

REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY

CONFIRMATION CASE NUMBER 35 OF 2021
(Criminal Case No. 189 of 2020 in the First Magistrate Court sitting at Liwonde)

THE REPUBLIC

VERSUS

PATRICK SILIYA

*Coram: Honourable Justice Violet Palikena-Chipao
Mr. S. Chisanga, of Counsel for the State
Mr. R. Makanje, of Counsel for the Defendant
Mboga(Ms), Official Interpreter and Court Clerk*

ORDER ON CONFIRMATION

The offender, Patrick Siliya, was charged in the Senior Resident Magistrate Court sitting at Liwonde with the offence of defilement contrary to section 138(1) of the Penal Code. He was convicted and sentenced to 8 years imprisonment with hard labour after a full trial. Upon review, the conviction was confirmed but reviewing the judge set down the matter to consider enhancement of the sentence on account that it was manifestly inadequate. At the time of the offence the victim was 8 years old.

The State is of the view that considering the sentencing trend, the breach of trust and the tender age of the victim, that the victim was defiled multiple times, the use of threats to procure submission, the sentence of 8 years is indeed on the lower side and should be enhanced. The defence on their part were of the view that the sentence be maintained. Arguing that it is within the sentencing trends.

At the confirmation hearing, the court asked the parties if they had also considered the question of the propriety of the conviction and the parties said no. It is noted that the reviewing judge

confirmed the conviction but considering that the review process is one process which is completed when both the conviction and sentence have been confirmed or an order is made on confirmation and that the High Court is still seized of the matter the fact that my brother Judge confirmed the conviction does not preclude my court from considering the question of propriety of the conviction.

This matter is being reviewed in accordance with section 15 (1) of the Criminal Procedure and Evidence Code, hereinafter the CP and EC, for this court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order passed or recorded by the lower court. On review, the High Court may exercise the same powers as are conferred on it on appeal under section 353 (2) (a), (b) and (c) and by section 356 of the CP & EC. My court is mindful of the principles guiding it in exercise of its power on appeal as laid down by the Supreme Court of Appeal in **Pryce v. Republic, [1971-76] 6 ALR (Mal) 6**. It was emphasized in that case that an appellate court is entitled to undertake a fresh review of the evidence and arrive at its own conclusions, independent of those at trial. While the appellate court is called upon not to disregard the decision of the trial court; at the same time, it is called upon to carefully consider the decision without shrinking from overruling it where the court comes to the conclusion that the judgment was wrong.

In reviewing the case on confirmation, this court also looked at the question of the propriety of the conviction. It is noted from the evidence of the lower court that PW1 is a witness of immature age who gave her evidence unsworn. As a matter of law, the evidence of PW1 required corroboration for it to ground a conviction (section 6 (2) of the Oaths and Affirmation Act. The lower court was well aware of the need for corroboration and concluded that there was sufficient corroborative evidence from the evidence of PW2 as well as the medical report. It is noted that there is a medical report which indicates that the analysis of the medical officer who examined M.G (PW1) was that the girl had been sexually assaulted. The medical report could not however confirm the perpetrator of the offence. This takes us to the evidence of PW2 which the court relied on.

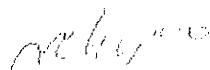
It is noted that PW1 told the court that she was sexually assaulted when her mother was away in January, 2020 and that this happened three times in the bedroom and one time in the field. Her mother had gone to hospital to nurse a sick cousin. When cross examined, PW1 said that she was raped during the night.

As to the evidence of PW2, it will be noted that she was away from January to February 2020 and she returned home on 1 March 2020. She told the court that she noted some strange behaviour in the child and asked her what was wrong but she said nothing. She further said that she asked the convict's second wife who said she knew nothing. Later she asked her younger sister to sit down with the child to find out what was the problem but the child still did not say anything. It

will be noted that the second wife and the younger sister were not called to testify to confirm the issue of the condition of the child at the time of the return of PW2. This is being raised in view of the claim of the convict that there was no change of behaviour in the victim. It is also considered that according to PW2, the victim (child) only raised the issue when there was a disagreement between the convict and PW2 and the convict was beating PW2. It is also noted that PW2 said that she then took the victim to the convict's secondwife where the victim revealed that the convict had sex with her four times. The convict in his evidence agreed with PW2 that the allegations only arose after a disagreement between the convict and PW2. PW2 did not say what caused the disagreement but according to the convict, the disagreement arose over the conduct of PW2 and the convict told her that he was leaving her and he started parking his things to leave. The convict claimed that his clothes were torn and he just left the house and returned later.

The court observes that there were two versions to the story. The version of the convict and that of the prosecution. The lower court took the approach that the version of the prosecution was credible than that of the accused. However, the lower court did not indicate as to why the prosecution was more credible than the accused. It has to be remembered that the approach to the defence story is not whether it is true but whether or not it might reasonably be true ((See *Gondwe v. Republic* [1971-72] 6 ALR Mal 33; *Republic v. Msosa* [1993] 16(2) MLR 734). It is observed from the lower court's record that the convict's version on the allegation is the same version he gave the police upon his arrest. Again it is noted that even PW2 in her evidence acknowledged that the allegations were only revealed after the disagreements which she said culminated into her being beaten. PW2's evidence that she suspected something on the victim upon her return on 1 March has not been corroborated by the people she claimed she approached as they were not called to testify. The timing of the allegations in the absence of the evidence of the two witnesses whom PW2 said she consulted on the strange behaviour of the victim should have made the lower court to consider that the convict's version might reasonably be true. It is the court's finding that the version of the convict might in the circumstances of the case be reasonably true with the effect that doubt is cast over the guilt of the convict. In the circumstances therefore, we find the conviction unsafe and it is quashed forthwith. The sentence that was passed is set aside.

Pronounced in Open Court this 24th day of June, 2021.



Violet Palikena-Chipao

JUDGE