IN THE HIGH COURT OF MALAWI

LILONGWE REGISTRY

CRIMINAL APPEAL NO. 104 OF 2007

J.N.N..... ..... APPELLANT

-AND-

THE REPUBLIC ..... RESPONDENT

CORAM: HON. JUSTICE NYIRENDA

Mr. Wadi/Mr. Chiphwanya; Counsel for the Appellant

Mr. Kayira, Mr. Nkhono, Mr. Kayuni; Counsel for the State

J U D G M E N T

The appellant was tried and convicted of incest contrary to Section 157(1) of the Penal Code. The particulars of the offence alleged that the appellant, between the 2nd July and the 10th July 2007, at his house in Area [number] Sector [number] in

the City of Lilongwe, had carnal knowledge of U.N. who is, and to his knowledge, his daughter. He was sentenced to 13 years imprisonment with hard labour by the Chief Resident Magistrate Court at Lilongwe. He now appeals to this court against the entire trial, his conviction and the sentence imposed on him. The grounds of appeal as contained in the Petition of Appeal are as follows:

1. ***APPEAL AGAINST CONVICTION (GROUNDS)***

(i) *The Learned Magistrate erred in finding that the applicant had a case to answer when the prosecution evidence contained fatal contradictions.*

(ii) *The Learned Magistrate erred in finding that the applicant had a case to answer when the evidence of PW1, the four-year old alleged victim was not corroborated in material particular.*

(iii) *The Learned Magistrate erred in finding the evidence of PW3, the maid, and PW5, the medical expert, corroborated the evidence of PW1 to the requisite standard when that evidence was equivocal in that it never pointed to the applicant as guilty of incest, and when that evidence was not conclusive as to whether*

penal penetration occurred but only raised a possibility thereof.

(iv) *The Learned Magistrate erred in relying on the evidence of PW3 as corroborative of PW1's evidence when PW3 herself never testified to have seen PW1's private parts prior to or some time after the alleged incest and so was unable to offer a comparative assessment of how they normally look like so as to afford the court evidence that indeed there was a change during the period of the alleged incest to support the allegation.*

(v) *The Learned Magistrate erred in finding that the evidence of PW5 corroborated the evidence of PW1 to the requisite standard in the face of the evidence of DW7, the defence expert witness, to the effect that some girls are born with a larger than normal introitus or without a hymen and therefore that a larger than normal introitus or absence of hymen is not evidence of penal penetration.*

(vi) *The Learned Magistrate erred in totally disregarding the unchallenged evidence of DW2, DW5 and DW6 to the effect that at the time of the alleged incest, PW1 never showed any signs of pain in her gait and that she was*

well, which evidence cast real doubt on the prosecution story; particularly testimony of PW3.

(vii) *The Learned Magistrate erred in finding as a fact that the applicant inserted his penis into PW1's vagina and that he did this after putting on a condom when the evidence does not bear on this at all whatsoever.*

(viii) *The Learned Magistrate erred in disqualifying wholly the evidence of DW3 on the note forwarded to him for no reasonable cause when the prosecution never disputed its authenticity.*

(ix) *The Learned Magistrate erred in wholly disqualifying the evidence of DW1, DW3 and DW4 without sifting the objectionable from the palatable.*

(x) *The Learned Magistrate erred in finding that PW1's hymen was broken when there was no evidence to this effect and when her medical report never bore on this point.*

(xi) *The Learned Magistrate erred in relying on the fact that during medical examination several days after the alleged incest PW1 had pain in her legs to buttress the incest allegation when DW2, DW5 and DW6's*

unchallenged evidence clearly showed that after the alleged incest and before the examination, she had no signs of pain, and she was even refusing to go with her mother.

(xii) *The Learned Magistrate erred in failing to take into consideration the question of inducement of PW1 when PW1 clearly and emphatically said that it was PW2 who told her to tell the story of the 'stick' and 'paper' having been promised that she would be given chocolate and fanta as a reward.*

(xiii) *The Learned Magistrate erred in law in failing to take into consideration the discredited evidence of the prosecution witnesses during cross-examination, particularly testimony of PW2, PW3, PW4 and PW5.*

(xiv) The Learned Magistrate erred on finding of fact that PW3 was a credible witness when in fact the evidence on the Court Record showed that her demeanour and credibility were evidently questionable and dubious.

(xv) *The Learned Magistrate erred in fact and in law in making conclusion of facts which were not even given in evidence.*

(xvi) *The Learned Magistrate erred in fact and in law in not warning himself against the dangers of trumped-up charges in sexual offences and in overlooking the question of fabrication of the charge against the accused.*

(xvii) *The Learned Magistrate erred in the final analysis in convicting the applicant when the State had failed to prove the case against him beyond reasonable doubt and when the conviction is therefore against the weight of the evidence.*

2. ***APPEAL AGAINST SENTENCE (GROUNDS)***

(i) The Learned Magistrate erred in failing to lend due weight to the mitigating factors in this case.

(ii) The resulting sentence is manifestly excessive.

In submitting against the trial the learned counsel Mr. Chiphwanya stated categorically that the trial Magistrate was inclined to convict the appellant against all probability. That the Magistrate's mind was made up throughout the trial and nothing could have moved him from convicting the appellant. In clearer language it is alleged that the trial Magistrate was biased against the appellant; that the bias is manifest in the

ruling on a case to answer and more particularly in the admission and rejection of evidence during the entire trial. It is contended that the Magistrate readily admitted prosecution evidence and was very quick to throw out the evidence by defence witnesses.

In the nature and seriousness of this case and the entire grounds of appeal this is an appeal that must be treated by way of rehearing and I proceed to do so. For that reason I would not have to deal with each and every single ground of appeal but look at the entire proceedings. Indeed counsel on behalf of the appellant both in their skeletal arguments and when submitting in open court consolidated the grounds of appeal. Suffice for me to say I have meticulously read through the grounds of appeal and will take them along in my mind throughout this judgment. In the main though the consolidated ground is that the decision of the trial Magistrate to convict and sentence the appellant as he did was against the weight of the evidence and circumstances of the case. Therefore the entire evidence must be analyzed and scrutinized and eventually, if it came to that, the sentence must be reconsidered against the mitigating factors. I should therefore immediately proceed to outline the essential testimony and the evidence from the witnesses on both sides of the case.

The first witness for the prosecution was the complainant herself, U.N., although her testimony was initially interrupted and she eventually came back after the testimony of the third prosecution witness. Her testimony was unsworn on account of her age. It was brief. It is easier for me to set it out in full by simply quoting from the lower court record. This is what she said:

Examination-in-Chief in English:

"I live in Area [number] with my mum. My mother's name is J.. My dad's name is Jo. N., he lives in Area [number] also. When I go to dad he puts his stick where I 'beeb' and 'weewie'. Here (touches the groin area). This is my hand. This is my mouth. This is my nose. (Child rather reluctant to mention the biological name). It is called 'bum bum'. The stick was inside his trousers. The stick was black in colour. He just took the stick and put it here (groin). I was not doing anything. He was wearing a white paper when he put the stick here (groin area). The 'bum bum' was paining. Then I was crying and dad was paining me. Dad put on a paper and put the stick here and then I was crying. It was put inside my trousers. My friend at school is M.. I don't know how old she is. I am 4 years old. I had tea and bread for breakfast.

Cross Examination:

I go to B... School where M. also goes. My birthday is yesterday. My birthday was at school. I shared my birthday cake with my friends. I also shared with dad. My sister is not Cecilia but Siya (court observes that child is very clever and confident). I am drawing my mum.

The stick you were holding is not the same as that one (a piece of grass). That one was big and it was black. I don't know how long. I did not tell my teacher that my dad put a stick in my 'bum bum'. It was not paining when I went to school. I told my mum when dad was putting a stick. My mum was there. When I told my mum it was Friday. I went to hospital today. I am no longer feeling pain. I was not moving when he put his stick. I was not moving but dad was moving. I was wearing my trousers, this one, when dad was doing that. My dad bought this jean at her shop. I go to mum's shop. This is the paper dad was wearing (a piece of A4 typing paper). That paper is white. The book is yellow. I don't know that colour (skin). My hair is black. My 'bum bum' does not have hair. The stick does not have hair. Dad took the paper he was wearing at the shop, his shop. This is the paper (A4 sheet) which I saw. (child produces a drawing)(see piece of paper) my mum told me to say that dad put this stick inside me.

Re-examination:

My dad was in the bedroom when he put the stick. He was not moving anywhere. He put the stick two times. When dad put his stick we were just the two of us in the bedroom.

Cross Examination:

Mum will give me chocolate and fanta for saying that dad put his stick inside me. I don't want to go to dad's place. I am not going there again because he puts his stick in me (child very clear about). I love teacher Winnie and teacher Munyenyembe.

Re-examination:

Dad was not moving. I will not go to dad's place again because he put a stick in me. Yes I know the importance of telling the truth. My mum tells me to tell the truth. I am feeling ok now on my 'bum bum'.

Examination by Court:

Nobody but me put me up to this. I don't know when this happened.

The second witness for the prosecution was U.'s mother J. M.. She told the court that she had been married to U.'s father but at the material time they had been separated for approximately three years. U. used to live with both of them, meaning that she would stay at her house and at times she

would stay at the appellant's house. The houses are in the same locality and close to each other. It is said on the 2nd July 2007 the appellant asked for U.. He had been out of the country and had just arrived. The girl was taken to him. On the 10th July 2007 the maid who used to look after U. phoned the witness and requested her to come home. Apparently the witness was not staying at home during that period. She had been staying at her workplace because of pressure of work. She instructed the maid to send her a note. It did not occur to her that the maid had anything important to tell her.

On Thursday the 12th July 2007 the witness called the appellant and requested that U. be brought to her. She had missed the girl. U. was brought by the appellant. That day the three of them spent sometime together and later U. went back home with the appellant. The following Sunday the 15th July the witness sent a vehicle to collect the maid and all her children including U. for them to go to church. U.'s sisters were brought but U. was not with them. The witness asked the maid why U. was not with them. She was told there was a problem and that is why the maid had called on Tuesday.

The witness went on to say the maid told her that U. had complained that her 'weewie' was painful and reluctantly broke the whole news to her. The witness called the appellant and asked for the girl but she was not brought. Later in the

day she went to the appellant's house and picked up the girl. She asked the girl what the problem was and she told her that her dad had put a paper and took a stick and put it inside her but that it was very painful.

Upon hearing this, the witness took U. to an elderly lady whom she knew and together they inspected her private parts. She noticed that the girl's genitalia was too reddish and enlarged. The next day the witness took the girl to her doctor who in turn referred her to a specialist at Kamuzu Central Hospital, Doctor Chiudzu.

Because of the nature of the complaint Dr. Chiudzu sent her to Area 18 police first where she indeed went. The next day the witness brought the girl back to Dr. Chiudzu for further examination. In cross examination the sequence of her movements between Dr. Chiudzu and Area 18 police became unclear as to what happened first and at what time. The fact remained though that she had been to both places and that the girl was examined by Dr. Chiudzu. She insisted in cross examination that together with Mrs. Tambala they inspected the girl's vagina. She said she could not inspect the girl alone because she was in a state of shock.

The third witness for the prosecution was the maid who looked after U.. She was responsible for generally looking after the

girl even when the girl was staying at the appellant's house. Her testimony was that on the 10th July 2007 when she was walking U. home from school the girl asked to be carried because she was feeling pain at her 'bum bum' which meant her private parts. When they got home U. invited her into her bedroom where she removed her underwear and showed the maid her private parts. PW3 says she noticed that the girl's vagina was blood red. According to her U. told her that her father had put his member into her.

The witness went on to say in order to relieve the girl of the pain she applied vaseline to her vagina. She observed that the vaginal entrance was enlarged so much that her two fingers could go in. It was upon this revelation that she tried to contact U.'s mother.

In cross examination the witness said although she was responsible for bathing U. the girl used to refuse her wash her private parts saying her father would do that.

The fourth prosecution witness was the policewoman to whom the matter was reported at Area 18 Police Station popularly known as Lingadzi Police Station. The matter was reported to her on the 16th July 2007. She examined the girl and observed that she had a hole in her vagina and it was reddish around. The girl was also not feeling alright with her legs.

She referred her to the hospital. After inspection at the hospital the girl was brought back to her with a medical report. In cross examination she said the girl was brought to her around 10 o'clock in the morning and that was after she had been to the hospital. At the station the witness inspected the girl in order for her to confirm the nature of the problem. She says she inserted her two fingers into the girl's vagina to establish if the hymen was still in place. U.'s hymen was not there and that the vagina itself had a hole and was reddish.

The fifth and last witness for the prosecution was Dr. Chiudzu, a Senior Gynaecologist and Obstetrician at Kamuzu Central Hospital. Dr. Chiudzu confirmed that U. was brought to her on the 16th July 2007. The mother said she was not happy with the smell coming from her private parts. The girl herself told her that her 'weewie' was paining. The witness asked her if anyone played with her 'weewie'. To her disbelief the girl said it was her father and that his name was N.. She asked the girl again if it was her father and not her friends at school. The girl insisted that it was her father Jo.. She asked the girl further what exactly her father used to do to her. The girl said he puts a stick, and that she would show her where her father puts a stick. The doctor then took U. to the examination room and laid her on her back on the couch. The girl opened her thighs and pointed to her genitalia. There were no cuts or bruises and no blood but there was a lot of

fluid which gave some smell. The doctor examined the genitalia and noticed that the introitus of the vagina was larger than normal for a girl of her age. She took specimen for examination. In the meantime she discussed the girl's situation with the mother and advised her to take the matter to police if that is what she felt.

The witness told the court that in a four-year old girl the walls to the vagina are back to back. Without penetration the vagina remains closed. In the case of U. the vagina was open which meant it had been penetrated by something.

Coincidentally Dr. Chiudzu knew U. and the parents. She had in fact delivered U. in 2003.

In cross examination she said at the time she examined U. her vagina was reddish. She went on to say the state of the hole in U.'s vagina could not have been caused by a single penetration with fingers. That it was definitely as a result of numeral penetrations. The witness agreed that usually if a child had sexual intercourse with a man the vagina would have cuts and there would be bleeding within 24 hours of the intercourse but that lack of cuts and bleeding would not negative penetration.

The samples that she took from U. came back normal. There were no traces of sexually transmitted infections or sperms. Dr. Chiudzu tendered the medical report as Exhibit P2.

The appellant was the first own witness. The important aspects of his testimony are not too long. He told the court below that on the 15th July 2007 he went to church with U. and came back home with her. Her mother PW2 then came to collect her without suggesting anything had gone wrong. Later on that same day J. called him and told him that U. was complaining of pain from her private parts. The appellant suggested that they take the child to the hospital. Apparently he did not get a response. The next day he tried to call J. again. He still did not get a response whereupon he decided to follow them at J.'s workplace where he thought they were. When he got there he says he saw U. but J. quickly took her to hiding. He left the matter at that. The next thing that happened is that he was called to Area 18 Police Station where he was arrested and charged with incest.

In cross examination his position was that between the 2nd and 10th July, 2007 U. was staying both at his house and her mother's house. He could not remember on which particular days she was at his house. He went on to suggest that J. was trying to frame him for reasons known to her. During the time U. stayed at his house it was still the same maid the third

prosecution witness who used to come to prepare her for school. He would then take her to school. He had no explanation as to why U. said all she said in court.

The second defence witness was Mrs. Munyenyembe, one of U.'s school teachers. Her short testimony was that she did not observe any problem with U. at school.

The third defence witness Mr. Chipeta a Laboratory Clinician at a private clinic within Lilongwe to which the appellant and J. used to go while they were still married. They also used to take their children to the same clinic. He went on to say on a certain day a man whom he could not name came to him at the clinic with a note from J. asking for a report saying she would pay. The request was written at the back of a paper from J. Shopping Centre. The specific message read 'Please assist me I will pay', and signed, Director A to Z , J. Mkhonyi. In other words the request clearly showed it was from J., U.'s mother. The piece of paper was tendered as Exhibit D2. The witness says he refused to give a false report. He then went to retrieve the clinic card for the N. family and endorsed in it the words 'refused to give a false report to Mrs. J.', on that same day the 7th July 2007. He says he also told the gentleman that he could not issue the false report. In his further evidence he said in fact J. had been to the clinic on that same day to ask for a report for the child. He refused to issue the report

because the child was not with her. In other words, the note said to have been brought by the unknown gentleman was a further attempt by J. to get a false report.

The fourth, fifth and sixth defence witnesses did not give any meaningful testimony. There is virtually nothing to be said about them except to say that they did not observe anything abnormal with U. and that she did not complain of pain at any point at the material time. The last witness for the defence was Tarek Majid DW7 also a gynaecologist and obstetrician at Kamuzu Central Hospital. His professional testimony was that there may be no injuries even after a girl has had sexual intercourse with an elderly man. Sometimes there would be serious injuries and at times minor lacerations. He further said there was no significance about a girl having a large introitus because some girls are born in that state. In cross examination he insisted that there might be no injuries after sexual intercourse with a girl of four years. He also said most girls are born with a hymen but some may not have. Some girls are born with enlarged introitus. He concluded by saying the possibility of these unusual cases are under five percent.

In the usual manner as I approach this case I remind myself of a number of key principles which guide the determination of criminal cases. It is now more than a well trodden path that the burden of proof in criminal cases is on the prosecution

throughout the case. Secondly the burden on the prosecution is to establish the case to a requisite standard which is proof beyond reasonable doubt; see the cases of Woolmington vs Director of Public Prosecutions (1935) AC 462 and Miller V Minister of Pensions (1947) 2ARL ER 372. The standard of proof in these cases is what is also translated in Section 169(1) of the Criminal Procedure and Evidence Code which states:

> *A fact is said to be proved when, after considering the matter before it, the court or jury, as the case may be, either believes it to exist or to have existed or considers its existence at the relevant time so probable that a prudent man aught, under the circumstances of the particular case, to act upon the supposition that it exists or existed.*

In Woolmington the test was expressed in this way:

> *Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to the qualification involving the defence of insanity and to any statutory exception. If at the end of the whole case, there is a reasonable doubt, created by the evidence given either by the prosecution or by the prisoner as to whether the offence was committed by him, the prosecution has not*

made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law and no attempt to whittle it down can be entertained.

From the summary of the facts of this whole case as laid out above certain basic facts emerge. It emerges from the facts that the appellant is father of the complainant, a girl of four years of age at the time of the alleged offence. The appellant was separated from the girl's mother. Both the appellant and the complainant's mother lived in Area [number] in Lilongwe and their houses were not too far away from each other. It is not in dispute that the complainant would be with the appellant one day and be with the mother the next day. She lived in both homes and would sometimes commute from one house to the other on the same day. The truth of the matter is that until the events of the allegations in this case and although the appellant and the girl's mother were separated, there was no estrangement between them. As a matter of fact from the girl's mother herself they still had a good relationship especially on matters relating to the welfare of the children. This is why the allegations in this case are extremely difficult to analyse. It is indeed for this reason that I have taken considerable time, thought and care to find my way through the matter to come to the findings that I do. I felt in the

nature of the case itself, besides anything else, I needed to proceed with extreme caution.

U. is said to have complained of pain in her private parts on or about the 10th of July 2007 when she was being walked home from school by Madalitso Kaulunga PW3. On arrival at home PW3 checked the little girl's genitalia and according to her the girl's vagina was abnormally red. Because the girl was complaining of pain in that area she applied vaseline to it to ease the pain. It was at the time of applying vaseline that she also noticed that the entrance to the girl's vagina was abnormally big for a girl of her age. PW3 was able to insert two of her fingers into the entrance.

When these matters came to the attention of the girl's mother PW2 a few days later she sought the assistance of another lady, Mrs. Tambala, and together they inspected the girl. She noticed that the girl's genitalia was too red and the introitus too wide. PW4 Woman Detective Inspector Chigwe at Lingadzi Police Station also had occasion to inspect the girl's private parts when the matter came to her. She too observed that the little girl's genitalia were abnormally red and the introitus too wide. U. eventually ended up in the hands of Dr. Chiudzu a Senior Gynaecologist and Obstetrician at Kamuzu Central Hospital. Upon examining the girl's genitalia she observed that it was abnormally red, she had no hymen and the

introitus was larger than usual for a girl of her age. Thus far another fact that is borne out by the evidence is that U. was found without a hymen. Her genitalia were abnormally red and the entrance to her vagina was abnormally large.

The issue, and this is the real issue in this matter, is whether the abnormality with U.'s genitalia can be attributed to the appellant having carnal knowledge of his own daughter.

According to J. M. her daughter told her that her father, the appellant, had put on a paper and took a stick and put it inside her and that it was very painful. A similar statement was made to Madalitso Kaulunga PW3 by the girl. Beyond these two witnesses the girl had quite a conversation with Dr. Chiudzu. To the question whether anyone used to play with her genitalia U. said it was her father and that his name was N.. To a further question whether it was her father and not her friends at school the girl said she was sure it was her father Jo.. As to what her father does the girl said he puts a stick and she would show the doctor where her father puts a stick. When she was taken to the examination room the girl lay down, opened her legs and pointed at her genitalia. Upon examination of the girl's private parts the doctor established that there was no hymen, the area was abnormally red and the introitus was too large. The doctor's expert opinion was that in case of a four-year old girl the entrance to the vagina is

closed. The walls to the vagina are back to back and remain in that state without penetration. In the case of U. there was a hole which meant that there had been penetration. Her further opinion was that one penetration with a finger could not have left the girl's introitus in the state it was. In her opinion that was definitely as a result of numerous penetrations.

Doctor Chiudzu's opinion should however be contrasted with that of Doctor Majid DW7 who is also a gynaecologist and obstetrician at Kamuzu Central Hospital. Doctor Majid was of opinion that there is no significance to a girl of U.'s age having a large or small introitus. Some babies are born with large introitus although this is very rare. He also said some babies are born without a hymen. Again this is rare. In his opinion these rare cases would probably be about five percent. Although he could not rule out penetration in his view it would equally not be conclusive that the U.'s large introitus was as a result of penetration.

It is at this point that I must again refer to what U. herself said in relation to this point.

U. told the court that her father puts his stick at her weewie and that the stick was inside his trousers. That her father used to wear a white paper and that she used to cry when that

was being done because she felt pain. At the time that was happening it was just the two of them in the bedroom. The stick was bigger than a piece of grass and that it was black. That while putting the stick in her 'bum bum', meaning her genitalia, she was not moving but her father was moving. She said she no longer wants to go to her father's place because he puts a stick inside her. In the same breath U. said her mother told her to say that her father put the stick inside her and that her mother would give her chocolate and fanta for saying that her father put a stick inside her.

I have myself carefully gone through U.'s testimony. It was simple and clear testimony. For the most part what she told her mother is what she told PW3 the maid; it is what she told PW5 Dr. Chiudzu and that is what she told the trial court. Her simple story is that her father puts a stick into her private parts. The stick was in his trousers. It is acknowledged that there are lapses in U.'s testimony. It is not clear what she meant by a piece of paper that she saw with the father. Perhaps the most serious lapse is when she said her mother told her to say what she said and that she was promised chocolate and fanta. But again soon after saying that she said no one put her up to saying what she said.

Counsel for the appellant have zeroed in on these apparently contradictory statements and submit very strongly that this

whole matter is a fabrication. But surely these statements should not be taken out of context. Perhaps we should remind ourselves of what the little girl said. First she said, "My mum told me to say that dad put his stick inside me", Next she said "My dad was in the bedroom when he put the stick. He wasn't moving anywhere. He put the stick two times. When dad put his stick we were just two of us in the bedroom. Then she said, "Mum will give me chocolate and fanta for saying that dad put his stick inside me. I don't want to go to dad's place. I am not going there again because he puts his stick in me".

What is coming out very clearly to me is that even on the two occasions when the child is swayed from her story she nonetheless comes back to it. The trial Magistrate describes U. as a very clever girl who spoke clearly. A trial Magistrate is entitled to make findings of credibility because of the advantage of seeing and hearing witnesses. While this appeal is by way of rehearing I must not lose sight of the advantage enjoyed by the trial Magistrate in seeing and hearing the witnesses who testified before him.

As I pointed out earlier to impugn a witness on credibility the entire testimony must be put in context. Even a lie will not automatically discredit the entire testimony of a witness see Permessure v Republic (1993) IMLR 458. In Oyesiku (1971) 56 Cr APP.R.240, Karminski L.J, giving the judgment of the

court of Appeal approved the following statement of Dixon C. J. in Norminal Defendant V Clements (1960) 104 CLR 479 at 79-80:

> *If the credit of a witness is impugned as to some material fact in which he deposes upon the ground that his account is a late invention or has been lately advised or reconstructed, even though not with conscious dishonesty, that makes admissible statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction. But, in as much as the rule forms a definite exception to the general principle excluding statements made out of court and admits a possibly self serving statement made by the witness, great care is called for in applying it. The judge at the trial must determine for himself upon the conduct of the trial before him whether the case for applying the rule of evidence has arisen and, from the nature of the matter, if there be an appeal, great weight should be given to his opinion by the appellate court. It is evident however that the judge at the trial must exercise care in assuring himself not only that the account given by the witness in his testimony is attacked on the ground of recent invention or reconstructions or that a foundation for such an attack*

has been laid by the party but also that the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made it rationally tends to answer the attack.

As pointed out earlier U.'s story has been consistent both before trail and during trial. I would therefore not consider her credibility impugned merely by reason of the statement which suggests that her mother put her up to what she said. As a matter of fact in response to the question by the court on the same issue U. said her mother did not put her up to saying what she told the court.

I should move on to another consideration of considerable importance. U.'s evidence was obtained unsworn and rightly so because the girl was only four years of age. According to Lusiasi V Regina IMLR 651 AT 652 the evidence of a child should not be taken on oath but should be taken unsworn. That leaves the prosecution with the burden of providing such corroboration as may be necessary. Further more corroboration is required as a matter of law under Section 6 of the Oaths, Affirmation and Declarations Act which stresses that an accused shall not be liable to be convicted on such evidence unless it is corroborated by some other material evidence implicating him. It is emphasized further in the

Lusiasi case that if corroboration is in law necessary, it should be given as part of the prosecution case, and if at the close of the case for the prosecution, corroboration is lacking, there cannot be sufficient evidence to require the accused to be called upon for his defence and he must be acquitted.

For evidence to be capable of being corroboration it must:

(a) be relevant and admissible, Scarrot, [1978]QB 1016;

(b) be credible, DPP V Kilbourne [1973)AC 729;

(c) be independent, that is, emanating from a source other than the witness requiring to be corroborated, Whitehead [1929] IKB99,

(d) implicate the accused.

A number of jurisdictions have done away with laws that require corroboration of unsworn evidence of a child. Despite these statutory reforms, in some cases the evidence of some children may remain unreliable, whether by reason of childish imagination, suggestibility or fallibility of memory. It is therefore invariably safer for a court to require a corroboration warning although this might in such cases be a matter of

judicial discretion turning on the circumstances of the case which might include the intelligence of the child and the extent to which the child understands the duty of speaking the truth.

As stated above for evidence to be capable of corroboration it must be independent, that is, emanating from a source other than the witness to be corroborated. It will not be enough that the prosecution calls several witnesses who merely repeat what they were told by the complainant because that might as well have been the complainant's testimony. In that context Edwards, J. said in Nyasulu V Republic [1971-72] MLR 268 at 271:

> *I cannot discern adequate corroboration of the complainant in this evidence. In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated ------- And to be extraneous to such witness it is not enough that the material to be used as corroboration be given in evidence by another witness if that merely means that it proceeds circuitously from the witness who is to be corroborated. The material to be used must not originate with the witness who is to be corroborated.*

As observed earlier U. was consistent in what she told her mother, PW3 and PW5 and that these witnesses repeated what U. told them in court. But from what is discussed above the testimony of these witnesses could not have amounted to corroboration of U.'s testimony. It is however submitted that there are instances when evidence emanating from the complainant may amount to corroboration. Evidence of the complainant's distress or physical manifestation, although emanating from the complainant, could amount to corroboration. In Nyasulu V Republic, [1971-72] MLR 268 at 271 the court submitted that the principle that corroboration must not originate with the witness who is to be corroborated is subject to the qualification that evidence of a physical manifestation on the part of the witness who is to be corroborated, given by another witness, may be accepted as corroborating the evidence of the first mentioned witness if the court is satisfied that the manifestation was genuine and not part of an act. See also Idi V Republic [1994] MLR 99 and Redpath [1962] 46 Cr. APP Rep 319.

U. was found with an abnormally red genitalia, without a hymen and with a large introitus by her mother, by PW3 the maid, by PW4 the police officer and more important by PW5 Doctor Chiudzu. In the opinion of Dr. Chiudzu the state of enlargement with U.'s introitus could not have been caused by a single penetration with fingers. It was definitely as a result

of numerous penetrations. It comes out very clear to this Court that even three insertions with fingers say by the maid, by Mrs. Tambala and possibly by the police officer could not be described as numerous penetrations let alone to result in permanent enlargement of the girl's introitus. Coupled with the loss of the hymen and abnormally red genitalia, in the judgment of this Court, Dr. Chiudzu, unlike Dr. Majid DW7, more credibly explained U.'s condition. U.'s own physical manifestation corroborated her consistent testimony.

The appellant's testimony was a mere denial and nothing more. I should however comment on the testimony of the third defence witness, Mr. Chipeta. Counsels for the appellant have protested that the trial magistrate was too quick to disbelieve this witness. I have no difficulties myself in seeing why the trial magistrate disbelieved Mr. Chipeta. I can only add a few observations. To begin with Mr. Chipeta does not explain why he decided to keep on file the piece of paper that was brought by an unknown man said to have been from J.. It is not clear why he found it necessary to keep such a piece of paper safely as part of the clinic record. He had refused to act on it and therefore it must have been of no use to him. Secondly Chipeta's testimony must be saying J. M. PW2 was a very dull and dimwitted woman, so dull that she would write such a delicate and incriminating request on a receipt from her own shop with a letter head on it. Furthermore J. must

have been so stupid as to make this request to a clinic to which they used to go with the appellant as a family. To the contrary J. M. seems to be a fairly clever lady considering her preoccupation disclosed in court. I will add weight to the observation by the trial magistrate and say that Chipeta was a liar, a very cheap liar for that matter. I can certainly say he was called to try and mislead the court. This invention has only served to strengthen the case for the state.

Having come this far my conclusion is more than evident. U.'s testimony, supported by that of the rest of the prosecution witnesses coupled with her physical manifestation correctly left no doubt in the mind of the trial magistrate. U. was penetrated at her 'weewie' the vagina. She was penetrated with a stick by her father. The stick was from her father's trousers. When all that was happening it was only the two of them in the bedroom. As a result of the penetration U. was found with blood red genitalia, she lost her hymen and she has been left with an abnormally enlarged introitus. In the circumstances of this case I am left in no doubt that U. was sexually penetrated and molested by the appellant. I am unable to find my reason to fault the findings of the trial Magistrate. I therefore confirm that the charge against the appellant was more than well established. I accordingly dismiss the appeal against conviction.

Finally I should turn to the appeal against sentence. I have every sympathy for the appellant as a first offender. I would however resign to the elaborate exposition and considerations made by the trial magistrate in arriving at the sentence that he did. Unless I found the sentence offensive in some material particular I should be slow to tamper with it. The events of this case will leave Odoka maimed, dejected and crestfallen for the rest of her life to say the least. I have no reason to interfere with the sentence. Accordingly I also dismiss the appeal against sentence.

Pronounced in Open Court at Lilongwe this 12th March, 2008.

A.K.C. Nyirenda

J U D G E