IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 16 OF 2017

YAMIKANI PAUL

V

THE REPUBLIC

Hon. Justice M L Kamwambe

Maele of counsel for the Appellant

Dr. Priminta & Ms Francisco of counsel for the State

Amos..... Official Interpreter

JUDGMENT

Kamwambe J

This is an Appeal against the decision of the lower court at least of all, let me give the back grounds the Appellant is aged 19 years and 10 months. He was charged with the offence of Defilement contrary to Section 138 of the Penal Code. The particulars of the charge were that in the month of January 2017, at Hau in the District Mwanza the Appellant had unlawful carnal knowledge of Memory Banda, a girl under the age of 16. In fact the girl was 15 years old, and they were all attending the same school, the girl in Form 2 and

the boy in Form 3. They were in a relationship and it was apparently, ordinary that they should engaged in sexual experience. The Appellant pleaded guilty and he was convicted on his own plea of guilty and sentenced to 6 years imprisonment. This was the plea by the Appellant "I understand the reading of the charge, I admit it is true that I had carnal knowledge of Memory Banda. It is true that she was under the age of 16 years." Court entered a plea of not guilty.

The grounds of appeal are that:

1. The lower court erred in law in entering a plea of guilty without having regard to the mandatory provisions of the Proviso to Section 25 (2) of the Criminal Procedure & Evidence Code.

2. The lower court erred in law in not bringing to the attention of the Appellant the Statutory Defence in Defilement cases.

I have considered both arguments of the State and the Appellant. The State is in agreement that plea was defected but first of all it is advisable that I bring out Section 251 of the Penal Code which provides that:

1. *When an accused appears or is brought before a court, a charge containing the particulars of the offence of which he is accused shall be read and explained to him and he shall be asked whether he admits or denies the truth of the charge.*

2. *If the accused admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and he may be convicted and sentenced thereon.*

   Provided that before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification the truth of the charge against him.

In the case of **Michael Iro v R** [1966] 12 FLR 104 (Fiji) it was stated that:

"in our view there is a duty cast on a trial judge when the accused is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted, the accused person should fully comprehend exactly what a plea of guilty involves."

This court agrees with the above observations by the valance court. It was further stated in the case of Mc Innis v R [1979] 143 CLR 575 at p. 589 by Murphay J that the notion that an unrepresented accused can defend himself adequately goes against experience in all but the rarest cases. Even an experienced lawyer would be regarded as foolish to represent himself if accused of a serious crime.

I wish to emphasize the fact that it is not enough for the trial court to just pronounce to the accused the nature of the charge to which the accused is expected to plead guilty or pleads guilty. This is what ordinarily happens unfortunately. The proviso to section 251 (2) calls further to require the consequences of the guilty plea to be outlined to the accused person. This is what hardly happens in most of our courts. I wish that courts are vigilant in always advising an accused person of the consequences of a guilty plea. Especially if we are dealing with an unrepresented accused person. However, in all circumstances the requirements of Section 251 must be complied with. It is not worthy that on ascertainment of whether the accused person understands the nature and consequences of the plea. The word used is shall which makes it mandatory to explain consequences, before a plea of guilty is entered. A plea of guilty relieves the prosecution of the burden to prove the case beyond reasonable doubt. And further a plea of guilty means the case will end there and then and the accused to be convicted and sentenced there and then. An accused person must therefore, be aware of these consequences before a court can accept or record a plea of guilty.

Another consequence of a plea of guilty is the likelihood of a long sentence especially in serious offences like robbery, defilement, murder and rape.

In **Thokoza Malenga v Republic,** Criminal Review Case No. 19 of 2015, in the case of **Daniel Chikapenga v Republic** Criminal Appeal No. 21 of 2015 (unreported) the convictions upon a plea of guilty were quashed and sentences set aside as the trial courts did not comply with the proviso to section 251 of the Criminal Procedure and Evidence Code and a retrial ordered before court of competent jurisdiction. Likewise in the case of **Isaac Sitole and Emmanuel Cosmas v Republic**, Criminal Appeal No. 37 of 2016 (unreported), I quashed the convictions for robbery on the grounds that the trial court did not have regard to the proviso of section 251 of the Criminal Procedure and Evidence Code before entering a plea of guilty, and a retrial was ordered.

I observe that in the case before us the trial Magistrate court did not comply with the mandatory requirements of the proviso to section 251 of Criminal Procedure and Evidence Code before entering a plea of guilty. As such, I agree with both the State and Appellant that plea was defective.

Now I come to deal with the second ground of appeal which is that the lower court erred in law in not bringing to the attention of the Appellant the Statutory Defence in Defilement cases. The offence of defilement is a unique offence in that it has a statutory defence namely that the offence is not committed where the accused has a reasonable belief that the girl was above the age of 16. It is not expected that lay persons would easily know about this defence.

Unrepresented accused persons, therefore, cannot easily avail themselves of this defence.

In the case of **State v Baleki [1979-1980] B.L.R 35,** it was held that on a charge of rape, where the complainant is alleged to have been under the age of 16 years, if the accused is undefended he must be alerted of the defence provided by section 147(5) of the Penal Code. This section provides a defence in respect of persons charged in Botswana with having unlawful carnal knowledge of a girl under the age of 16. The section provides the accused with a defence if the accused can show that he had reasonable cause to believe, and did believe that the victim had attained the age of 16 years. The court apparently noted that the accused should be alerted of the defence, since having regard to the evidence he stood the risk of being convicted of defilement if the victim was in fact below the age of 16 years.

In the case from Botswana of **Gare v The State [2001] 1 B,L,R 143, CA** at p 148 which is a similar case of defilement, it was held by a majority of 2:1 that:

> "the Appellant in the case did not have a fair trial where the trial Magistrate did not take any steps to appraise the Appellant of the special statutory defence available to him as to whether he believed that the girl was above the age of 16. The conviction for defilement was quashed. Zestsman JA stated that" *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.*

*In the South African case of **S.v. Andrews** 1982 (2) S.A. 269 (N.C). It was held that considerations of fairness require that where a statute raises a presumption which needs to be rebutted by the accused, if undefended, should be informed of the presumption, and a failure to inform his thereof can lead to the quashing of his conviction if he was prejudiced by such failure.*

> *.....section 10 of the Constitution of Botswana provides, inter alia, that a person charged with a criminal offence must be afforded a fair hearing, and must be informed, in a language that he understands and in detail, of the nature of the offence. 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 ineptness in conducting his defence, and his probable ignorance of this special defence, the existence and the 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."*

And Lord Weir JA stated that:

> *"In the present case, the Appellant faced a serious charge, that of unlawful carnal knowledge of a female under the age of 16 years. The Penal Code provided him with the defence that if it appeared to the court that he had reasonable cause to believe and did in fact believe that the complainant was 16 years of over he would be acquitted. 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 and illiterate accused, would have been to do so."

In Allan Willard v Republic Criminal Appeal No. 33 of 2016 9unreported) I granted bail pending appeal and this is what I stated:

> *"Without risking to delve into the appeal, suffice it to say that the statutory defence provision would be rendered useless unless if unrepresented accused persons were left into the dark as to its existence and eventually got such accused persons incarcerated. The law would seem to be favouring the financially able who are represented. This could go against the constitutional provision of ensuring a fair trial and one against discrimination. In view of this it appeals primafacie that the appeal has a prospect of success."*

It is apparent that the trial court did not explain the statutory defence to the accused person and following the cases cited above, no fair trial was heard. As such the accused person for this second ground of appeal, merits to have his conviction quashed and sentence set aside just like in the first ground of appeal.

The task that I have now is to determine the appropriate remedy for the accused. I may order a retrial to take place or I may order that he be acquitted, but I ought to give reasons for doing so. I may also

reduce the sentence of 6 years imprisonment. The Appellant's counsel has spiritedly argued that in this relationship of the Appellant and the girl there was no abuse, because they were in a relationship. I do agree that indeed we have not received any evidence of abuse. The girl did not testify that she was forced to have sex with him. This is a unique case. Most cases we dealt with there is a power imbalance between the perpetrator of the offence of defilement and the victim. For instance in **Chimwemwe Chimbanga v R** Criminal Appeal No. 3 of 2011 the girl child used to go to the Health Centre at Chilomoni since she was young to collect medication for her ailing body. She had a condition which required her to be frequenting the Health Centre to collect medication from the Appellant. The Appellant used to threaten her if she dared to break the relationship and that he would beat her up. He commanded her to meet him at some specified places to pick her up to go to some lodges or rest houses for sex. She was indeed a true victim. She did not like the relationship to continue but she was forced into it as she lived in fear of him. A sentence of so much imprisonment was imposed on appeal. In other cases of defilement it is where a man of between 18 and 65 years of age is defiling a girl under the age of 12. Some of the defiled children are 3 years of age. For instance in the case of **Rep v Victor Molesi** Confirmation Case No. 373 of 2017 the convict who was a stepfather defiled a 6 year old girl child. You can easily see that the stepfather was abusing the girl child. This distinction has exercised my mind deeply.

The law is that punishment must fit the accused, and be fair to the accused while paying attention to public interest. I have been drawn to think very seriously as to what would be a fair sentence in the circumstances. This is a unique situation, a special situation as it were. However, it does not subtract from the fact that the purpose of this section 138 is to protect the girl child because in case the 15 year

girl even if she consented to sex she was unequal partner to unlawful act, the man would still be heard liable. He knew she was 15 no doubt about it but the element of absence of abuse must be specially treated. He was not taking advantage of the girl. He was not a sugar dad as it could be, this was an innocent affair. I am prompted to employ section 337 of the Penal Code. This is a situation which demands the use of this section, as it is said in the Shauti case punishment must be blended with mercy, mercy must not be abused. It must be used reasonably at appropriate times. I feel this is time that we can use it. I have considered the case of **Felix Joseph v Republic Criminal Case No. 3 of 2015** (unreported) by Justice Kenyatta Nyirenda who upheld a sentence of 4 years IHL on conviction for defilement where the Appellant was a first offender and he was aged 22 at the time of the commission of the offence. The victim in this case was aged 15. There was a reason why 4 years was imposed. The Appellant as the boy child has also to be considered for protection by the law. He is a child by virtue of being at school in Form 3. He was only 17 years old. This are special circumstance to take into account. He deserve to be given another chance to proceed with school. I repeat, it is befitting to employ section 337 (1) (b) of the Penal Code. I discharge the accused absolutely. He should be able to go back to school. He is a first offender and really useful, young. We should save him from getting in contact with hardened prisoners. It is so decided.

Pronounced in Open Court this 7th day of June, 2017 at Chichiri, Blantyre.

M L Kamwambe
JUDGE