IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL CASE NO. 5 OF 2018

BETWEEN:

JOSPHAT MITAMBO.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: HON. Justice M L Kamwambe

Chisanga of counsel for the State

Kudziwe of counsel for the Appellant

Ngoma.....Official Interpreter

JUDGMENT

Kamwambe J

The Appellant was convicted of the offence of defilement contrary to section 138 (1) of the Penal Code and sentenced to 14 years imprisonment. The particulars of the offence were that the Appellant had unlawful carnal knowledge of MM, a girl under 16 years of age. He now appeals against conviction and sentence.

Grounds of appeal are as follows:

1. The learned magistrate erred both in law and in fact in convicting the Appellant because the weight of the evidence adduced by the prosecution does not support the conviction and caused grave injustice.

2. The learned magistrate erred in law in convicting the Appellant in disregarding the Appellant's plea that he reasonably believed that the girl was of the age of 16 years.

3. The sentence imposed was wrong in principle and manifestly excessive.

It is not in dispute that the Appellant had sexual intercourse with the girl and all evidence pointed to the fact that the Appellant and the girl were having sex often. Appellant was not represented in the court below. It is alleged that Appellant pleaded that the girl was 16 years of age and a plea of not guilty was entered. Appellant argues that the fact that the Appellant pleaded that the girl was 16, the court could have been alerted of the need to explain to the Appellant the available statutory defence under section 138(1) of the Penal Code at the time when he was about to make his defence or before making a decision on whether to remain silent or to testify. The court did not bother to explain the defence to the Appellant when he was questioned on whether he would testify and instead he just proceeded on the ground that the Appellant chose to remain silent.

The proviso to section 138 of the Penal Code reads:

> *''Provided that it shall be 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 and did in fact believe that the girl was of or above the age of 16 years."*

It should be made clear that it is not enough just to say the girl victim was 16 years of age without stating how you came to believe that she was 16 so as to demonstrate that you had a reasonable cause to believe so, if the defence is to be successful.

The Appellant was not represented as such it becomes imperative as a matter of practice for the court to inquire how the belief arose. At plea the Appellant admitted the charge of defilement but went on to say that the girl was 16. The court rightly entered a not guilty plea.

PW4, the uncle to the girl, told Appellant about twice that the girl was a child not fit for marriage and still at school. The Appellant seemed to heed the warning and agreed to wait for her to finish school. But in December 2016 the girl went to stay with the Appellant and on 24th January 2017 Appellant was arrested for the offence. The girl admitted that Appellant was her boyfriend/husband and that they always had sexual intercourse.

I really wonder how Appellant could have had a reasonable cause to believe she was 16 or above when he was warned that she was a child and he agreed to wait for her till she reaches marriageable age. Appellant was taking an unjustifiable risk.

The court rightly observed that, 'although the accused said that the girl was 16 years old he did not produce any evidence to refute the evidence of her mother that the girl was born on 2nd February, 2002 and therefore she was 15 years old.' The circumstances are that the Appellant was aware that the offence is not committed if the girl was 16 years old or above. Despite all this, the truth remains that Appellant could not appreciate the nature of the statutory defence. I strongly believe that an injustice was occasioned as he was not accorded due explanation of the defence as an unrepresented accused person. The trial was rendered unfair due to the irregularity.

The question that arises now is the effect of the irregularity occasioned by the court. Appellant exercised his right to remain silent because he did not know that he had to give a reasonable

explanation of the age of the girl being 16 years or over, as such, it would be unfair not to blame the court for not explaining the defence to him. If he had known that he had to explain how he believed the girl was 16 or above, he would hardly have chosen to remain silent.

In the like cases that I have heard in the past I have ordered a retrial. To order a re-trial is discretionary but courts must look at all circumstances of the case since the discretion must be exercised judicially. Reasons must be exposed for exercising the discretion either way. However, Skinner CJ, in **Banda (P.) v Rep.** SCA 10 MLR 142, advised that a retrial should not be ordered to enable the prosecution to fill the gaps in the evidence and that it would be wrong to allow the prosecution, where it had come to court with an insufficiently prepared case and gaps in the evidence to have a second bite of the cherry. The CJ laid down some principles to follow whether to order a retrial or not. Courts should determine first whether the error or irregularity or defect in procedure is one that cannot be cured by section 5 of the Criminal Procedure and Evidence Code.

In **Sumar v R** [1964] E.A. 481 the court held that whether an order for re-trial should be made depends on the particular facts and circumstances of each case but that it should only be made where the interests of justice require it and it is not likely to cause an injustice to the accused person.

The Eastern African Court of Appeal in **Manji v Rep**. [1966] E.A. 344 summarised the principles of earlier cases as follows:

> *"We will not quote the other passages if full but will content ourselves with stating the principles which emerge from them. They are the following: in general a re-trial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution*

to fill up gaps in its evidence at the first trial; even when a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a re-trial should be ordered; each case must depend on its particular facts and circumstances and an order for re-trial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

The proviso is a crucial procedural step in trial even if not part of the main ingredients of the offence. At all times when the accused person is not represented the court should, as a matter of due prudence, expose the defence to an accused person in case it became relevant in his situation and opt not to remain silent. This is not a matter that can be cured by section 5 of the Criminal Procedure and Evidence Code even if he was represented. Appellant should have rescinded his right to remain silent when the mother of the victim child testified about victim's age. Appellant knew that age of victim was crucial that is why he said she was 16 years old, but did not substantiate how he thought her to be 16 years of age. In the circumstances of this case, I sustain the conviction.

Appellant was a young man of 21 years of age, and a first offender. This court sees it imperative to reduce sentence from 14 years to 8 years imprisonment.

Pronounced in open court this 31st day of August, 2018 at Chichiri, Blantyre.

M L Kamwambe
JUDGE