IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA Criminal Appeal No.11 of 2017

(Being High Court of Malawi, Principal Registry, Criminal AppealNo. 14 of 2016)

Between:

YamikaniLetasi.....Appellant

And

The Republic.....Respondent

Coram: Honourable Justice E.B. Twea SC, JA
Honourable Justice R.R. Mzikamanda SC, JA
Honourable Justice A.C. Chipeta SC, JA
G Mbendera, Of Counsel for the Appellant
C. Panyani Phiri, Of Counsel for the Respondent
Chimtande/Masiyano; Recording Officers

JUDGMENT

Twea SC, JA:
The decision we are about to pronounce is a unanimous one. The opinion of the Court will be read out by the Honouable Justice Chipeta SC.

Chipeta SC, JA:
Before us is a Criminal Appeal from the High Court of Malawi sitting at Blantyre in exercise of its appellate jurisdiction.The matter had commenced in the Court of the First Grade Magistrate sitting at Nsanje. In the Court of first instance it had been registered as Criminal Case No. 6 of 2016, while in the High Court it was registered as Criminal Appeal No. 14 of 2016. The Appellant is YamikaniLetasi and the Respondent is the Republic. The origins of MrLetasi being so at loggerheads with the Republic are anchored in an allegation of defilement that attached to him under Section 138(1) of the Penal Code (Cap. 7:01) of the Laws of Malawi. The allegation was to the effect that, as a Teacher at some Primary School within

Nsanje District,he, on or about 22nd January, 2016,had *unlawful* carnal knowledge of one of his female students, a girl under the age of 16 years.

In passing we should like to observe that whereas in the past it was essential in any charge of defilement to use the expression *"unlawful* carnal knowledge," following the amendments that were effected to the Penal Code in the year 2011, it is no longer necessary to use the word *"unlawful"* within that expression in such charges.The use of the word *unlawful* within this expression in the charge that was used in the trial Court was accordingly superfluous. Further, we wish to observe with appreciation and approval, the fact that the Court of first instance arranged, right from the beginning of the proceedings, that in the best interests of the concerned girl-child she be referred to by thename Margret Jailosi, which is not her real name, as a way of suppressing her true identity.

The record reveals to us that at the end of the trialone YamikaniLetasi was convicted as charged,andthat hewas then punished with a sentence of 12 years imprisonment with hard labour. Hisappeal to the High Court was against both the conviction and the sentence. It ended up in a complete dismissal, and both his conviction and sentencewerethus confirmed. It is on account of this development that the appellant is now before us with this second appeal. He has issues both withthe High Court's confirmation of his conviction,and with its confirmation of his 12 years long sentence.Theappeal, therefore, is against the Court below dismissingthe appellant's first appeal in its entirety.

This being a second-levelappeal, it is crucial that we at the outset sensitize ourselves as to the limits of our legal mandate when confronted,as we are,withthis type of appeal. In this regard, the first provision the appellant has cited for our considerationis Section 11(2) of the Supreme Court of Appeal Act (Cap. 3:01) of the Laws of Malawi. It makes it plain that appeals of this nature must be only limited to matters of law. Such appeals must never extend either to matters of fact or to matters concerningthe severity of sentence. As the provisionemphaticallydepicts,decisions of the High Court on matters of fact and on the severity of sentence are final.

Following readily in the heels of this provision is Section 12(1) of the Supreme Court of Appeal Act, which is also one of the provisions the appellant has cited to us.Going through it,we see that it urges us to only allow appeals that come to us

under Section 11 of the same Act if (i) we see that the High Court judgment cannot be supported having regard to the evidence, or (ii) if we notice that the High Court made a wrong decision on some question of law, or (iii) if we gain the sense that at the end of the day the decision the High Court reached occasioneda miscarriage of justice.

Regarding this provision, we note that the Section 11 this provision refers to does not only deal with second-level appeals.We take it, therefore, that the prescriptions Section 12 (1) lays down do not singularly apply to second-level appeals, but that they apply generally to the whole range of appeals that emanate from the completeSection 11 of the Supreme Court of Appeal Act. Indeed, looking at Section 11's subsections one by one it will be seen that it deals with different types of appeals. While bySection 11(2),as already seen, this provisionindeed deals with appeals like ours that arise from the High Court's exercise of appellate or review jurisdiction, clearly by its subsections (1) and (3) it also deals with appeals that arise from the High Court when it sits in exercise of its original jurisdiction. These even include appeals by the Director of Public Prosecutions against the High Court's findings of acquittal if he/she has a point of law to raise.

In light of that, it is our view that not every prescriptionin the list appearing in Section 12(1)between paragraphs (a) and (c) covers every appeal that falls under Section 11. Some prescriptions might only suit appeals arising from cases handled by the High Court in its original jurisdiction, while others might only suitappeals arising from the High Court's exercise of its appellate or review jurisdiction.We cannot rule out prescriptions that might suit both types of appeal.

Bearing this in mind, we observe that in an appeal like the one before us it might not be feasible for us to allow an appeal on the basis of Section 12(1)(a) of the Supreme Court of Appeal Act. As that provision enables us to allow appeals where we think the High Court's decision does not appear to be supported byevidence, we see it as a more suitable provision to use in cases where we are handling a first instance appeal from a trial that has been carried out in the High Court. This is because in such situations we have the mandate to deal with both questions of fact and questions of law that might arise in such an appeal. In a second–level appeal, however, where we are only limited to considering questions of law, we do not see how we could delve into issues of adequacy or inadequacy of evidence, which would primarily be factual questions. We suppose, however, that

if a ground of appeal happened to raise a point of law at the same time as it raises a complaint on the sufficiency of the evidence, we might still find ourselves obliged to,at least,attend to the legal part of the question so raised.We are, however, otherwisevery much conscious of the fact that at this stage we are legally barred from determining questions of fact.

As for Section 12(1)(b) of the Supreme Court of Appeal Act, however, which permits us to allow an appeal on grounds of an error of law, we find it to be directly suited to theappeal we are currently seized of, as it is directly in synch with the mandate we have under Section 11(2) of the Supreme Court of Appeal Acton second-levelappeals. Thus, should the appellant manage to convince us that the lower Court's judgment was wrong on a question of law, we will not have any difficulties in resorting to the use of Section 12(1)(b)of the Supreme Court of Appeal Act in pronouncing our determination in the appeal.

Concerning Section 12(1)(c)of the Supreme Court of Appeal Act, which urges us not to tolerate miscarriages of justice, we are also of the view that if the situation beshown to be deserving,it is a provision that we could easily resort to in this appeal. In fact we tend to think that this provisioncan both applyto cases of first instance appeals and to cases of second-level appeals. At the centre of all the adjudication Courts are engaged in is the quest to do justice. There is no way, therefore, that we can spot a miscarriage of justice in an appeal of whatever type and choose to turn a blind eye to it. Thus, should the situation necessitate our resort to this provision in the course of dealing with this appeal, we shall not have any constraints inputting it to use.

At this juncture we wish to say that we have gone through all the above drill just to ensure that as we proceed with this appeal we should not fall into the danger of overstepping the boundaries that the law has set down for us. With the needed precautions taken, we now find ourselves ready to go into the appeal. In all, the appeal before our Court is based on three amended grounds. Actually at the hearing, with our leave,the appellant had occasion to further amend his third ground of appeal.

As of now the appellant's grounds of appeal read as follows:

(a) The learned Judge erred in law in convicting the appellant on the basis of his caution statement only, when he had pleaded not guilty and thereby

the Court has to disregard pre-trial admissions in terms of **Chisenga vs R** 16(1) MLR 52 (MSCA)

(b) The lower court erred in law in finding that the Appellant knew that the victim was aged below the age of 16 hence the information on the statutory defence could be of no consequence, and

(c) The High Court erred in law in *not rehearing the appeal against the sentence by not considering the age of the victim as a mitigating factor.*

Following the appellant's filing and service of his notice and grounds of appeal, he also filed and served skeleton arguments in support of the appeal.Notice for the hearing of the appeal was on 7th September, 2017, six weeks before the date of hearing of 21st October, 2017, duly served by the Court on both the parties to the appeal. However, on the date of hearing,only learned Counsel for the appellant and his client were in attendance atCourt. The respondent was nowhere to be seen.Further, since the time the record of appeal was completed and given to the parties by the Court in terms of Order IV rule 8(2) of the Supreme Court of Appeal Rules in April, 2017, the Court record does not reflect any reaction to the appeal by the said respondent.

What is notable is that, therespondenthas this far not yet filed any skeleton arguments in response to those that were filed by the appellant,even thoughthe said respondent wasduly served with the said appellant's skeleton arguments. Worse still, no excuse or explanation was offered to us in respect of therespondent's absence on the date of hearing. We thus saw no reason why the planned hearing of the appeal should be affected by the respondent's absence, both parties having been duly notified of it. In the result, we permitted the appellantto proceed to present his appeal to us, notwithstanding the absence of the respondent. As it were, therefore, we as good as heard this appeal *ex-parte.*

In consequence of our said direction, the appellant duly argued his appeal before us. We listened to him with great care.We have in addition to that thoroughly read and considered both the grounds of appeal he filed and the skeleton arguments he tabled in support of the appeal. We now proceed to deal with the appeal, starting with ground one thereof. As earlier indicated, in this first groundthe appellant attacks the learned Judge in the Court below for *convicting*him on the basis of a caution statement only. We here hasten to point out that,as couched,this ground of appeal does not reflect the correct position.

We take it to be quite plain to all concerned, including to the appellant,that the learned Judgein the Court below onlyhandled this case the time it came to him on appeal. It cannot, therefore, be true, as the appellant asserts, that the Honourable Judge convicted him in this case. What he did was to merely confirm the conviction the appellant had alreadyearlier on received from the Court that had tried him.

On a plain reading, therefore, this ground of appeal is erroneous in the manner it projects its attack on the learned Judge. However, apart from us exposing the error in this ground so thatlessonscan be learnt about the vital need for the parties to take great care when drafting their grounds of appeal, we do not wish to take further issue with the error in question.We view it as being relativelyminor. We opt, instead,to understand this ground of appeal as if it is depicting a complaint by the appellant against the HonourableHigh Court Judge's confirmation of hisconviction on the basis of a caution statement only.We will thus deal with this ground of appeal as if it had been framed in this way.

As can be seen, the first point the appeal is making through this ground is that the confirmation of conviction herein was solely based on the caution statement the appellant had made to the police prior to his trial in the Court of first instance. The meaning of this assertion is that apart from the caution statement there was no other evidence on which the confirmation of conviction could have been based. In arguing this point, the appellant has pointed out that owing to the Trial Court's failure to conduct a *voir dire* examination of the victim girl (PW1) the time it was recording evidence from her, the High Court adjudged all of her testimony to have been inadmissible. Following this disqualification of the victim's evidence, theappellant trashes all the other evidence that was given as useless. He concludes, therefore, that there then remained no other evidence that could have proved that thegirlherein had been defiled.

It may at this stage be worthwhile to briefly recount the contents of the caution statement that has been so vehemently complained about by the appellant, if only this could help us better understand the background to this ground of appeal. In a nutshell the confession statement in question shows the appellant as having confessed (a) to having been in a love relationship with the girl-pupil in question, (b) to,through an invitation from the girl herself,having met with her on the material day, and to thenhaving had sex with her, (c) to,at night that same

day,having been confronted by the parents of the girl, and to have honestly confessed to them the sexual deed he had engaged in with their daughter, and (d)to, the following day, the appellant having gottensurprisedthat instead of sitting down to sort out the issue in a discussion,the father of the girl hadreferred the issue to the Police.

By way of trashing the remaining evidence, the appellant argued as follows:regarding the evidence which came from PW 2 (the father of the victim), who said that when he spoke with the appellant the said appellantconfessed to him having defiled his daughter (PW 1), andregarding the evidence of PW 3 (the paternal aunt of PW 1 the victim), who said the appellant mentioned at this very discussion with the father of the girl that he had *chatted* with the girl (she used the word *'kucheza'* in the local language), the appellant's stand was that all this evidence waspure hearsay. His contention was that these two witnesses had no independent evidence of their own as, in his view,what they told the Court was a mere repetition of what the disqualified victim witness (PW 1)had told them.

Beyond this, it was the appellant's further argument that in any event there was a big contradiction between what PW 2 said in evidence and what his sister PW 3 said, despite both having been at the same gathering. To him PW 3's statement to the effect that the appellant admitted chatting with the victim totally contradicts the evidence of PW 2 to the effect that the appellant admitted to him having defiled the victim girl. The appellant's conclusion was that in the end there was no evidence from the first three Prosecution Witnesses (i.ePW 1, PW 2, and PW 3) to implicate him on thecharge of defilementthat he was facing in that Court. As such, he contended, that all that remainedwas the evidence of PW 4, which heavily hinged on the confession caution statement. He believes, therefore, that it is only on the basis of this caution statement, which he indicates the High Court embraced in full as properly admittedin evidence,and as also clearly depicting the appellant's admission of guilt, that the said Court based its confirmation of his conviction on.

Coming from that premise, the appellant next made the point that the case of **Chisenga vs R** [1993] 16(1) MLR 52, a Malawi Supreme Court of Appeal decision, is highly instructive in situations such as the one he was commenting upon. To him that case has decreed that once a person accused of crime has pleaded not guilty to a chargein Court, as the appellant did on being charged with defilement

in this case, the Court so trying him ought to disregard any pre-trial admissions he may have made in his caution statement.To this end he quoted as follows from page 56 of the **Chisenga**judgment: *"The prosecution not having proved an essential element of the offence, cannot rely on a confession, denied confession, bearing in mind that a plea of not guilty puts every material fact in issue and that anything in the nature of an admission by the accused before the trial, ought, in such circumstances to be disregarded by the Court."*

The appellant thus argued that having pleaded not guilty to the defilementcharge in this case, it was incumbent on the prosecution to prove against him all the elements of that charge,and that because of the **Chisenga**judgment, in finding him guilty (or rather in confirming his conviction), the Court below ought not to have placed any reliance on evidence emanating from this pre-trial confessionof his as was contained in the caution statement. Believing as he does that the caution statement ought to have thus been totally disregarded, and being further of the view that PWs 2 and 3 did not give any admissible or valuable evidence, his stand on the confirmed conviction was that it had no iota of evidence to stand on. He accordingly argued that this confirmation of conviction is unsafe, and alsothat it is contrary to known principles of law.

It has teased our minds, we must say, whether by this ground of appeal the appellant was not indirectly just trying to get us to decide matters of evidence,which would be matters of fact, a thing not allowed in a second-level appeal. His point, however, being that the confession in the caution statement ought not to have been treated as evidence by the High Court, and his additional point beingthat minus the said caution statement there was no other evidence on which the High Court could have sustained its confirmation of the conviction, we understand this ground of appeal to be raising the question whether a conviction can at all be confirmed in a vacuum, i.ewhere there is no evidence at all.

To us, therefore, much as such question might look like a question of fact, it would also be a question of law. Convictions are meant to be based on evidence of guilt. Where an appellant claims that there was not even a single piece of evidence to implicate him in the crime he stands convicted of, he is not just raising the question whether or not *sufficient* evidence was paraded against him, which would be a factual question. He is rather raising the legal question whether a conviction can be allowed to stand when there is total absence of evidence. We

thus feel comfortable about going ahead with adiscussion of this ground of appeal and determining it. However, had the appellant's question simply been whether the evidence given against him was sufficient or insufficient for the High Court to sustain his conviction, we would not have hesitated to disqualify the ground of appeal as being one fishing out for a decision on a pure question of fact.

Be this as it may, weneedto mention here that somehow, and mainly as a result of general probing from the Court on the presentation of his appeal especially *vis-à-vis* the import of the **Chisenga**judgment on the caution statement, the appellant went astep or two outside his prepared and written arguments. In this regard, over and above his reliance on the **Chisenga**judgment in challenging the High Court's use of the pre-trial confession caution statement in its judgment, he extended his attack onthe admissibility of that caution statementto the admissibility of the medical report that had also been admitted in evidence by the Trial Court.

Further, in this extended attack, the appellant employed a different reason for so claiming that these two pieces of evidencehad been wrongly admitted in evidence. His additional reason was that both the caution statement and the medical report were not received in evidence in conformity with the dictates of the law by the trial Court. His suggestion was that the requisite pre-conditions for these documents to be tendered in evidence had not been observed by the time that Court was accepting them and marking them as exhibits.

In respect of this extension in arguments, we wish to say right away that despite the argument emerging and being presented with relative passion, we cannot discuss it in ourjudgment. This is because it does notin any way form part of this appeal.We recall the appellantat the commencement of the hearing of this appeal adopting all the documents that he had thus far filed with theCourt. He was accordinglyobliged to stick to the confines he had set for himself with the contents of those documents.

The documents he so adopted were the notice of appeal and the grounds of appeal he had filed. These bore no ground of appeal against the admission of the caution statement and/or medical report on the basis that the said documents had been admitted in violation of the legal provisions that regulate the tendering of such documents in evidence. Also adopted were the skeleton arguments the

appellant had filed in support of the appeal. In these, the appellant did not include any arguments pertaining to a breach of the law that oversees the tender of documents such as caution statements and medical reports in evidence. His attack in the appeal was limited to the High Court's reliance on the caution statement, which he claimed offended the principles enunciated in the **Chisenga**judgement.

Granted that that the appellant might just have pursued this line of argument on the spur of the moment, we still would not want to leave him in suspense as to role the arguments he so presented had in this appeal. We know not whether the mere fact that we heard him make these extra arguments might have boostedhishopes for the success of his appeal.The fact, however, is that the arguments in question do not belong to this appeal.They, therefore,cannot have any role to play in it.

As already indicated, there is nofiled or amended ground of appeal that backs these arguments.There is also no argument in the skeleton argumentsthe appellant filed that they can be attributed to as a mere highlight of. We really therefore cannot be drafted into making gratuitous pronouncements on arguments that are both outside the appellant's grounds of appealand outside his skeleton arguments.Even if hemight have gone into them by sheer accident of answeringour questions, he cannot use them in this appeal. Our focus regarding the caution statementmentioned in the first ground of appeal, therefore, will be,and must be, purely on the basisthe appellant pre-chose for his appeal and properly highlighted. Both by his first ground of appeal and throughhis supporting skeleton arguments his stand is that the caution statementought to have been disregarded because of the pronouncement in the**Chisenga**judgment. It is not that the caution statement and the medical report should be disregarded because of being admitted contrary to rules governing the admission of such type of evidence.

Reverting to the appellant's assertion that the caution statement was the sole evidence on which the lower Court could have based its confirmation of his conviction, we now wish to make a few observations. The first is to agree with him that after the High Court had pronounced that the evidence of PW 1, a witness aged 14 years, ought to be excluded due to the fact that she had testified without being subjected to a prior *voir dire* examination, then whatever she had

said in her evidence could not have been used as proof of any element of the offence the appellant had been charged with.

However, beyond this the appellant also argued that the testimony from the girl's father and that from the girl's aunt also deserved exclusion because,according to him, it was hearsay. We have here again wondered whether by this argument the appellant has not again just tried to draw us into the realm of deciding his appeal on matters of fact. Linked, however, as this complaint is with the argument that on the basis of the **Chisenga**case even the caution statement itself should have been excluded, we think a suggestion that the Court below ought to have recognized the evidence of PWs 2 and 3 as hearsay raises the legal questionswhat hearsay evidence is and whether the evidence those two witnesses gave fits into that description. It is only for this reason, therefore, that we will now look into the question whether indeed the caution statement was the sole evidence the lower Court could have based its confirmation of this conviction on.

Our starting point is to say that we have great difficulty in following theappellant's argument on hearsay evidence.We begin by asking ourselves that ifit was the joint evidence of PW 2 and PW 3 that the victim girl had left home for a market place in the afternoon of the material day andthat by 8.00 pm that day she had not yet returned home, whichcaused them anxiety and led to PW 3 and the girl's mother beginning to search for her,then what is it in this story that can be attributed to PW 1 being the origin of what the witnesses said so as to be designated as hearsay evidence?

Further, if it was PW 3's further evidence that during this search she met with the appellant and asked him if he had seen the girl,and that he then told her that he had indeed been with the girl but that he had already released her to go home. Again here we have asked ourselves what part of that evidence could be hearsay as claimed by the appellant? Recalling that it was the appellant's contention that these two witnesses peddled hearsay in Court in the sense that they merely repeated what PW 1 had told them, we fail to see PW 1 as the source of the evidence PW 3 gave about her meeting and talking with the appellant. We wonder then where the hearsay the appellant was talking about is this far hiding in this case.

Further examining the evidence of the two witnesses herein in the light of the appellant's condemnation of the same as hearsay evidence, we note that PW 3 said that because of the appellant's answers to her questions she invitedhim to accompany her to the victim girl's father's house. It was then the further evidence of PW 2, the father of the girl, thatwhen the appellant had been brought to his house and he had asked him why he had held up his daughter, he first said he had been with her somewhere, and upon being asked what had made him detain the girl he told him that he had had sex with her. From all we have gone through above, it appears to us that the appellant's understanding of the term hearsay is completely different from ours. What we see is that PW 2 and PW 3 narrated in Courtabout things they personally did, and about interactions they personally had with the appellant. They did not speak of things someone else, like PW 1, experienced and which they merely heard about. Thus, when the appellant accuses them of just having repeated to the Court what they heard from the disqualified PW 1, we find ourselves totally lost about what he means.

To us the testimony the two witnesses gave cannot in anyway, and by any stretch of imagination,be equated to the peddling of hearsay evidence.We thus totally disagree with the appellant's classification of PW 2's and Pw 3's evidence as inadmissible hearsay evidence. To us, this was direct evidence of what the witnesses had personally experienced, which evidence was independent of the confession contained in the caution statement. Coincidentally, however, in most material particulars the caution statement in question tallies with the evidence PW 2 and PW 3 gave, including on the point that the appellant confessed committing the defilement tothe parents of the girlthe very time he was brought to their house.

We think, therefore, that the appellant had no justification for downgrading the direct evidence PW 2 and PW 3 gave to the Court to the level of inadmissible hearsay. We accordingly reject the argument he made as cheap and untenable. In our judgment, therefore, it is not true that after excluding the evidence of PW 1the Court below was not left with any other evidence beyond the confession caution statementthat it could have based its confirmation of the conviction on. External to the contents of that caution statement, as we have just shown, there definitely was other evidence derived from the interactions and conversations PWs 2 and 3 directly had with the appellant,which evidence had the independent capacitytoprove the elements of the crime of defilement whichthe appellant had

been charged with. In this regard it is significant that the father's evidence not only covered the aspect of the victim's age being below 16 years, but it also covered the aspect of the appellant acknowledging to him that he hadhad carnal knowledge of his said daughter.

While saying this, we do not forget the appellant's further contention that there was a serious contradiction between the testimonies of PW 2 and PW 3 in relation to what really transpired the time they were engaged in a discussion with himat PW 2's house. Hisclaim is that since PW 2 said that the he confessed having engaged in sexual intercourse with the victim girl, and yetPW 3 merely said that he said that he had chatted (kucheza) with the girl, then these witnesses must be seen as having given evidence that was heavily contradictory. Again it hasbothered us herethat the appellant has somehow, by the style of the arguments he has advanced,dragged us into looking into factual matters i.e. into matters of evidence. Considering, however, that on the whole we have already accepted that via this ground of appeal the appellanthas raised a question of law for us to resolve, we find ourselves bound totouch on these matters of evidence so as to finally answer the main question he has raisedi.ewhether indeed, as claimed by him, there wasin this case no evidence at allthat could have empowered the High Court to confirm the appellant's conviction.

In our examination of the contradiction the appellant has alleged between the evidence of PW 2 and PW 3, we have taken into account the fact that although the Trial Court recorded all the evidence it took in English, the witnesses in question actually testified to it in their local language, i.e Chichewa. In the case of PW 2, the father, the Chichewa words he used in his testimony were plain and unambiguous, and so it came out clearly inhis evidence that the appellant had confessed to him having engaged in sex with the victim girl.

However, in the case of PW 3, the girl's aunt, who in her testimony said that the appellant had admitted having been with the girl and chatting with her, she used the Chichewa word 'Kucheza', whose translation is not necessarily plain and unambiguous. That word canmean*'chatting'* as the Court recorded, butit could well mean something different, depending on the context in which it is used. Thus, in this case we have additionally noted that in her evidence, following questions from the Court, PW 3had further pointed out that at this very discussion,and in the presence of the appellant,thegirl who had so seen the

appellant chatting with the victim girl had indicated that this chatting between the two took place at a bush.

Bearing in mind (i) that the Chichewa word 'Kucheza' which PW 3 usedneed not be restricted to the meaning *chatting* which the Court attached to it, (ii) that the*'chatting'*in question was taking place at a bush and that it was between a male teacher and a female pupil from the same school, (iii) that the said *'chatting'* caused the girl pupil to so much delay in returning to her home that her parents and relatives by 8.00 pm got worried enough to start searching for her, and (iv) that in the cross-examination the appellant conducted on the State witnesses he even suggested that it is this very girl whohadenticed him into meeting with her on the said day, we see that the context in which PW 3 used the word *"kucheza"* does not render that word or her evidence contradictory to what PW 2 said. To us, therefore,*chatting* in the circumstances revealed by the further evidence of PW 3 cannot be said to be contradictory of what PW 2 said, let alone to be in serious contradiction thereof as has been argued. This*"chatting,"* if so it was, that PW 3 spoke about in the above disclosed setting could certainly not have been an ordinary harmless *"chatting."*There was, therefore, no such contradiction between these pieces of evidence as the appellant has complained about.

Reverting to the evidence of PW 2, we find it interesting that after that witness hadclearly testified in the presence of the appellant,and after he hadso drastically implicated himwith the disclosure that he had openly confessed to him having defiledthat witness's daughter in the conversation that they had, in the cross-examination the appellant next took up he did not make it a priority to tackle this critical and directly implicating evidence of the witness. As we see it, the appellant carefully navigated his cross-examination around peripheral issues. He, all in all, completely avoided directly confronting the witness on this crucial portion of his evidence.Instead, he devoted his time to asking the father of the girl questions such as whether he witnessed the defiling in question, whether he(the appellant) was not drunk at the time, what clothes he (the appellant) was then wearing, why the father rushed to the Police instead of reporting the incident to the Village Headman, whether the father did not then beat up his daughter, and whether it is not the girl that had sent him (the appellant) the message to meet with her on the material day.This cross-examination, as can be seen, meandered around everything the appellant thought fit to tackle, but it did not hit at PW 2's plain

evidence that the appellant confessed to him having defiled his 14 years old daughter.

The pieces of evidence PW 2 and PW 3 gave were, therefore, solid and direct pieces of evidence in their own right. Considering that the appellant even shied away from confronting PW 2 on his implicating evidence of confession to the witness, and that we have seen no contradiction between the said PW 2's evidence and that of PW 3, the bottom line, for us, is that we see no merit in the appellant's claim that the lower Court's confirmation of the conviction was solely based on the confession in the caution statement. As shown, there was independent evidence from two other witnesses, who neither gave hearsay evidence nor gave contradicting evidence, on the allegation of defilement the appellant was facing. In our judgment, therefore, the confirmation of the conviction by the Court below wascapable of being founded on a wider base of evidence than the caution statement the appellant has chosen to restrict it to. It is our finding that the decision of the High Court was not, and did not have to be, solely based on the confession found in the caution statement of the appellant.

Having now found that the caution statement was not the sole evidence on which the confirmation of the conviction was or could have been founded, we are ready to move to the question whether indeed, as the appellant has argued, the Court below legally ought not to have given any attention to the confessionfound in the appellant's caution statementat the time it was confirminghis conviction. The central case the appellant is relying on here, as already indicated, is the case of**Chisenga vs R** [1993]16(1) MLR 52 (MSCA). For us to more fully appreciate how the quotation the appellant lifted from that case and is relying on came about, we have read, not only the said quotation, but also the entire judgment as well.

Our first observation is that whereas the present case is on the offence of defilement under Section 138(1) of the Penal Code, the **Chisenga**case was on a totally different offence, i.e. the offence of Theft by Public Servant under Section 283(1) of the Penal Code. From the way these two offenses were drafted by the Legislature, it is clear to us that there is a major difference between the two of them. In Malawian Law, as must be well known in the local legal circles,the offence of Theft by Public servant is not just like any other criminal offence that is found in the Penal Code. It was deliberately and peculiarly couched differently

from all other offences. Indeed, in dealing with the **Chisenga**case this peculiarity did not escape the attention of the Bench that presided over that case.

As can be seen from the judgment, after they had referred to and quotedfrom subsection (1) of Section 283 of the Penal Code, theBench said: *"It is common place that that subsection creates a presumption of law which would otherwise not exist. A person employed in the public service who by virtue of his employment has received or has in his custody or under his control any money or other property and who is unable to account for it will be presumed to have stolen it, unless he satisfies the Court to the contrary.....It is an essential element of the offence, for the presumption to arise, that a public servant has been unable to produce or make due account of the money or other property which has been in his custody or under his control."* (p56 paras b to d) To our knowledge, there is no other offence under the Penal Code of Malawi that has been couched in a way so clearly saddling the accused person with an evidential burden of proof to rebut his presumed guilt once a proper foundation for it has been laid down.

Certainly a simple comparison will show that Section 138(1) of the Penal Code, whichsimply reads: *"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,"* does not by any degree resemble the offence of Theft by Public Servant. It does not carry any of the peculiar features that other offence carries as itemized by the Justices of Appeal in the **Chisenga**judgment. It strikes us, therefore, that it could be quite dangerous toindiscriminatelyjust liftand then apply either *ratio decidendi*or *dicta* that is meant to address a situationconcerning an offence that has been drafted in a peculiar mannertoa situation found in an offence that does not have the same peculiar features as the case the*ratio* or *dicta*in question is coming from.

This, however, is what the appellant has done, and wetend to think that it is an adventure that is based on blind hope.We further think that itborders onthe unreasonable.It looksto us, therefore,like comparing potatoes to mangoesand then equating them. The sense we get from the courage the appellant has exhibited in virtually comparing and equating thesetwo completely different case scenarios is that he has taken us on a dangerous road. As we examine his argument, therefore,we need to be extremely cautious lest we fall into pitfalls that are most likely lying in wait for us on such an adventure.

As it is, in the **Chisenga**case it was crystal clear that the prosecution had totally failed to prove a critical element of the offence of Theft by Public Servant. Apart from whatever evidence they might have paraded to prove Chisenga as a Public Servant, or to show that he received money or had control of money by virtue of his employment, it was essential before that man could be presumed to have stolen such money or any of it that the prosecution should alsohave shown by evidence that he was given an opportunity to produce such money or to otherwise account for it, and that he had failed to do so. It is on this last element that the prosecution totally missed out in that case.

As comes out clearly in the relevant judgment, the moment the authorities thought Chisenga had a shortage, they had him arrested and incarcerated. By the time the Headmaster of the institution he was working at broke into the safe and removed cash and some documents, Chisenga was already away in custody. Equally, the time an auditor came to audit and verify the shortage, Chisenga was still in police custody. Thus, on both occasions the safe was opened in his absence. It also turned out that some documents and money, which could probably have come to Chisenga's aid, had he been given a chance to either produce the money alleged to be short or to account for it, had already been removed in his absence by the Headmaster.

It was impossible, therefore, in that case for the presumption of guilt to arise against Chisenga for him to then assume the evidential burden to rebut it. The prosecution had no way of providing any evidence concerning the last element of the offence. Thus, even though there was a caution statement admitting theft of part of the money mentioned in the Charge, it need not have meant that the makerof the confession was admitting the offence of Theft by Public Servant. As Chisenga had by then not been given any chance to either produce any money or to account for such, it could not be said that he had failed to produce such money or to account for it. Likewise, despite confessing in the caution statement stealing a portion of the money, it could not have been taken for granted that by saying so Chisenga meant that he had even failed to produce that portion of money or to account for it, because he had been incarcerated too early and had as such not been given any opportunity to produce the same or to account for it.

In circumstances like that, where the State completely goofed in relation to one essential element of the offence it was trying to prove, and where it could not replay the scene and create the missing evidence for that essential element, there was indeed no way it could have repaired that kind of void by a confession in a pre-trial caution statementso as totrigger the presumption of guilt into existence. Thus, in the context that was applicable in the **Chisenga**caseit is understandable that the learned Justices of Appeal who were seized of the appeal rightly found that the confession Chisenga had made in his caution statement had to be disregarded from being used as a base to found a conviction for the peculiar offence of Theft by Public Servant.

The same, however, is not and cannot be true for the present matter, where all essential elements of the offence were covered by evidence external to the confession in the caution statement, and where the offence at hand had no built-in presumption that had to be triggered or rebutted. We hold, therefore, that the appellant misapplied the authority of the **Chisenga**judgement in this appeal. He had no justification for transplanting a pronouncement made to suit the peculiar situation that was before the Court in a Theft by Public Servant case to a situation where we are dealing with a defilement case that has no like peculiarities.

However, in passing, we should like to fully agree with what the learned Justices of Appeal said in the **Chisenga**case to the effect that a plea of not guilty puts every material fact in issue. That, however, is as far as we will go with the holding of our Senior Brother Justices of Appeal. Indeed, it is our understanding of the law that when an accused person so pleads not guilty, whether through a plain denial of the charge, or through an equivocal admission of the same, the result is that in so doing he puts the whole allegation and all the elements of the crime charged in issue. When this happens, the prosecution immediately find themselves saddled with the burden to call for and present evidence to prove the offence. They do this generally by calling a variety of witnesses, including eye witnesses and investigators, so as to cumulatively cover all the elements of the offence charged. They may also present documentary evidence during trial to assist in proving the case.

Now if, as argued by the appellant, it is indeed the law that once a plea of not guilty has been entered the Court should not attend to, or take into account, any pre-trial admissionsthat are in the caution statement, then we believe that would

effectively end the need for prosecutors to call investigators as their witnesses whenever the only evidence those investigators have is thatthe accused confessed to committing the crime when they were recordinghis caution statement. This would also mean that investigators would only be welcome as prosecution witnesses if their evidence is to the effect that when they questioned the accused about the offence alleged and recorded his statement under caution, he denied the offence. This, to us, not only sounds funny, but it would also be plain ridiculous. It certainly does not make sense to us that an investigator of a case can only play a useful role in Court when he has evidence that is favourable to the accused, and that when he has evidence favouring the prosecution, as long as the accused has pleaded not guilty, he should not be allowed to present that evidence in Court. We believe accordingly that if indeed this was the position of the law, thenthe role of Investigators in criminal cases would be highly curtailed and restricted.

However, as far as we know Investigators are, and must, always be called as witnesses in criminal cases because it is their duty to contribute,through the evidence they gather while investigating,to the proof of the offence charged. A crucial part of their job is to come to Court and inform it whether when the person they were investigating was confronted with the offence after due cautionhe admitted it or denied it. Beyond this, subject to compliance with the rules governing the admission of such documents, they are also required to read out and tender in evidence what the accused actually said, which they must have recorded verbatim during suchinvestigatory interview in relation to the offence alleged. Indeed, it is for this reason that they are not supposed to go about this job casually. The law requires them, when carrying out such inquiry and before recording the accused's utterances, to warn him that he is free not to say anything, but that if he does opt to say something, it will not only be recorded but it will also be presented as part of their evidence in a Court of Law. If, therefore, Investigators are to be worthwhile witnesses in Court, those that can help the Court to discover the truth regardless of consequence, they must be free if they obtained a denial caution statement from the accused to say so, and if they instead obtained an admission caution statement from him to equally say so.

As we have said above, in the peculiar circumstances attending the **Chisenga**case, our learned Senior Brothers quite rightly reached the conclusion that the confession caution statement Chisenga had made could not be used to supply the

gap left by the absence of evidence on one essential element of the case of Theft by Public Servant. If, however, beyond this they also meant that in every circumstance, not just in the special circumstances they were dealing with, the moment the accused pleads not guilty then *"anythingin the nature of an admission by an accused person before trial, ought, in such circumstances, to be disregarded by the Court,"* then our choice would be to respectfully disagree with them, and to depart from their understanding. Luckily for us, we are not bound by what they may have said or meant as we exercise comparable jurisdiction to theirs.

For the avoidance of any doubts, therefore, our stand is and remains that once a plea of not guilty has been entered in a criminal case, it puts in issue all the material elements of the offence charged. In that event evidence by any competent witnesses, including investigators, is the only means by which the prosecution can attempt to prove the denied charge.A plea of not guilty, in our judgment, cannot pre-select what evidence the upcoming witnesses should bring or not bring to Court. What is and what is not admissible from the witnesses that come cannot be determined by the plea, but by the vetting mechanism of the rules of evidence that govern criminal proceedings. In that instance the evidence of an investigator, whether it be about an accused's confession or about his denial, is all part and parcel of the means the law has put at the disposal of the prosecution in a bid for them to discharge the burden of proofthe plea of not guilty creates for them.

As it is, therefore, it is our view that in this case the High Court did not err when it utilized the confession of the appellant found in the caution statement when confirming his conviction. We thus, for reasons already given above, reject the appellant's argument to the effect that on the basis of the **Chisenga**judgment the said caution statement should have been disregarded. In our judgment, therefore, both on the score that there was additional evidence external to the admission in the caution statement that proved all the elements of the offence of defilement, and on the score that the Court below did not commit any legal error in relying on the said confession caution statement, we fail to see any merit in ground one of the appellant's appeal. We hereby dismiss that ground.

Moving on to the second ground of appeal, which alleges an error of law by the Court below in its finding that the appellant knew the victim girl to be below 16

years of age,thereby rendering information on the available statutory defence to be of no consequence, we note that in arguing this point the appellant found it fit to start from as far down as the Trial Court. He first referredto the proviso to subsection (2) of Section 138 of the Penal Code,which reads:*"Provided that it shall be a sufficient defence to any charge under this Section if it shall be made to appear to the Court, jury, or assessors before whom the Charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years."*

In light of this proviso, the position the appellant has takenis that the Trial Court had a legal obligation to bring the statutory defenceit containsto his attention right at plea stage.His complaint is that the Trial Court did not do so. Following this, the appellant contended that there are authorities which oblige Courts of Law to so bring to the attention of accused persons, especially if they are unrepresented, any statutory defences that might be available to them right at the beginning of the proceedings so that they might take benefit of them. Failure to do so, he argued, amounts to the giving of an unfair trial to such accused persons.

Turning to the High Court judgment hehas appealed against, the appellant pointed out to passages in the said judgment which are to the effect that as a teacher he knew or he ought to have known that the victim girl pupil he had sex with was below the age 16 years, and that as such it mattered not whether the Trial Court gave him any information on the statutory defencein question. His complaint is that nowhere in the caution statement, or in his evidence in defence, did he ever say that he knew that the girl was under the age of 16 years. He wondered, therefore, where the High Court took this finding from. Henext argued that it was dangerous for the Court to speculate that he,as appellant, knew the age of the victim girl just because he happened to be a teacher at the school she was a pupil of. In summing up this grievance of his, at paragraph 4.2.6 the appellant contended that the finding that he knew the age of the victim *"cannot be supported by any evidence on the file."*Resulting from this, he claimed thatit was wrong for the Court to then find that in this instanceinforming him of the statutory defence would have been of no consequence.

Before we can examine this ground of appeal further, we find it important to,at this juncture, make a few early observations on it. The way we look at it, this

ground of appeal is not strictly raising matters of law for us. Itin fact appears to be composed of a combination of factual and legal concerns to us. The portion of the ground of appeal that attacks the finding of the lower Court to the effect that the appellant knew the age of the victim to be below the age of 16, even though it has been christened as an "error of law" is,to us,certainly not a question of law. In fact the appellant confirms this view to us when he argues that this finding cannot be supported by any evidence on the file.

It will be recalled that we took time at the beginning of this judgment to explore our mandate in the light of the inter-relations between Section 11 and Section 12 of the Supreme Court of Appeal Act. We held then that Section 12(1) (a)is not applicable to second-level appeals like the one we are now dealing with. We will therefore not make ourselves busy addressing this factual portion of the second ground of appeal.

This aside, however, it seems to us that the remaining part of this ground of appeal could well be viewed as raising a question of law for our attention. The appellant's stand being that advance information on the statutory defence herein was essential for him to have a fair trial as an unrepresented accused person, our tendency is to view this portion of this ground of appeal as one depicting a complaint that the High Court erred in law when it concluded that in the prevailing circumstances informing him of the statutory defence would not have been of any consequence. However, since the appellant believes that the Court was legally obliged to give him information on this statutory defence, he takes issue with the holding of the Court, which basically implied that it did not matter whether or not the appellant was informed of this statutory defence.

In our recollection, the appellant was very emphatic about the existence of the Court's duty to inform him about this statutory defence. Actually, in his oral argument of the appeal, he gave the Court no leeway in the matter, and in this regard he frequently usedthe word "must" to denote the gravity of the obligation resting on the Court's shoulders. His expectation, therefore, was that the Trial Court should have basically read out to him the details of this statutory defence alongside the charge of defilement during the plea process.Much, therefore, as the ground of appeal is somewhat muddled up with some factual complaint, we still see in it a portion that is querying the High Court'sloosening ofan obligation the appellant believes the law has otherwise made mandatory.Now, since to this

extent the appellant does raise a question of law before us, to wit, the question whether the High Court was justifiedin frowning upon a legal obligation and whether it thus erred, we will proceed to further examine the arguments the appellant brought forth in respect of this ground of appeal.

In his quest to demonstrate the existence of the obligation on the part of Courts to inform, especially unrepresented accused persons, of this statutory defencewhich might apply to them in defilement cases, we notice that the appellant mainly relied on authorities arising from foreign jurisdictions. Among the case authorities he cited we see one from Fiji, a chain from Botswana, and one other from the Seychelles. He did, however, in the end add one Malawian case, almost just as an icing on the already baked cake.

The Fiji case is that of **AlipateKarikarivs The State** [1999] 45 FLR 310. It was a case in which the appellant had been convicted and sentenced for defilement even though the Trial Court had not drawn his attention to the proviso containing the applicable statutory defence.In it the presiding Judge based his decision quashing the conviction and setting aside the sentence on a quotation from the then Chief Justice of Fiji in an earlier similar case, i.e. the case of **AkuilaKubuotawa and Reginam**(Labasa Criminal Appeal No. 2/75). The quotation in question reads: *"I might add for the guidance of Magistrates that, in the case of an unrepresented accused, any statutory defence should be brought to his attention. For instance, on a charge of this nature, the accused should be informed that he is charged with unlawful carnal knowledge of a particular girl of a specified age and that he had no reasonable cause to believe that she was of or above the age of sixteen years;and the record should disclose that the charge was explained accordingly."*From references the**AlipateKarikari** judgment made to the relevant defilement provision inFiji Law, we have observed that, like our Section 138 of the Penal Code, it has the offence of defilement in one subsection and the statutory defence in issue in a separate proviso of the same Section.

Coming to the defilement caseswhich the appellant cited from Botswana, the main case he placed reliance on was that of**Gare vs The State** [2001] 1 B.L.R. 143 from that Country's Court of Appeal. In itby a majority 2:1 decision the Court came to a holding similar to that of the Fiji case above-referred. In that case Zietsman JA, who delivered the main opinion of the Court, first said: *"The question that arises is whether the magistrate should, in the circumstances, have*

drawn the appellant's attention to the special defence set out in subsection 147(5) of the Penal code, and whether his failure to do so means that the appellant was not given a fair hearing at his trial."(p 4 of the judgment supplied or p 14 of the Appellant's List of Authorities).

Next, aftermaking reference to two South African cases on considerations of fairness in relation to statutes that raise presumptions and special statutory defences,and upon also referring to Section 10 of the Botswana Constitution on the rightof an accused person to a fair hearing, the learned Justice of Appeal wound up his judgment in the words: *"In the present case the subsection in the Penal Code under which the appellant was charged provides a special defence which can be raised by the accused. It is my opinion that in view of the appellant's obvious ineptiness in conducting his defence, and his probable ignorance of this special defence, the existence and meaning thereof should have been explained to him by the magistrate. The fact that this was not done leads me to the conclusion that it cannot be said that the appellant was given a fair trial."* (p 6 of the judgment supplied or p 16 of the appellant's list of authorities). Incidentally we have also noted here from the quotations the Court made of subsections (1) and (5) of Section 147 of the Botswana Penal Code that the offence of defilement and its statutory defence ,arein separate subsections. This is very much like the situation under Malawi law, except that in our case whereas the offence is under a subsection, the statutory defence appears in a proviso.

There were additional case authorities the appellant cited from various Registries of the High Court of Botswana,which had followed or agreed with the position taken in the **Gare**case. These include the cases of **Gaosenkhwe vs The State** 2001 (1) BLR 324 from Palapye, **Mfwazala vs The State** [2007] 3 B.L.R. 476 from Francis Town, and **Tsunke vs The State** [2004] 2 B.L.R. 155 from Lobatse. He also cited the Botswana High Court case of **State vs Bareki**[1979-1980] B.L.R. 35,in which an alternative conviction for defilement on an original charge of rape was overturned on the basis of the considerations espoused in the**Gare**case.

As further reinforcement of his contention on the obligation of Courts to give advance information of this statutory defence, the appellant also referred to the Seychelles case of **Pillay vs R** 2013 SLR 249,which discussed a set of guidelines or practice rules Magistrates were encouraged to follow in order to ensure fair trials for unrepresented accused persons. Indeed one of these rules or guidelines is on

advising an unrepresented accused of any special statutory defencethat is available to him.

It is after he had so widely toured elsewhere that the appellant finally came home and cited to us the High Court of Malawi case of **Allan Willard vs Republic** Criminal Appeal No. 33 of 2016 (unreported). The case in question does not contain a substantive judgment in a defilement trial, but it is a ruling on a bail pending appeal application. In it the High Court appears to have recognized the existence of a duty on the part of the Court to inform an unrepresented accused person of the statutory defence that is available to him in defilement cases, in view of which it found *prima facie* prospects of success of the pending appeal and then granted bail.

We have at quite some length considered the second ground of appeal.At the same time we have also considered all the arguments and all the case authorities the appellant has proffered us with in support thereof. We must say, however, that during the hearing of the appeal, through the questions we raised,we quite openly demonstrated to the appellant that we had doubts about his claim that it was obligatory, or that it was a *"must"*,for a Court in defilement cases to advise an unrepresented accused person of the statutorydefenceavailable to him herein and to do so right at plea stage. To be quite honest wedo also need to say it here that, despite the answers we got from the appellant, our said doubts have not yet subsided.

Talking about the **AlipateKarikari**matter from Fiji, we do not comprehend how, in the quotation we were referred to, the Court ended up with the conclusion that this statutory defencewhich is embedded in a proviso distantly placed from the subsection creating the offence of defilement should virtually be read alongside the Charge by the Court during plea, as if it was part and parcel of the elements of that offence. We have, however, not had the chance to see or to read the full judgment in the case of **AkuilaKubuotawa**from which that guidance to Magistrates emanated. Be this as it may, we do not find ourselves persuaded to follow a *dictum* that seems to expand the elements of the offence of Defilement by adding to its traditional elements that must be put to an accused during plea, elements of a statutorydefence that is separately provided for outside the subsection that createsthe said offence.

Likewise in the **Gare**case where, as we have already shown, the offence of defilement with all its material elements is provided for in subsection (1), and the statutory defencein question is separately provided for in subsection (5) of Section 147 of the Botswana Penal Code, we are just as puzzled how the HonourableZietsman JAsimilarly ended up with the impression that the offence of defilement and its statutorydefenceare provided for in a single subsection of the relevant Penal Code. We say so because theHonourable Judge is on record as having said:*"In the present case the subsection in the Penal Code under which the appellant was charged provides a special defence which can be raised by the accused."*

It may well be,therefore,that it is due to his having this incorrect impression that the Judge concluded that the defencein question ought to have been explained to the unrepresented accused as part of the plea processi.e during theexercise of informing him in a language of his understanding and choice aboutthe nature of the offence he was answering. We are thusnot sure whether the Honourable Justice of Appeal would have come to the same conclusion had he taken note of thefact that the offence and the defence in question are four subsections apart, although in the same Section. Unfortunately we cannot speculate on that, but we cannot help thinking that this would have made a difference.

As it is,we notice that in advocating that Courts give information about the statutory defence in defilement cases to an unrepresented accused in advance as a matter of obligation, on the panel of three Justices of Appealhe was part of in this case,Hon Zietsman JA was the only one towing that line of thought. Even Lord Weir, JA, who concurred with him in the judgment he delivered, did not agree with the view that this practice should be seen as a matter of obligation. In this regard Lord Weir JA said:*"At the start of the trial the charge was read over to the appellant and he said that he understood it. The special defence was not. I do not go so far as to say that there was any requirement to read out the terms of the statutory defence at the start of the proceedings, although my own inclination, particularly in the case of an unrepresented accused, would have been to do so."* (page 11 of the judgment supplied or page 21 of the appellant's List of Authorities).

Beyond this, as we have further noted, even the third Justice of Appeal in that case, Hon Justice Aguda, the then Acting Judge President, not only disagreed with

Zietsman JA on this point,he also altogether disagreed with his whole judgment, and he consequentlydelivered a dissenting opinion in the case. With particular reference to the obligation Zietsman JA had emphasized existed for aTrial Court to pre-alert an unrepresented accused person about the applicable statutory defence, Hon Justice Aguda made a number of pertinent observations, which we must say strike a strong accord both with the doubts we have *vis-à-vis* the arguments the appellant paraded before us and with the views we holdon thisissue.

To start with, Hon Justice Agudasaid :*'In his heads of argument, the appellant submitted that "based on the behavior of the complainant it is reasonably probable that he was under the impression that the complainant was over the age of 16 years."…….It appears to me that the argument of the appellant in this regard will not avail even the most illiterate person. If the charge is read to him, that his offence was having had sexual intercourse with a girl under 16, even if he was an illiterate who was unrepresented it seems clear to me that he would have made it abundantly clear throughout the proceedings either in his cross-examination of the prosecution witnesses or in his own evidence in defence that he believed that the girl was above 16 years of age. That is to be expected even from an unrepresented illiterate accused person. This never happened in this case and what is of great significance is that in our law it is the Court trying any person charged with this offence which has a duty of deciding whether the accused had reasonable cause to believe and did believe that the complainant was of or above 16 years of age, not the accused.'*

It is further clear from Hon Justice Aguda's judgment that as at the time the **Gare**judgment was being pronounced, there was already in existence in Botswana aunanimous decision that had just been pronounced by a full Bench of the Court of Appeal comprising of five Justices of Appeal, including the Judge President and Hon Justice Aguda himself, in the preceding session of that very Court against which the majority decision in the **Gare**case was directly and clearly running counter. The case in question was that of **OntshabetseLejony vs The State** Cr. App. No. 23 of 2000, a defilement case, in which the full Courthad emphasized the point that the decision whether the statutory defenceherein shouldapply in any given case is the sole responsibility of the Court.

Thus, commenting on the subsection that creates this statutory defence in that case, the Judge President was in part quoted by Hon Justice Aguda as having said: *"In the end result, it was to the Court which tried the charge that the statute conferred the duty of finding whether the person charged had reasonable cause to believe and did in fact believe that the victim was of or above 16 years.....The Magistrate's Court found, judging from the evidence and the looks of the victim, that Lejony could neither have had that belief, nor did he in fact believe that the victim was 16 years or above. I have no reason to disagree with that finding....."*As at the time he was sitting in the **Gare**case, therefore, the view Hon Justice Aguda held about this statutory defence was the same one he had helped pronounce in the **Lejony**case, and it is this opinion he bore in mind as he went about assessing the **Gare**appeal.

It is obvious from his judgment that he had to struggle with the question whether the new view that was emerging on this statutory defence could fit in with the precedent the full Court of Appeal had by then just pronounced and created a few months earlier. He inthe endthen said: *"There is nothing in the argument before this Court, nor regrettably contained in the judgment of my brother Zietsman, JA, to convince me to change my opinion. On the other hand I am in even stronger mind that the full Bench of this Court was right in the **Lejony**case. This Court is not bound to agree with any judgment of any foreign Country, no matter how eminent the judges of the foreign Court may be. I do not believe that justice must be considered only as regards the accused, and not the victim. The duty of the Court is to strike a balance..."* (page 9 of the judgment supplied or page 19 of the List of authorities).

As it is, therefore, although the **Gare**case, which had been decided by a majority of 2:1 in the Court of Appeal was popularly welcomed and readily applied by the various Registries of the Botswana High Court across that Country, it appears that it is the **Lejony**judgment, which had been decided a few months earlier by the same Court of Appeal in a unanimous judgment of five Justices of Appeal, which should have taken the limelight and become a leading precedent in this regard. Indeed we wonder why, if the appellant was desirous of citing to us authoritative cases from Botswana on this subject, he did not cite the **Lejony**case to us. It was, as we have earlier mentioned, a weightier authority on the statutory defence herein than the **Gare**case is. At the very least, therefore, the appellant could have cited both the **Lejony**and the **Gare**cases to us, as they both deal with the

statutory defence in issue. However, he completely eclipsed the **Lejony**case in preference for the lonely viewsZietsman JA expressed on behalf of the majority in the**Gare**case. Had it, therefore, not been for our taking interest in the dissenting judgment of Hon Justice Aguda,we might not have had the chance to stumble across the weighty**Lejony**authority.

Coincidentally, the observations Hon Justice Aguda made in the **Gare**case tie up quite well with the sentiments the Seychelles Court expressed in the **Pillay** case. In that case the Court did quite appreciate the difficulties an unrepresented accused person faces in a Court of law, and it did also quite understand such accused person's need for some level of assistance from the Court, but it still found it useful to draw the line and to limit the extent of the assistance a Court can give. Thus it quoted from the Australian case of **Dietrich vs the Queen** (1992) 177 CLR 292 as follows: *"It stands to reason, however, that whilst the essential stagesof the procedure are to be brought home to an accused who is unrepresented by counsel, the Court cannot act as an adviser to the accused as to various tactical possibilities open to him[and] all possible moves open to him at every stage and which could have been adopted by counsel if there was one assisting the accused"* (p 30 of list of authorities). It thus did not surprise us that when it came to listing the steps Magistrates needed to follow to ensure that they hold fair trials, the Seychelles Court did not brandish them out as compulsory obligations. Rather it implored Magistrates to *"as much as practicable follow..."* the said guidelines.

Left, as we now are, with only the Malawian case authority of **Allan Willard** to vet, our first observation is that the apparent support the High Court gave in that case for the appellant's argument that alerting the accused about the statutory defence in defilement cases is a legal obligation that Courts must fulfill at plea stage only came out in a ruling on an interlocutory bail pending appeal application and not in a substantive defilement appeal decision. As such, we believe that the Court was by no means making any conclusive decision on the point. The appeal in which this point was going to be exhaustively argued and considered for final determination was then still pending. Hence, we notice, that the Court cautiously prefixed its statements on this defence with the words: *"Without risking to delve into the appeal..,"*which allowed room for it to revisit the point. As such, we treat the remarks the High Court made in this ruling as being merely tentative, and that they did not even amount to precedent for the Courts subordinate to the said

Court. In any event, a High Court decision cannot have authoritative force in this Court. We accordingly hold that the appellant cannot get any assistance from this case in the present appeal.

Now, following the survey we have carried out above on all the cases the appellant cited to us from several jurisdictions in support of the second ground of appeal, we see ourselves convinced that in insisting on the argument that courts have an obligation in defilement cases to inform the accused about the available statutory defence right from the time his plea is being taken, the appellant is wasting time on chasing after a red herring. As we have already observed, there does not appear to be any reasonable explanation why in the **AkuilaKubuotawa**matter the Honourable the Chief Justice of Fiji called for a mixture of the elements of defilement contained in one subsectionof a section and the elements of the statutory defence contained in a different proviso of the same Section when reading out the charge to the accused during plea. We thus do not find ourselves persuaded to emulate the holding it influenced in the **AlipateKarikari**matter as we deal with this appeal.

Also as already observed in the **Gare**case, on a panel of three Justices of Appeal that presided over that case, Zietsman JA found himself a loner when he decided that the Magistrate that tried Gare as an unrepresented accused ought to have pre-warned him of this statutory defence during the time he was taking plea. His colleagues on the bench, Hon Justice Aguda and Lord Weir JA, clearly dissociated themselves from this rigid view on the issue. We equally, therefore, gain no inspiration from the majority judgment Hon Zietsman JA pronounced in that case.

What, however, impresses us as representing the correct understanding of the law on this statutory defence is the dissenting judgment of Hon Justice Aguda. We find this fortified by the **Lejony**case, which carries the stand of the full five-judge panel Court of Appeal decision on this statutory defence, indicating as it does that the responsibility to decide whether the defence must apply in any given case is the sole business of the Court. To us this implies that it does not matter whether or not the accused flags the defence, the Court will still be obliged to consider itif circumstances render it conducive to do so. We might as well add that this would include the Court acting on the defence, whether or not the accused was pre-alerted about it, as long as it has, in whatever manner and by whomsoever, been *"made to appear to the Court"* that the defence would be applicable.As it is the

Sychelles case lends additional weight to all this, and fortifies the impression we have throughout held in this appeal, to wit, that no such obligation at all exists.

For us as turns out to be the case, just like Hon Justice Aguda opined, if an illiterate man has the charge of defilement carefully read out and explained to him in a language of his understanding and choice, by the time he is so pleading to it, it should be very clear to him that he is being accused of defilement,not just because heallegedly had sex with a female, but because heallegedly had that sex *with a female aged below 16 years.*The charge itself as framed makes it very plain what allegation the accused is up against, and clearly implies to him that if the sex in question was had with a girl aged 16 years or above the accusation would not even have arisen. The defence, which is in a separate subsection or in a separate proviso from the subsection creating the offence, need not, therefore be read out as part of the plea process. We say so first because, separately placed as it is,it does not form part of the elements of the offence, and second, because, as already indicated, the charge itself already indicates the cut-off age point from which the offence ceases to exist.

Thus, it is our view that if an accused person pleads not guilty to defilement, and if it is genuinely his reasonable belief or if it is his actual belief that he had sex with a female aged 16 years or above, then it really ought to come naturally to him to somehow get this feeling or hunch of his across to the Court as his way of extricating himself from the charge. Thus either as he cross-examines witnesses, or as he presents his evidence in defence,he shouldbe able to somehow trigger in the Court the sense that as at the time of his sexual encounter with the victim girl he (the accused)genuinely found himself in a dilemma, and that he was then thus labouring under one of those types of belief or knowledge. He need not say it in the words of the statute. He need not even say it himself if some other witness can. From the way we read the proviso to Section 138(2) of the Penal Code, it is sufficient if somehow it is*"made to appear to the Court"*that that was the impression the accused honestly hadat the time heallegedlycommitted the offence charged. Once thisminimum threshold for calling in the defence has been reached, the Court isduty-bound to assess the situation and see if the accused deserves to be accorded benefit of the same.

To us, therefore, an accused person, even if illiterate and/or unrepresented, does not need any coaching lessons from the Courtabout the availability of

thisdefence,be it at plea stage or at any other stage of his trial, for him to take advantage of it. Indeed, the moment it is so *"made to appear to the Court,"* whether by word of the accused or of another, or by the conduct of the accused or of another, or by any other means, that the particular accused before it had reasonable cause to believe, or that he otherwise in fact believed, that the girl he was having sex with was of or above the age of 16 years, then it must of its own motion and without need of any further prompting, extend the benefits of this statutory defence to that accused person. In that case knowledge, or advance knowledge,about the existence of this defenceon the part of the accused is, in our understanding of the law, neither material nor a pre-condition to his taking benefit of the statutory defence.

In saying so, however,we should not be understood to be saying that Courts must never under any circumstances reveal the existence of this statutory defence to any accused person. It is possible that a rare situation could arise where it will be obvious to the Court that the best way of ensuring justice is to alert the particular illiterate and/or unrepresented accused before it about this statutory defence. In such case there would be nothing wrong,and no harm would result, if the Court did so alert the accused about the defence. Then, however, the Court would not be doing so as a matter of compulsion. It would be doing so in its own discretion upon assessing the prevailing situation.

All we are saying, therefore, is that in this case the appellant is completely wrong if he is saying that the High Court erred in its decision on his first appeal to it when it held virtually that it did not matter whether or not he had,as an accused person,been told about this statutory defence. After all, as can be seen, we have ourselves basically come to that very conclusion. It is our judgment that there was in this case, as there is in every defilement case, no obligation for a trial Court to, in advance and at plea stage, inform the person accused of defilement before it of the existence of this statutory defence. Therefore, neither the trial Court's failure to inform the appellant about this statutory defencewhen he was tried before it, nor the High Court's observation during his first appeal that it did not matter whether he was informed of the statutory defence,at all amounted to any legal error. It istherefore our judgement that the obligation the appellant has so passionately advocated for Courts to bear in the sense that they have no choice but to alert the accused person of this statutory defence in every defilement case during plea-taking stage is more of his own wish than it is a requirement of the

law. We,in consequence, see no merit in the appellant's second ground of appeal and we hereby dismiss it.

We now move to the appellant's third ground of appeal.It will be recalled that we said at the beginning of this judgment that on the veryday that we heard this appeal the appellant obtained our leave to further amend this ground of appeal. This came about because in the way he had previously framed it, the ground of appeal in questionwas completely unacceptable. It had projected the High Court as having committed an error of law in its upholding of a "manifestly excessive" sentence of 12 years imprisonment with hard labour. Since, to us, this was purely and simply a grievance against the severity of sentence, we took issue with it as an empty grievance.

Section 11(2) of the Supreme Court of Appeal Act, as already shown at the outset, is very clear when it says that appeals against High Court decisions,made in exercise of its appellate jurisdiction or in exercise of its powers of review, should *inter alia* not concern matters of severity of sentence. In respect of any decision the High Court so makes at appeal or review level this provision expresslystates that *"such decision shall be final ...as to severity of sentence."*We thus felt that in so appealing to our Court against the severity of the 12 years long sentence, just because the High Court had maintained itdespite him consideringit to be manifestly excessive, the appellant was beingdeliberately defiant against a clear prescription of the law.We could not accept that.

It is following our above said query that the appellant proceeded to obtain our leaveto amend the ground of appeal in question to its present form. Basing on the requirement, also covered in the same Section 11(2) herein, that appeals post-appeal or post-review in the High Court must only be based on matters of law, the appellant said that his grievance was on a point of law and not *per se* on the severity of this sentence.He said his point was that by not considering the age of the victim as a mitigating factor when confirming the sentence hereinthe High Court had not reheard his appeal against sentence. This is what hebranded as an error of law, and it is on this account that we allowed him the amendment.It is also on this premise, we must say, that we allowed him to argue this ground of appeal in full.

The appellant anchored his grievance in this ground of appeal in the case of **Ayami vs Rep** [1990] 13 MLR 19, a Supreme Court of Appeal decision on a second-level criminal appeal. A quotation he believes to be relevant to the point he has raised through the amendment he made, and which he attributes to page 26 of the judgment, although it is in fact from page 25 thereof, upon reading it appears to us to have been taken out of the contextin which it belongs. We have thus chosen to repeat part of the said quotation, but we include in it the sentence preceding the one the appellant chose to start from so as to capture the context the appellant excluded.

The quotation in question, in part, thusreads: *'The appeal from the First Grade Magistrate's Court was in the nature of an appeal on matters of fact. The approach which the High Court is required to take when hearing an appeal of that kind is to embark on a re-hearing of the case. This involves subjecting the whole of the evidence to a fresh and exhausting scrutiny. It was held by Skinner CJ in the case of Pryce vs Rep [1971] 6 MLR (Mal) 65 at 71 as follows: "In our opinion the proper approach by the High Court to an appeal on fact from a Magistrate Court is for the Court to review the record of the evidence and to draw its own inferences."....'*(emphasis supplied)

Based on this quotation, it was the appellant's contention that in the present matter, to the extent that the High Court did not consider the age of the victim as an essential factor in sentencing, then it did not re-hear the appeal which he had lodged against sentence. He followed this up with arguments by which he meant to show why it would have been important for the Court to take that age into account as it reviewed the sentence of 12 years imprisonment it eventually confirmed.

Looking at the authority the appellant has cited to us to back this ground of appeal, what immediately comes to our minds is that it advocates a re-hearing in appeals that are based on matters of fact. As such we do not see the said authority as either covering, or purporting to cover, appeals against sentence, which we very much doubt if they can be said to be the same as or equal to appeals against matters of fact. As it comes out very clearly in thisauthority,what the authority stands for is limited to the particular category of appeals it has distinguished and isolated. We believe that is why in the quotation the appellant referred us to their Lordships *inter alia* kept talking about a *rehearing* of *the case*,

subjecting the whole *evidencetoa* fresh and exhausting *scrutiny*, and about reviewing the record of the evidence. Nothing in what they emphasized related to appeals relative to sentence(s).

Indeed, in the same **Ayami** case, the Court remained very particular and consistent in showing that when it was talking about the High Court conducting an appeal by way of re-hearing, it was specifically confining itself to appeals on matters of fact or on matters of evidence. Thus at page 26 of that judgment the Court went on to say: *"We wish to point out that the right to have his case re-heard by the High Court is a right enjoyed by a person who appeals against the decision of a Trial Magistrate on matters relating to the evidence."* It next, on the same page, went on to say: *"Failure by the High Court to conduct a re-hearing of the case when an appeal, from the Magistrate's Court on matters relating to evidence, is brought before it constitutes an error of law which is appealable to this Court..."*

To us, hearing or reviewing evidence for purposes of convicting or confirming a conviction is not one and the same thing as hearing or reviewing mitigating and aggravating factors for purposes of passing a sentence or confirming a sentence.Hearing evidence involves swearing witnesses, and having them cross-examined and re-examined after their evidence-in-chief, and reviewing such evidence means revaluating sworn testimony that has gone through various stages of testing its veracity to ascertain if guilt has been proved. This is totally unlike a Court listening to mitigating and aggravating factorsfor purposes of passing a sentence post-conviction, or totally unlike an appellate Court hearing mitigating or aggravating submissions for purposes of considering whether or not to alter the sentencethat has been appealed against. As must be well known,submissions on mitigation and aggravation made for sentence purposes are merely given as information to the Court to help it exercise its discretion. They are not, like evidence, given under sanction of an oath or tested through cross-examination. They are not presented to prove or disprove anything,but only to place the Court in a position to have some sense of appropriate balance between passing a harsh and passing a lenient sentence. These factors do not prove or disprove any sentence, as all sentences basically lie in the discretion of the Court. Demanding, therefore, a re-hearing of such loose presentations to the Court for information purposes so that a fair sentence, whether lengthy or short, is passed, appears to us to be a demand without precedent.

Makingit worse in this appeal, the appellant has just made an assumption in his mind that the **Ayami** judgment pronouncements relative to the High Court's handling of appeals on matters of fact can automatically and freely just be transplanted and applied to an appeal such as the present one, which is against sentenceand which is on a point of law or on a purported point of law. He has accordingly not in the leastbothered at allto explain to us wherefrom he got the mandate to just borrow that authority from its domicile scenario and to then apply it to a scenario that is *prima facie* not applicable to it. Our considered view, in the circumstances, is that the appellant has totally misapplied the case of **Ayami** in the appeal that is before us. It is not applicableto it, and we so hold.

Despite our above holding, however, instead of us immediately dismissing the appellant's third ground of appeal, we have decided tospare a few moments to examine what our position would have been had we agreed with the appellant that in the appeal he brought to the High Court against sentence the said Court ought to have conducted a rehearing of the submissions he made to it on the age of the victim in order for him to secure a reduced sentence. Considering, however,that the appellant secured the amendment to his third ground of appeal unexpectedly,and that he did sojust because we had expressed our displeasure with the way he had previously framed the said ground of appeal, we havefound it important for us to take aninterest in checking on the manner in which he had framed the appeal against sentence in the High Court. This is to discover how, if at all, and the extent to which, if any, he featured this age of the victim as a pivotal feature for the review of sentence he was expecting in that Court and in that appeal.

We have as a resultof this exercise noted that at paragraph 6.6 of his Petition of Appeal (page 52 of the Record of Appeal) his complaint was merelythat: *"the lower Court erred in law in sentencing the appellant to 12 years IHL without considering Sections 339 and 340 of the Criminal procedure and Evidence Code."*It is our observation that the provisions the appellant so highlighted in this segment of his appeal against sentence in the High Court merely related to suspended sentences, and to considerations that a Court must bear in mind before passing an immediate custodial sentence of imprisonment on a first offender. In truth, they had nothing to do with the age of the victim. Equally,through them, there was no hint that the appellantwould be heavily banking on the High Court

focusing on the age of the victim as a principal consideration in its review of the sentence in the said appeal.

We then next noted that at paragraph 6.7 of the same Petitionthe appellant's complaint was that: *"The sentence of 12 years IHL is manifestly excessive."*To us, this was such a general complaint that it could notbe classified as attaching to any particular mitigating factor. There is no way, therefore, it could be said or be understood to be featuring a given mitigating factor, let alone to be featuring the age of the victim as the mitigation factor it should be attached to in the appeal against sentence he had so taken up in the High Court.

Beyond this, we have seen that in pursuing his said appeal against sentence in the High Court, at paragraph 2.6 of his skeleton arguments the appellant compressed the two segments of his grievance against sentence in the words:*"The sentence of 12 years IHL is manifestly excessive for a first offender."* (page 58 of the Record of Appeal). Further, at paragraph 3.6.1 of the same skeleton arguments,the appellant begun withaddressing the issue of first offenders, and only then did he from paragraphs 3.6.2 to 3.6.7 make reference to six different comparable cases to back up his claim that the High Court should reduce his sentence.It would appear, therefore, that from the way he framed and projected his appeal against sentence in the High Court what he throughout made look prominent in his complaint about the excessiveness of the sentence he was challenging was the consideration of his status as a first offender. The other mitigation factors, including that concerning the age of the victim, he only featured in secondaryposition.

Further, we have noted that when he resorted to citation of comparable cases, out of the six cases that he covered only one case, i.ethe case of **R vs Petulo**Conf. Case No. 134 of 2013 (High Court Principal Registry), suggested a way of using the age of the victim to increase or to lower an intended sentence in defilement cases. Its suggestion was that where victims are in the upper age spectrum sentences for defilement ought to be lower than in cases where the victims are in the lower age spectrum.As can otherwise be seen, however, many other factors must have been at play in all those cases,and it must have been their combined effect, therefore, that helped shape the sentences that were passed orconfirmed.(pages 73 and 74 of the Record of Appeal).

One thing we believe we can say, therefore, about all the cases the appellant cited to the High Court on the appeal against sentence is that, although on his part he hadmade it a point to highlight for each case the age of theconcerned victim alongside the sentence that was passed or confirmed, it cannot be true that in all those cases the victim's age was the sole factor or the dominant factor that influenced the resultant sentences. The Courts seized of the cases in question, presented as they must have been with multiple factors to consider for sentence purposes,obviously had to look at the total combination of all those considerations, some aggravating and others mitigating, before they could settle for any particular sentence.Certainly the considerations in question could not have just started and stopped at the age of the victim. They must have extended to mitigation based on the age of the accused, the question whether the particular accused was a first or a repeat offender, etc. Thus, wherever the age of the victim played a role, such as in the case of**Petulo**, that factor must only have been one among themany othersthe Courtsmust have taken into account in passing or confirming the sentences in question.Contrary to what the appellant appears to be projecting to us, therefore, our view is that the age of the victim cannot claim the exclusive privilege of being the dominant consideration in settling sentences in defilement cases.

Now, while we are still on the case of **Petulo,**it is important for us to observe that it merely carries aproposal on a method Courts could consider adopting in determining the duration of sentences in defilement cases. We say so because the suggestion the case contains was preceded with the words: *"In relation to defilement, there might be need for consideration of the lower and upper end of the age for which the Penal code proscribes sexual intercourse."*It is thus not settled that this should indeed be the way forward, even though the appellant seems to be so much dependent on this suggestion. The **Petulo**case should, therefore, not be understood to be finally fixing the way defilement sentences should be imposed or reviewed. It has just made a proposal which Courts, as they continue to deal with like cases, will vet and see if this should indeed be the lead feature in theirpractice of sentencing indefilement cases.

In *obiter*, we would just like to observe that the fact that through Section 138(1) of the Penal Code the Legislature has, at maximum, pegged defilement to a life imprisonment sentence says a lot about how gravely Courts should be viewing

this offence. Tendencies, therefore, of viewing defilement as if it is less serious when committed against a relatively older girl,and/or as if it is more serious only when committed against a relatively younger girl may well be carrying some latent danger of condonation of the offence if we allow them to intoxicate our minds too much. It was, for instance, observed in the **Lejony**case, even though not specifically for sentence purposes, that the offence of defilement was created for the protection of young girls. These sentiments were also repeated, and concurred in, by all three Justices of Appeal that presided over the defilement case of **Mothoemang vs the State** [2011] 1 BLR 176 in the Botswana Court of Appeal.In the words of Kirby JP: *"...it should always be borne in mind that the law against defilement was enacted principally for the protection of young girls, and it is the duty of the Court to preserve that protection..."* Courts will do wellthen if they see to it that all girls below the age of consent deserve their legally given protection, whether or not they tend to look nearly ripe for sexual activities. They should, therefore, not be disadvantaged with the passing or confirming of peanut sentences of imprisonment against the persons that feast on them and ravish them.

For the moment, we believe that this is all that we should say. As we have already made it clear above,the making of adjustments to the sentence of 12 years length, which the appellant had originally complained to be manifestly excessive, is not part of this appeal in terms of Section 11(2) of the Supreme Court of Appeal Act. For purposes of the appeal before us, however, the point remains that although the appellant tried to make capital of the age of the victim in relation to sentences that were passed or confirmed in the many cases that he cited, not all those cases looked at the age of the victim in the waythe High Court looked at it in the **Petulo** case. Also our point remains that the age of victim factor was in truth only one among many otherfactors that played a role in influencing the sentences that were so passed or confirmed.

Examining the record of appeal further, we find it showing that in arguing the appeal before the High Court, the appellant merely adopted all the documents he had filed in its support (page 95 of the record of appeal), and that by way of highlighting or emphasizing his filed arguments he did not say much. Specifically regarding his appeal against sentence (pages 94-99 of the record of appeal), we see that he did not makeanyoral argument to either highlight or otherwise stress any of the arguments or the case authorities he had included in his skeleton

arguments. Thus, he did not even take up the opportunity to highlight or emphasize the point he is now claiming that he was especially not re-heard on. In actual fact, the truth is that he did not highlight or emphasize any other mitigation feature that was covered in his skeleton arguments in this oral presentation of his. Basically, therefore, the appellant's arguments in support of his appeal against sentence were at large, and they did not shed off whatever influence the many other features,apart from the one he is glued to, must have had on the Courts as they passed or reviewed those sentences.

Going to the judgment of the High Court, on sentence we incidentally note that the Court concentrated on what had been the main thrust of the appellant's appeal. As seen from the way the ground of appeal against sentence was framed in that Court, and from the way the skeleton arguments championed the Sections 339 and 340 of the CP and EC argument, the first offender argument, the age of the offender and the age of the victim arguments, it is clear that the appellant had tried to persuade the Court to trim the sentence he was concerned with to lower levels from multiple angles, and not just from the angle of the age of the victim. In view of this, the High Court came out quite clear why it could not agree with himthat the sentence he had appealed against was a manifestly excessive one.

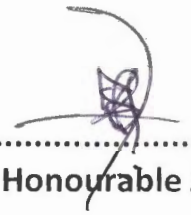
In this regard *per* its own wordsthe Court said: *"The appellant was sentenced to 12 years imprisonment. It has been argued that the sentence is manifestly excessive. Under Section 138(1) of the Penal Code the maximum sentence for defilement is life imprisonment. The lower Court sentenced the appellant to 12 years, meaning that the lower Court did not consider the appellant the worst of offenders. The appellant was aprimary school teacher, and the student was a pupil at the same school. As a teacher, he was in a fiduciary relationship with the victim and the other pupils. He was supposed to be a role model for the victim and the other pupils. The pupils were supposed to trust him, and he was supposed to be a father figure to them. He broke that trust and he was not even remorseful. As a teacher he ought to have known better that he could not have sex with his pupils, more so having a sexual relationship with the victim. He betrayed the trust the pupils had in him. I cannot therefore tamper with the sentence the lower court imposed, it could have even imposed a much higher sentence than the one imposed."*

In our understanding, in saying all this, the High Court was not at all displaying that it did not hear or re-hear the appellant's arguments on all the mitigating features he had presented to it for purposes of gaining a discount in the sentence. All it was really saying was that, in contrast with what the appellant had submitted and emphasized on in hisappeal to have the sentence reduced, there were these other very important aggravating and counter-balancing considerations it also had the duty to bear in mind before it could consider interfering with the sentence. In our judgment, if from the pronouncement the Court made the appellant took the view that the court did not re-hear him on the point of the age of the victim, assuming that had been the requirement, then we believe thathe has completely miscomprehended the judgment, and that he is quite mistaken about its import. After all if to be satisfied that there had been a re-hearing he needed the Court to mention or to repeat in its judgment each and every feature he had presented it with in his submissions on sentence, then query why in this appeal he is only taking issue with the non-mention of the age of the victim and not with the non-mention of his first offender argument and/orof his Sections 339 and 340 of the Criminal Procedure and Evidence Code arguments.

As we see it, in the way the appellant had projected his appeal in the High Court, the Court only needed to highlight the counter-balancing aggravating features to take the decision either to confirm or not to confirm the sentence appealed against. In so doing it did not mean that the Court had been deaf to the appellant's arguments. The argument about the appellant not being re-heard on a single point that the appellant has selected to base his appeal against sentence on does not make any sense to us. In fact, our unanimous view is that it is because the High Court had fully heard the parties, including the appellant, on the appeal against sentence that it came to the conclusion that had it sat at first instance it could have even imposed a higher sentence. In our judgment, therefore, even if re-hearing were a requirement in the appeal against sentence that was before the High Court, which, as we have already held, it was not, our conclusion would have been that the said Court had fully fulfilled that requirement. On the basis, therefore, as we have already held, that a re-hearing was not called for in an appeal against sentence, and also on the basis that even if it had been a requirement our view would have been that the High Court sufficiently fulfilled that requirement, we find no merit in the appellant's third ground of appeal. In the result we dismiss it.

In net aggregate, therefore, the appellant has in this appeal failed on all the three grounds of appeal he tabled before us. The result is that his appeal, both as against conviction and as against sentence, now stands dismissed in its entirety. We order accordingly.

Pronounced in Open Court the 29th Day of March, 2018 at Blantyre



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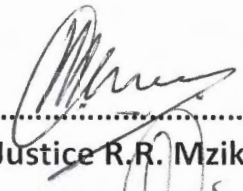
Honourable Justice E.B. Twea SC, JA



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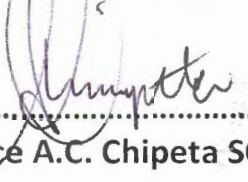
HonourableJustice R.R. Mzikamanda SC, JA



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Honourable Justice A.C. Chipeta SC, JA