IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 21/2007

BETWEEN

WATIPATSA MZUNGU .....APPELLANT

AND

THE REPUBLIC .....RESPONDENT

From the Senior Resident Magistrate Court sitting at Lilongwe Being Criminal Case No. 7 of 2006

CORAM: HON.JUSTICE R.R. CHINANGWA, J

Appellant, Present/Unrepresented
Chembezi, Counsel for the Respondent
Kaferanthu, Court Interpreter
Mrs Mhone, Court Reporter

JUDGMENT

The appellant Watipatsa Mzungu appeared before the Senior Resident Magistrate Court sitting at Lilongwe from 4th to 23rd January, 2006. It was on a charge of Defilement contrary to section 138(1) of the penal code. The particulars averred that the appellant on 28th December, 2005 at Kawale 1 location in the city of Lilongwe had unlawful carnal knowledge of

Madalitso Phiri a girl under the age of 13 years. The appellant pleaded not guilty. After trial he was found guilty and convicted of Indecent assault contrary to section 137(1) of the penal code. He was sentenced to 42 months penal servitude.

The appellant appealed against both conviction and sentence. On conviction the appellant said that he wondered why having been charged with defilement he should be convicted of indecent assault. To him it showed that there was no evidence against him. The appellant said that he did not sexually assault or Indecently assault the complainant. She was threatened to incriminate him by her mother.

The state submitted that the conviction be upheld. There was sufficient evidence to sustain a charge of indecent assault. That the trial court was entitled under section 155(1) of the Criminal Procedure & Evidence Code to convict him. The state argued that the complainant was not threatened to incriminate appellant, but persuaded to reveal the identity of the culprit. The state said that appellant was privately teaching the complainant. The appellant took advantage of his position.

This is what complainant said in evidence:

"I know about the case that happened. It was at night. He told my mother that he would be teaching me on private lessons. I mean the accused. My mother accepted him to be tutoring me…..

This day I was carnally known. He grabbed me by the hand and pulled me into his house. Then he made me lie on his bed. Then he held me on the neck. Then he started having sex with me 'kundipanga zopusa'. He grabbed me by the neck so that I should not make noise. He laid on top of me. My clothes were on. I wore a dress, petticoat and pant. When he was sleeping with me, he had removed my underpants. I know a male sexual organ. It is a 'mchila'. He rolled his penis all over my private parts. I was not happy. I pushed him away to let go of me. He let me out through a window. He said I should tell my mother that I was at Brendas house. I told my mother that I was at Brendas house. I did not tell the truth as I was afraid she would beat me up or kill me for what we did, that 'amandipanga zopusa' I had been feeling great pain."

The appellant submitted that when complainant was being looked for, she was at Brendas house. The evidence of complainant was that it was appellant who told her to tell her

mother lies. The trial court was justified to accept the evidence of complainant as opposed to appellant.

The argument that the state did not invite Brenda or her mother to clarify this point is unattainable. The state had discretion whom to call on its side. It was up to appellant, had he wanted, to invite Brenda and her mother as defence witnesses.

On the altering the charge from rape to indecent assault. It is clear from the evidence of complainant that appellant did not succeed to gain penetration. On the available evidence the trial court was perfectly entitled to reduce the charge of defilement to indecent assault. Section 155(3) of the Criminal Procedure & Evidence Code provides:

> *"When a person is charged with the defilement of a girl under the age of thirteen years and the court is of opinion or the jury finds, as the case may be, that he is not guilty of that offence but that he is guilty of an offence under one of the sections 137 and 141 of the penal code, he may be convicted of that offence although he was not charged with it."*

The trial court acted within the law to convict appellant with the offence of indecent assault. The appeal against conviction is dismissed.

The next issue is on sentence. The trial court imposed 42 months of penal servitude. The appellant prays that sentence be reduced to enable him continue with his studies. He said that before his arrest and consequent conviction he was studying journalism at the Blantyre Business College. He also submitted that he is a first offender. He is an epileptic victim. On its part the state left the consideration on sentence entirely to the discretion of this court.

The appellant was convicted and sentenced on 23rd January, 2006. The operation of sentence was backdated to date of arrest the 28th December, 2005. He has been in prison since 28th December, 2005. Much as the well being of women and girls have to be protected from the likes of appellant. Consideration has also to be given to the appellant. He is a first offender. He is young. It is a well known fact that our prisons are very congested. It is my view that the period he has served is sufficient punishment. I set aside the sentence of 42 months penal servitude and substitute with such sentence that would result to immediate release unless held on other lawful grounds. Appeal succeed to this extent only.

PRONOUNCED in Open Court on this 7th day of June, 2007 at Lilongwe.

R.R. Chinangwa

J U D G E