REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CRIMINAL DIVISION
CRIMINAL APPEAL CASE NO. 33 of 2016

(Being criminal case No. 30 of 2016 in the First Grade Magistrate Court Sitting at Karonga)

BLACKSON NKHONJERA
V
THE REPUBLIC

CORAM:
HOUNORABLE JUSTICE D. A. DEGABRIELE

Mr. D. Shaibu	Counsel for the State
Mr. G. Nyirenda	Counsel for the Appellant
Mr. L. Munthali	Official Interpreter
Mrs. J. Chirwa	Court Reporter

DeGabriele, J

JUDGEMENT

Introduction

The appellant was charged with the offence of Defilement contrary to section 138 of the Penal Code. He pleaded not guilty to the charge and after a full trial he was convicted and sentenced to 96 months imprisonment with hard labour. Being unsatisfied with both the conviction and sentence, he now appeals.

The grounds of appeal are that

a. The lower court erred in convicting the appellant without disproving the defence of the appellants doubts as to the age of the victim.

b. The sentence is manifestly excessive in the circumstances of the case.

The age of the offender

I have read the record of the lower court and established that the appellant was a child of 17 years when he committed the offence but was tried when he was 18 years old. For this reason, the lower court should have dealt with his matter as it would any case concerning a child offender. Clearly, the appellant was dealt with as an adult and he was not accorded any of the protective considerations under Child Care, Protection and Justice Act, 2010. The lower courts are called upon to always check the ages at the commission of the offence or at arrest and compare with the age a person is brought in for trial. In numerous cases, the offenders are brought for trials after a number of years because of various reasons. It is advisable for the court to be diligent especially when faced with young offenders. In this appeal, the appellant will be dealt with under the requirements of the Child Care, Protection and Justice Act, 2010.

BACKGROUND

The facts in brief are that the appellant was 17 years when he was arrested for the commission of the offence. The victim was 14 years old as stated by the Exhibit 3, which is a report from the headmistress of her school and she was in standard 7. The appellant and the victim admitted in the lower court that they were in a relationship from 2015 to up to 2016 when she fell pregnant and the appellant denied responsibility. The appellant and the victim had agreed to marry after they finished school. The had sexual intercourse on a number of occasions and the victim became pregnant.

The record of the lower court shows that the appellant did not enter a defence and did not in any way challenge the evidence of the prosecution. In his appeal the appellant is raising the issue that he did not know that the victim was below

the age of 16 years and that he believed her to be over the age of 16 years. The appellant did not raise any objection as to the age of the victim in the lower court. The lower court heard evidence form PW2 as well as a letter from the school stating that the victim was 14 years old, therefore a girl under the age of 16 years. The only time the appellant disputed the age of the victim was at plea taking and this was disproved by the evidence which clearly showed that the victim was 14 years old.

While the burden is on the prosecutor to prove the case and each element of the offence beyond reasonable doubt in accordance to section 187 of the Criminal Procedure and Evidence Code, the same section shifts the burden to the accused to prove certain issues once the prosecutor has proved its point. In this case, the prosecutor led evidence to show that the victim was 14 years old. It was imperative for the appellant to disprove the same by leading evidence to show that the victim was over 16 years old, or to give substantive reasons as to his belief that the victim was over 16 years old.

In the absence of any evidence to the contrary on the age of the victim bb the appellant, the holding of the lower court that regardless of the denial of the responsibility of the pregnancy the appellant had committed the crime of defilement under the law as he had had sexual intercourse with a girl who was below the age of 16 years is in order and is supported by evidence. There was no failure of justice as the appellant did not provide any evidence for which he based his belief that the victim was over the age of 16 years. To this effect the words "conviction" as used in the lower court are removed and; in line with the Child Care, Protection and Justice Act, 2010, this Court finds the appellant to be responsible for the offence as charged.

The appellant appealed against the sentence stating that the sentence was manifestly excessive in the circumstances of the case bearing in mind that he was a child himself at the time of the commission of the offence. This Court

removes the words "sentence" as used in the lower court and makes an order that the appellant be admitted to a Reformatory School where he shall remain until the child has been released on the recommendation of the Child Case Review Board. The Court further orders that the appellant's case be called for review by the said Child Case Review Board within a period not exceeding one year from the date of this judgement.

Made in Chambers at Mzuzu Registry this 20th day of March 2018

D.A. DEGABRIELE

JUDGE