up gaps in the evidence. It would, in our opinion, be wrong to allow the prosecution, where it had come to court with an insufficiently prepared case and gaps in the evidence, to have a second bite of the cherry.
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> We think also that the court also has to balance the interests of justice against a possible injustice to the appellant. Each appeal depends on its own facts and circumstances. In some there will be circumstances which would render it oppressive to put the appellant on trial a second time. In others, it would cause a greater miscarriage of justice to the community not to have him retried. The court should maintain a sense of proportion and avoid making an order for a retrial in respect of trivial offences. Again, it should not make the order unless there is some indication that the state intends to recharge the appellant.'

8. The charge was for a very serious offence as opposed to a misdemeanour. The error that has resulted in the quashing of the conviction emanated from the court below and not the prosecution. In answering the question whether the evidence discloses the offence charged or some other, this court has no way of knowing, for if the convict were to prove his claim then there would be no offence. Of course, the state asked for the court to order a retrial so

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[1] [1981-83] 10 MLR 142

the court is not in the dark as to the state's position. I, however, do not think it would cause a miscarriage of justice not to have the convict retried, the convict having already been in prison for a year now for a charge on which the probabilities that it may or may not be proved are equal. I believe it would be very oppressive for him to be retried at this point. I therefore acquit him.

Made in open court this day the 22nd of April 2022

Chima J