14-05-2004

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL APPEAL NO 2 OF 2000

GEORGE CHAPHUKA

versus

THE REPUBLIC

From the First Grade Magistrate Court sitting at Soche Criminal Case No. 935 of 1999

CORAM: Chimasula Phiri, J.
Mr Mwenelupembe for the State
Mr E. Banda of counsel for the appellant
Mr Kamanga – official interpreter.

Chimasula Phiri J.

JUDGMENT

The appellant was convicted on two counts of defilement contrary to Section 138 of the Penal Code by the First Grade Magistrate Court sitting at Soche. He was sentenced to 4 years imprisonment with hard labour on the first and 3 years imprisonment with hard labour on the second count. The sentences were ordered to run concurrently. He appealed against both convictions and sentence.

On the hearing of this appeal it was clear that the conviction on the second count was erroneous. Consequently the court quashed the conviction on that count and the sentence of 3 years imprisonment with hard labour was set aside. The appeal only proceeded on the first count.

The brief facts are that the appellant was working for Sanjika Palace as one of the security personnel. On 4th January 1999 he was on duty

patrolling the Sanjika Palace forest. It is alleged that whilst on duty he caught 4 little girls who had gone to the forest to look for mushrooms but ended up collecting some firewood from the forest. He threatened the girls with punishment. He ordered them to go to a nearby river where they were made to take a bath. He ordered the two very young girls to go away but the other two were made to move to different places. The appellant told them to undress. He forcibly had sexual intercourse with the first girl and immediately went to the second girl. At that time his penis had lost its erection and the appellant failed to force entry into the vagina of the second. It was for this aspect that the appellant's conviction on the second count was quashed. Both girls are under 13 years old. After both girls were released by the appellant, they went to their respective homes in total distress and were crying. Upon reaching home they reported to their parents. The girls were taken to a clinic within Sanjika where a nurse examined the private parts of these girls. A report was made in respect of Mwandida Fashion that semen was seen in her vulva and was bruised and that her private parts permitted entry of a finger and the impression was that she was raped. The report for the other girl just indicated bruises on the vulva but that there was no penetration. These girls were sent to QECH for further examination but that was not done. Later there was identification parade at Chilomoni Police sub-station and both girls picked the appellant from among other policemen. These were findings of facts made by the lower court.

In arguing the appeal Mr Banda counsel for the appellant was very eloquent. His main arguments were that the conviction is generally against the weight of the evidence, that there is a lot of contradictory evidence from the prosecution witnesses, that the lower court improperly admitted hearsay evidence and lastly that the lower court should have admitted the evidence of the appellant and his witness as representing truth of the matter. On sentence Mr Banda said the sentence was manifestly excessive. The State did not make any submissions during the hearing because counsel for the state was not available.

First point argued by Mr Banda is that there is no corroborative evidence. The girl said that she was raped by the appellant. She reached home whilst crying and was totally distressed. She was taken to a clinic in Sanjika where a nurse formed an impression that the girl had been raped. Traces of semen were found in her private parts. I would have difficulties to agree with counsel because there are a lot of independent pointers confirming the occurrence. At Police the appellant was positively identified

as the culprit. Further, the magistrate allowed the girls to give sworn evidence because he was convinced that the girls appreciated and distinguished falsehood from truth. The evidence of the other girls was corroborative. The second point argued by Mr Banda is that the medical report submitted by Sanjika clinic is insufficient because that was not issued by a qualified medical doctor. This point has been dealt with in our courts and I was of the view that it must be very clear that a report confirming penetration in rape or defilement cases can be submitted even by any lay person who examined the private parts of the victim. In the villages there are elders who know about these issues very well and their findings are admissible in evidence. What more then with a qualified nurse or midwife? A report by such officers would equally be acceptable. The path to justice would be full of pimples if the procedure restricted admission of medical reports to only a particular category of medical personnel such as doctors. I reject the arguments of Mr Banda.

Thirdly, Mr Banda raised the argument that the lower court should have accepted the evidence of the defence and not that of the young girls who testified for the prosecution. I would dismiss this by saying that the lower court had opportunity of seeing the witnesses and assessing their demeanour. It would be very difficult for me who only dealt with the court record to say that the lower court should have believed the appellant. The magistrate was entitled to take a stand on the demeanour of the witnesses and I find no fault with that. Consequently, I find that the conviction was properly grounded on the available evidence.

On sentence, Mr Banda has said that the sentence of 4 years imprisonment with hard labour is manifestly excessive and that the appellant had been in custody for a long time before trial. This I can dismiss with few words that the appellant is very lucky to have been slapped with such a light sentence for such a grave offence. If there was a cross appeal by the DPP I could have enhanced it to between 6 and 8 years imprisonment with hard labour. It is with extreme reluctance that I will leave it to stand at 4 years imprisonment with hard labour.

Lastly, I wish to put on record that I deliberately took a long time to deliver this judgment because I was approached by a relative of the appellant at home with a view that I should consider the appeal favourably.

I wish to discourage litigants from leading courts into temptations.

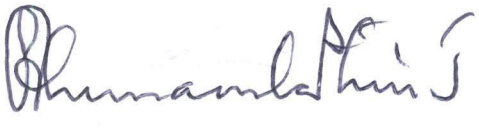
PRONOUNCED in open court at Blantyre this day of January 2002.

Chimasula Phiri
JUDGE

ADDENDUM

This judgment was supposed to be delivered on my behalf in January 2002 when I was going through the dark hours of impeachment proceedings. When I resumed duties in November 2002 I was under the impression that the judgment had been delivered. It was not until 10th May 2004 when the Assistant Registrar brought to my attention that this judgment had not been delivered in open court. Therefore to be fair to the appellant, notwithstanding his being out on bail, his sentence shall continue from January 2002 or from the date when he was released on bail until the expiry of the 4 years imprisonment with hard labour upheld by the court.

PRONOUNCED in open court at Blantyre this 14th day of May 2004.



Chimasula Phiri
JUDGE