



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CONFIRMATION CASE NO. 84 OF 2021

(Being Criminal Case No 138 of 2020 in the First Grade Magistrate Court sitting at Chikwawa)

THE REPUBLIC

-v-

MATHEWS GIFT

CORAM: HON. JUSTICE AGNES PATEMBA

Ms. Kulesi, Counsel for the State

Mr. Panyanja, Counsel for the Convict

Mrs. Chiusiwa, Court Reporter

Mr Amos, Official Interpreter

ORDER ON CONFIRMATION

1. The convict Mathews Gift , aged 20, from Mtepela village, Traditional Authority Mbawela in Thyolo district was convicted by the First Grade Magistrate of the offence of defilement contrary to section 138 (1) of the Penal Code.
2. The summarised facts of the case are that Ms. L.H aged 15 was in a love relationship with the Convict aged 20. As lovers, they engaged in sex and Ms. L.H got pregnant. As a result of the pregnancy, the girl moved into the house of the Convict and started living together. On the 15th August 2020, Ms. L.H gave birth to a baby girl. The Convict admitted that indeed they have been engaging in sex with the girl because she was his girlfriend but she did not know that the girl was under the age of 16. The matter was reported to police by YONECO.

3. The Court found him guilty and convicted him of the offence of defilement contrary to section 138 (1) of the Penal Code and was sentenced to 2 years IHL.
4. Upon review, the reviewing judge was of the considered view that the sentence imposed by the lower court was on a lower side and ordered that the matter be set down to consider enhancement of the sentence.
5. At the hearing, the State Advocate submitted that the sentence should be enhanced from 2 years to 10 years while the Defence Counsel submitted that the Court should enhance the sentence from 2 years to 5 years IHL considering that the Convict is relatively young, they were in a relationship with a girl and has been involved in supporting the baby that was born out of the defilement and that the convict is the first offender.
6. Section 138 (1) of the Penal Code provides that;

Any person who carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life.

Provided that it shall be a 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 sixteen years.

7. The proviso of section 138 (1) of the Penal Code avails a statutory defence to the accused person if he had reasonable cause to believe that the girl was above the age of 16 years. In such a scenario the offence of defilement is said not to have been committed.
8. Analysing the evidence adduced in the lower court, when the Convict was cross examining MS. L.H regarding the issue of age, the girl confirmed that she told the Convict that she was 16 years old which influenced the Convict to engage in sex because he believed that the girl was 16 years old. Apparently at the time the Convict proposed to Ms. L.H she was 15 years and 10 months old. When the Convict was recording his caution statement at police he told the recording officer that he believed that the girl was 16 years old. There

was consistency of this piece of evidence from the Accused and this court believed him. This piece of evidence was confirmed by the victim in her testimony and was clearly recorded in the lower court file. It is possible that may be the lower court inadvertently omitted to pay attention to this piece of evidence to invoke the proviso of section 138 (1) of the Penal Code. In the case of *Yamikani Paul v. Rep*, Criminal Appeal No. 16 of 2017 (Principal Registry) (unreported) the Judge noted that failure by the trial court to inform unrepresented Accused person of the statutory defence of defilement amounts to unfair trial and merits to have his conviction quashed and sentence set aside.

9. Further analysis of the evidence from the lower court record reveals that the mother of the girl testified that her daughter was born on the 17th October 2003. Her sixteenth birthday fell on the 17th October 2019. The Convict proposed to her in August 2019 when she was 15 years and 10 months old. As per the evidence of the victim she had first sex with the Convict on the 19th November 2019, a month after she had clocked 16 years. The baby was born on the 15th August 2020, nine months after she had sex with the Convict on the 19th November 2019. Unless of the lower court did not believe this part of evidence by the girl that her first sex was on the 19th November 2019, this Court has no reasonable ground to dismiss this piece of evidence as it corroborates with the gestation period of her pregnancy.
10. In Conclusion, this Court does not find any basis to uphold the conviction that was imposed by the lower court later on to consider enhancing the sentence as recommended by the reviewing Judge. From the evidence adduced in the lower court it is clear that there was miscarriage of justice in this matter. I therefore quash the conviction and set aside the sentence that was imposed on the convict. The Convict is therefore set at liberty unless held on other lawful grounds.

Delivered this **4th** Day of **August** 2021.



AGNES PATEMBA,
JUDGE