IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 32 OF 2018

DYSON NZERU.....APPELLANT

-AND-

THE REPUBLIC.....RESPONDENT

CORAM: Hon Justice M L Kamwambe

Francisco counsel for the State

Jumbe of counsel for the Appellant

Amos...Court Clerk

This is a petition of appeal by the Appellant against the decision of the Senior Resident Magistrate court at Blantyre on the following grounds of appeal:

1) The lower court erred in finding that the accused fled the alleged act when there is evidence that he remained in Chilomoni from 6th to 20th August, 2015 when he returned to Namitete Technical College in Lilongwe.
2) The lower court erred in law in holding that the Appellant had a case to answer to the aforesaid charge at the close of the prosecution's case when the prosecution had failed to prove all elements of the charged offences.

3) The lower court erred in law in admitting medical report giving the accused person advance notice and obtaining consent therefrom contrary to section 180 (3) of the Criminal Procedure and Evidence Code (The CP&EC).
4) The lower court erred in law and in facts in coming to the conclusion that it was the Appellant who defiled the victim without any further evidence.
5) The lower court erred in law in coming to the conclusion that the Appellant defiled the victim from the medical report itself.
6) The lower court erred in law in holding that the Appellant was guilty of the offence simply because of allegations that he had run away soon after the alleged offence when in actual fact he was in school.
7) The conviction is by the lower court has occasioned a miscarriage of justice in that the conviction is against the weight of evidence in the circumstances.
8) That the sentence of 11 years IHL meted by the lower court is manifestly excessive in the circumstances.

Even if counsel for the Appellant does not state it, the appeal is made under section 346 as read with section 350 of the Criminal Procedure and Evidence Code. Counsel is reminded to always quote the authority under which he or she is appealing.

In our present case the victim girl child was 5 years and 9 months old and was in standard 1. Her parents were renting a house from the family of the 24 year old boy who also lived at the same place as neighbours. Girls were playing outside whilst the Appellant was seated on a chair studying. One of the girls was 11 years of age. The other girls left for lunch leaving behind the victim girl and the Appellant when the Appellant invited the victim girl into the house for her to point at letter q at the alphabets on the wall. It was alleged that later Appellant lay victim on a mattress and separated her legs and violated her. She felt pain. When she went home and her mother was washing her she told the mother that she was feeling pain on her private parts and she mentioned Dye to be responsible for the pain.

The first ground of appeal that the lower court erred to make a finding that the accused person fled to another place to wait for the steam to cool down does not appear to be a strong ground to base the quashing of the conviction because even if such a finding was not made, from reading the whole record and judgment, the lower court would have come to the same finding of guilty. It does not, in my view, add any meaningful or material value so as to influence a finding of the accused to be guilty. He may have genuinely gone to college as he claims. However, knowing that he was confronted by the mother of the victim girl about his conduct, the accused should not have left quietly without informing the victim's mother that he was going to school. This conduct would make any reasonable person think that he was fleeing from the case. The finding by the lower court therefore was not unfounded as there was justification for so finding.

On the second ground that the lower court erred for finding that there was a case to answer since not all elements of the offence were proved, the Appellant argues that PW2 another minor did not see accused defile PW1 the victim. I do not think that the lower court suggested that PW2 saw accused defile the victim. The lower court was aware that when the victim was defiled the defiler and the victim were left alone and therefore PW2 could not have seen the defiler committing the offence. Hence, the court pointed out that the absence of the other children created an opportunity for the accused to carry out the unlawful act. He further pointed out that since they lived in very close proximity the girl knew the accused well making it unquestionable that it was the accused who assaulted her. PW3, mother of victim testified that when she was about to wash victim, the victim said she felt pain in her private parts inflicted by Dye, and as she examined her she noticed bruising and fluid come out of her private parts. Further, the testimony of the medical officer and the mother who saw the bruises and fluid oozing out of the girl's private parts proved that there was penetration.

The evidence shows that it was the appellant who was left behind with the victim child and the child told the mother what

happened to her and that the perpetrator was the Appellant. Could the child have been lying? There is nothing that could make us doubt the credibility of the victim's unsworn testimony. The evidence of the victim child was properly corroborated. This case relies on circumstantial evidence. On the other hand, instead of looking for corroborating evidence we could also require the court to make its own impression of the victim's unsworn evidence in the circumstances. 11 year old PW2 said that she left the victim behind with Appellant as she went for lunch. Even if we know the legal standing that a child's evidence cannot corroborate the evidence of another child, it is important nevertheless for the court to consider the circumstances and form an impression of what was more likely to have happened and who was more likely to be the perpetrator of the offence. This is why at the end of everything the court is supposed to warn itself of the danger of convicting on uncorroborated evidence. The court's impression of the circumstances in the face of unsworn evidence must of course be supported by evidence beyond reasonable doubt so as to sustain a conviction. This means that unsworn evidence of a child which is not corroborated and where (circumstantial) evidence is overwhelming and convincing as against the accused, it would be safe to convict. It would not be necessary for the court to be warning itself the danger of conviction in the absence of corroborating evidence. But since corroboration here is a matter of law, we follow it.

Let me take this opportunity to speak on corroboration further as it has developed to be an emotive issue. The requirement of corroboration in rape or generally sexual offences with persons over 16 is a matter of practice which today is causing controversies. Critics say that it has lived its usefulness and they have good and compelling reasons to persuade courts not to rely on corroborating evidence unnecessarily. Why should a complainant woman require corroboration of her evidence in sexual offences only and not in other offences such as theft? It seems women were not trusted to tell the truth in sexual offences only and so corroboration practice was coined to labour women. In **Banda –v- Rep 1966-68 ALR Mal. 336** Bolt J said that where, in a case in which it is incumbent on a

trial court to warn itself to look for corroboration, such a warning is not given and no corroboration is apparent, then an appellate court may look at the whole of the evidence and the reasons given by the trial court in order to decide whether it is just and proper (where there is no failure of justice) to uphold the conviction. He went on to say that corroboration is only required by law in exceptional statutory cases but it is desirable as a matter of practice that a court should warn itself as to the danger of convicting without corroboration in sexual cases and cases which depend on evidence of an accomplice.

In **R –v- Kaluwa 1964-66 ALR Mal. 356 at 364 the court** said that corroboration of the complainant's evidence in a case of rape is not essential but it is the practice to warn the court of the danger of convicting on her uncorroborated testimony. This means that you can convict on uncorroborated evidence so long as the court warns itself of the danger of convicting on uncorroborated evidence. I wish to suggest that a court does not even need to warn itself of the danger so long as there is enough circumstantial evidence to satisfy the legal requirement of proof beyond reasonable doubt. The same case of **Kaluwa** said also that circumstantial evidence may amount to corroboration when this evidence is proved by witnesses other than the one requiring evidence. One may ask what this means. Because there is a practice of requiring corroborating evidence, Judge Cram wanted to marry such circumstantial evidence to corroboration to justify the practice of looking for corroboration evidence. But in my view, today we could be bold enough to ignore corroboration and merely consider if the circumstantial evidence suffices to secure a conviction. The same result will be obtained and the controversial approach of looking for corroboration will have been avoided. We are in a gender sensitive era and therefore should do away with laws, practices and notions which seem biased in favour of one sex. Such practices tend to be discriminatory and likely to be unconstitutional if examined closely. Fortunately, this practice has not been challenged.

In this case, only the Appellant had the opportunity to defile the girl in his own premises on a mattress. I am surprised that the Appellant does not clearly indicate which element of the offence was not proved. In my view all elements were proved. There was penetration as stated by the doctor and observed by the mother when washing the victim, the girl victim was 5 years 9 months old which is under sixteen and she Said that it was Dy (shortcut of Dyson as they used to call him) the Appellant who defiled her. The child said that she felt pain, could she have been lying about it and what could motivate her to say what she did not experience? Even without looking for corroboration in this case the court was right to find the appellant guilty by merely considering the totality of evidence in the case.

In **Mwakabanga –v- The Rep., 1968-70 ALR Mal.** 14 the court said that the purpose of corroboration is to establish the general credibility of the witness; it is not necessary that every element of his evidence be corroborated and if it is corroborated in a number of material particulars then the court is justified on relying on his testimony as a whole."

The case above was in respect of corroboration evidence in a treason offence, but we can learn something from it when dealing with sexual offences. This is what I meant that at the end of the day the court looks at the totality of the evidence whether it is convinced beyond reasonable doubt that the accused committed the offence even without specifically fishing for corroboration evidence.

The third ground is one of admitting the medical report wrongly, that is, not according to section 180 (3) of the Code which requires that the accused has consented to the use of the medical report in evidence against him or that he was served the medical report carrying an endorsement that it is intended to be tendered in court and accused has not within 7 days of being so served, objected to it being tendered. It is true that the prosecution did not comply with section 180 (3) and this makes the medical report inadmissible evidence. As such, it cannot be tendered as part of prosecution evidence. The medical report did not even have a

logo of the hospital from where it originated. However, as admitted by the Appellant's counsel, you do not need to rely on the medical report to prove penetration. In some instances the medical report is tendered by the police investigator and once the medical report is admitted in evidence, the case may suffer serious evidential damage as the investigator did not examine the victim girl and so cannot be cross examined on the veracity of the report. In this case, a medical officer, Dr Gugulethu Mapurisa testified that he/she examined the victim and found bruising on the vaginal wall and found that the vaginal membrane was not intact suggestive of penetration and sexual abuse. Even if the medical report was made inadmissible, the oral evidence of the medical officer would be proper evidence to prove penetration.

I would also wish to agree with the State that the issue of admissibility of the medical report should have been objected to at the earliest opportune time in the proceedings bearing in mind that the Appellant was represented by counsel before the report was admitted into court to form part of the prosecution evidence. This is a situation where I would apply section 5(2) of the Code, that its admission did not occasion any failure of justice since the medical doctor testified in person and was subjected to cross examination.

This case was based on circumstantial evidence from which one can justify an inference of guilt if the prosecution establishes beyond reasonable doubt that the facts are incompatible with the innocence of the accused and incapable of any reasonable explanation **(Nyamizinga v R [1971-72] 6 ALR (Mal) 258).**

In **Mehta v R (1961-63) ALR Mal. 363** Southworth J (as he then was) in explaining circumstantial evidence stated as follows:

> *"...The burden of proof resting on the prosecution goes beyond setting up a preponderance of probability and requires the Crown case to be established beyond all reasonable doubt; and that when the Crown case rests upon circumstantial evidence...the court must...be sure there are no other co-existing circumstances which would weaken or destroy the inference [drawn from the evidence]."*

In the present case, there is no other person who could have defiled the girl. There is nothing to make the girl mistaken by pointing at the wrong perpetrator. She knew Dyson well as a neighbour. Penetration was proved.

I need not consider grounds 4, 5, 6 and 7 as they have been covered above.

Ground 8 is that sentence is manifestly excessive. The sentencing law considers the young age of the accused as a mitigating factor. Persons between 18 and 25 years old deserve leniency because of their immature minds although they have entered adulthood. They have tendencies of being reckless and daring because they want to test and experience things. In this case the Appellant was 24. Some measure of mercy should be exercised. The tender age of the victim girl child will always be an aggravating factor and in this case the victim was 5 years and 9 months. Appellant took advantage of the indefensible state of the child who suffered innocently. It was very inconsiderate of the Appellant to inflict injuries on such a young child. We have to balance between the mitigating and the aggravating factors to arrive at a proper decision. The principle followed is that an appellate and confirming court will only interfere with the discretion of the trial court in fixing sentence if the sentence is manifestly excessive or if some wrong principle has been applied (**Regina –v- Mamanya and Misomali, 1964-66 ALR Mal. 271**). Where the victim child is below 8 years old a sentence above 14years is expected. It is not uncommon for a sentence of 18 years being meted. You cannot treat it with a sense of shock at all considering that a girl child is supposed to be protected by the law with stern sentences as a deterrent. In the circumstances I would not necessarily say that the sentence of 11 years is manifestly excessive but I have been persuaded by the youthful age of the Appellant and that he is a first offender to reduce the sentence. Further, he is pursuing a career at Namitete Technical College and a very long sentence would ruin his future completely. He has definitely learned a lesson from what he did. He should be an ambassador of the nation in future demonstrating good conduct towards girls. The victim girl did

not contract any sexually transmitted disease fortunately. This should be taken as a mitigating factor. For the reasons given above I substitute a sentence of 11 years with one of 8 years imprisonment.

Pronounced in Open court this 14th day of March, 2019 at Chichiri, Principal Registry, Blantyre.

M L Kamwambe

JUDGE