IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

REVIEW CASE NO. 3 OF 2021

(Being Criminal Case No. 787 of 2020 before SRM, Blantyre Magistrate Court)

THE REPUBLIC

V

CHARLES GONDWE

Coram: Justice Vikochi Chima
Mathews Gamadzi, Principal State Advocate
Assisted by Grace Wasili, Senior State Advocate
Humphrey Panyanja, Senior Legal Aid Advocate
Mrs Moyo, Court Clerk

ORDER ON REVIEW

Chima J

This matter comes for review under sections 360, 362 and 363 of the Criminal Procedure and Evidence Code and also sections 25 and 26 of the Courts Act. The accused, a young man of eighteen years, was charged with defilement contrary to section 138 (1) of the Penal Code. During plea, he admitted having had sexual intercourse with the girl but stated that he had thought the girl was eighteen years of age according to his assessment on the appearance of her body. A plea of not guilty was entered. The girl was proved to be fifteen by the testimony of her mother. During cross examination of the complainant, she admitted that she had told the accused that she was seventeen years old. She also admitted that she had had sexual intercourse with the accused on

three occasions at the accused's house. At that time, she had spent three days at the accused's house without her parents' knowledge. She also stated that she had had two boyfriends (Chisomo and Tiyamike) previous to having the accused as her boyfriend and that she had had sexual intercourse with each of her former boyfriends prior to the accused having been sexually involved with her. She, further, stated that she had slept at Tiyamike's house on two occasions and at Chisomo's house once; and that on all these occasions, she had had sexual intercourse with the boys involved. She also said that her parents had been in the process of arranging for her to marry the accused and had asked to meet the accused.

In cross examination of the mother (PW2), she stated that the accused was the boyfriend of her daughter. She said that she had met the accused for the purpose of impressing it upon him to properly follow the procedure (probably marriage formalities) but that he declined and that she had warned him (what exactly she warned him about is not stated in the record).

The accused's evidence was that the girl had told him that she was seventeen years and five months old and that they had agreed to marry. Her parents invited him to their house to discuss the marriage formalities but he did not go. A few days later, the girl went to his house. Later, he met her uncle. He advised him and the girl to marry. He did not comment on what the uncle told them. The girl spent three days at his house. At the end of those days, he and his sister took her to her parents' house and they met her grandmother who said the girl's mother was away to the police station.

I. *VOIR DIRE*

I note that the magistrate conducted a *voir dire* examination of the complainant prior to her taking oath. Section 210 of the Criminal Procedure and Evidence Code as read with section 6 of the Oaths, Affirmations and Declarations Act states that a person of immature age may testify either under oath/ affirmation or not under oath depending on whether they understand the nature of an oath or affirmation. In *Makhanganya v R*,[1] it was held that when a child ceases to be of "tender years" is a matter for the good sense of the court, but for practical purposes, a child under the age of fourteen years should be regarded as "of tender years". The magistrate having inquired and found that the complainant was fifteen years old should not have bothered to have conducted *voir dire* on the witness.

II. THE DECISION

Section 138 of the Penal Code provides that:

> '(1) 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…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.'

---

[1] [1961-63] 2 ALR Mal 491; *Jackson v Rep* [1971-72] 6 ALR 440

The learned magistrate stated that:

> 'Now, this court understands that the issue of consent does not matter. In fact, the offence hinges on the very fact that a young girl is incapable of understanding what consent is in the first place and that she cannot give what she does not understand. That is well understood by this court.
>
> However, it would be a grave injustice for the criminal justice system to give a blind eye to the available defence of mistaken belief as to the age of the victim in an appropriate case. I must admit that the conduct of any person speaks volumes to the age or supposed age of that person. This is basic common sense. **I find the conduct of the victim in this case so reckless and that it would for all intents and purposes make the accused person believe that indeed she was 17 years old.**
>
> Actually, the record shows that she told the accused that she was 17 years old and that she appears to have discussed with the accused person her sexual past prior to her sexual encounters with the accused person herein. I say this because the questions from the accused person were exact.
>
> I must say any reasonable person would have operated under a mistaken belief that the victim was indeed beyond the age of 16 years **and that with her conduct no one would be stretching anything if he was to operate under a mistaken belief that the victim in this case was not 15 years old as she truly is...**I find that the accused person was mistaken as to the exact age of the victim **mainly from the conduct of the parents of the victim and also the unmatched sexual conduct of the victim which made it possible for the accused person to mistakenly believe and reasonably so in my view, that the victim was not of the age of 15 but rather 17 years as she claimed. Her sexual experience outlived her age** and she made a representation to the accused person as regards her age, which the accused person had no reason to doubt its veracity...I must further admit that I had the occasion of looking at the victim...and **I must admit that any reasonable person in the circumstances of the accused person would have acted under the mistaken belief that the victim was not so young a person considering that she had moments of sneaking out from her boyfriend's homes where she had had her person carnally known..."**[2]

A. Child Marriages

The magistrate found that one of the factors that grounded the accused's belief as to mistake the complainant's age was the fact that the complainant's parents had encouraged him to formalise a marriage with the complainant. Regrettably, the court cannot countenance the fact that the parents were in support of their relationship and intended it to become a marriage to be a reasonable cause, for that union of the so-called marriage would be illegal. Child marriages are proscribed by section 22 (6) of the Constitution, section 14 of the Marriage, Divorce and Family Relations Act, 2015 and sections 80, 81 and 83 of the Child Care, Protection and Justice Act. It is inconsequential that they may not have been aware of the dictates of the law.[3] Below the provisions are set out.

Section 22 of the Constitution provides:

> '(3) All men and women have the right to marry and found a family.
>
> (4) No person shall be forced to enter into marriage.
>
> (5) Subsections (3) and (4) shall apply to all marriages at law, custom and marriages by repute or by permanent cohabitation.
>
> (6) No person over the age of eighteen years shall be prevented from entering into marriage.'

---

[2] At para 20-24 of the judgment
[3] Section 7 of the Penal Code

Section 14 of the Marriage, Divorce and Family Relations Act states that:

> 'Subject to section 22 of the Constitution, two persons of the opposite sex who are both not below the age of eighteen years…may enter into marriage with each other.'

Section 80 of the Child Care, Protection Act provides as follows:

> 'No person shall subject a child to a social or customary practice that is harmful to the health or general development of the child.'

Section 81 of the Child Care, Protection Act states:

> 'No person shall—
>
> (a) Force a child into marriage; or
> (b) Force a child to be betrothed.'

Section 83 of the Child Care, Protection and Justice Act stipulates:

> 'A person who contravenes section 80, 81 and 82 commits an offence and shall be liable to imprisonment for ten years.'

B. Complainant's Sexual History

The other consideration that is said to have played in the accused's mind in his assessment of the complainant's age was the fact that the girl had had some two previous boyfriends both of whom she had spent a few nights at their homes and had sexual intercourse with and also the fact that the complainant had also visited the accused's home and as it were, presented herself to him for sexual intercourse.

That kind of reasoning is very dangerous. One's sexual history does not date a person let alone distinguish one from being a child from an adult. There are plenty of highly sexualised children just like there are a lot of adults with an elaborate sexual past.[4] Most of those children even came to be that way because a grown man had been sexually abusing them. The statistics indicate that one in five young women had at least experienced one incident of sexual abuse by the time they reached majority.[5] Section 138 of the Penal Code has one of its objects being to protect even such highly sexualised children from further abuse. In the Canadian decision of *R v* George,[6] the Court of Appeal noted that it would be perverse to exclude from protection those children that have become familiar with sex and sexual acts by letting free accused who allege to have been mistaken as to the complainant's age due to the complainant's sexual past. Isabel Grant and Janine Benedet write about the ridiculousness of an accused relying on a mistaken belief based on how experienced in sexual acts a complainant is and also the incongruence between ones's sexual history and the number of days they have spent on earth. They state that:

> 'If the accused learns [how familiar the complainant is in sexual matters] from the sex acts he is engaging in with the complainant, the sexual assault is already underway. The accused cannot rely on a belief in age

[4] Michelle Xiao Liu, 'Suffering in Silence: The Failure of Malawi's Sexual Offence Laws to Protect Children—A Human Rights Report and Proposed Legislation', Wisconsin International Law Journal, Vol 38 No. 3
[5] Ibid
[6] 2016 SKCA 155, 135 WCB (2d) 536

> developed after the fact. It also ignores the fact that, given the prevalence of child sexual abuse, familiarity with sex acts tells us nothing useful about someone's age.'[7]

The magistrate writes:

> '…that she appears to have discussed with the accused person her sexual past prior to her sexual encounters with the accused person herein. I say this because the questions from the accused person were exact.'

While I agree that the cross examination was very direct signifying that the complainant must have told the accused her previous sexual escapades (unless by some uncanny coincidence that the accused had stumbled on that line of cross examination by chance and had managed to get favourable answers), there is nothing on the record from where one could decipher at what stage in their relationship the girl had narrated to him these things. What one has done in the sexual realm is not something, I think, the average person lightly shares with a mere acquaintance. It therefore may not be correct that the accused's belief concerning the girl's age stemming from the girl's sexual experience may not have come before he had sexual intercourse with her. She may well have shared her past after she was already sexually involved with the accused. What I am saying here in no way nullifies my above sentiments that the number of sexual experiences is not a measure of a person's age.

C. Bodily Development

I do believe that a person's physical development generally corresponds to their age. Further, I do not think it far-fetched that in certain situations a fifteen-year-old may be mistaken for a seventeen-year-old and if the girl goes on to claim that she is seventeen, that can even fortify one's belief. The magistrate stated that he saw the girl and his assessment was that she would pass for a seventeen-year-old. A reviewing court cannot fault such kinds of assessments unless they appear outrageous. Thus for these reasons, I would find that the court below was right in accepting the accused's defence and acquitting him.

D. Overcriminalisation of Factually Consensual Sexual Intercourse

This court would also just like to note a few problematic areas concerning the realm of the offence of defilement in as far as it criminalises factually consensual sex between teenagers. In *Yamikani Paul v Rep*,[8] the accused, who was aged seventeen at the time of the commission of the offence, was convicted of having defiled his fifteen year old girlfriend. The two were in the same school with the accused being in Form three and the girl in Form two. It was ordinary for them to engage in sexual intercourse. Before the magistrate court, the accused apparently pleaded guilty to the offence and was convicted and sentenced to six years' imprisonment with hard labour. On appeal against the court's finding of guilt, Kamwambe J noted the following:

> 'The appellant's counsel has spiritedly argued that in this relationship of the appellant and the girl there was no abuse, because they were in a relationship. I do agree that indeed we have not received any evidence

---

[7] Isabel Grant and Janine Benedet, 'Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law' (2019), Allard Faculty Publications
[8] Criminal Appeal No. 16 of 2017, High Court (Principal Registry), Unreported

> of abuse. The girl did not testify that she was forced to have sex with him. This is a unique case. Most cases we deal with there is a power imbalance between the perpetrator of the offence of defilement and the victim…In other cases of defilement it is where a man between 18 and 65 years of age is defiling a girl under the age of 12.

The judge thus set aside the custodial term and ordered an absolute discharge under section 337 (1) (b) of the Penal Code. Michelle Xiao Liu writes concerning the overcriminalisation of factually consensual sex in Malawi as follows:

> 'The current statutory rape law makes it a crime for any person to have sex with a girl who is under the age of sixteen. Under the law, therefore, a teenage boy who has factually consensual sex with his fifteen-year-old girlfriend could be arrested for the same crime as a grown man who exploits the same girl for sex. Although the CCPJA [Child Care, Protection and Justice Act] prohibits imprisonment of children, the law treats statutory rape as a "serious offence" and children and minors who are arrested for that crime may not be diverted away from the criminal system…The African Committee of Experts on the Rights and Welfare of the Child, in a 2017 Joint General Comment with the African Commission on Human and Peoples' Rights, recognized that older teenagers may have the emotional maturity to make decisions about their lives, including the decision to have sex. The Committee on the Rights of the Child recognised that adolescence is a "period characterized by rapid physical, cognitive and social changes, including sexual…maturation…In its 2016 General Comment on the *Implementation of the Rights of the Child During Adolescence*, the Committee on the Rights of the Child reminded State Parties of their obligations to protect all children from sexual abuse and exploitation together with the need to balance the evolving capacities of children. The Committee specifically stated that State Parties should "avoid criminalising adolescents of similar ages for factually consensual and non-exploitative sexual activity. The Committee also stated that State Parties, like Malawi, should "review or introduce legislation recognizing the right of adolescents to take increasing responsibility for decisions affecting their lives.'[9]

She goes on to state that:

> 'Pre-marital relations in Malawi are a cultural taboo, but sex between teens is a poorly kept secret. According to the 2015-2016 Demographic and Health Survey, the majority of fifteen-to nineteen-year-old teenagers have already had sex. Approximately one out of every eight females and one out of every five males surveyed said they had their first sexual encounter at age fifteen. A Women's Rights Program Manager at an international organization fighting poverty noted that teenagers in Malawi are becoming sexually active voluntarily at the age of thirteen and up…And for many of these teenagers, they are sexually active with a girlfriend or boyfriend who is close in age…the heavy hand of the statutory rape law fails to differentiate between exploitative sex between adults and children and consensual sex between teenage peers…Based on personal experience inspecting prisons around Malawi in 2018, a representative of the office of the Ombudsman…said that there was a trend of young men—including some who were in their teens—serving lengthy sentences for defilement. The representative explained that the intent of the statutory rape law was to "catch the big fish--those big men who have been preying on our young girls. The representative explained, however, that teenage boys having sex with their girlfriends are oftentimes caught by the statutory rape law and subjected to the harsh legal consequences thereunder, some serving sentences as long as ten years.'[10]

The point is that there is necessity for lawmakers to revisit the law such that the intention of the law is accomplished, which is to prevent grown men from taking advantage of young girls. The way other countries like South Africa and Canada have done it is to make available a defence of consent in a situation where the accused and the complainant are close in age and where the complainant is at least a certain age, say twelve or fourteen years, and the accused is no older than

---

[9] Supra note 4 at 596

[10] Ibid at 597-598

say, five years than the complainant.[11] The following justification for such a state of affairs is provided as follows:

> 'This recognises that as the age disparity increases, the imbalance of power and the potential for harm increases…The close in age exceptions reflect a recognition that younger teenagers do engage in sexual experimentation with each other and that the criminal law is not the appropriate tool for protecting teenagers from the consequences of all such activity. However, where men are outside of the close in age exceptions, there should be a significant responsibility on them to make sure that the girls with whom they are engaging in sexual activity are 16 years of age or older.'[12]

III. MANNER OF JUDGMENT WRITING

Section 140 of the Criminal Procedure and Evidence Code provides what each judgment must contain. Principally, a judgment must have the point or points for determination, the decision thereon and the reasons for the decision, the provision and the offence for which the accused has either been convicted or acquitted of. There is, however, also something to be said about the language, the tone and style to be employed in judgment writing. The fact remains that every judicial officer has his own style of writing. For example, some are factual, short and to the point while others are poetic and use metaphors.[13] Be that as it may, judicial writing is a solemn responsibility and its communication needs to be sober regardless of the individual judicial officer's manner of expression. In the introduction to the judgment, the magistrate wrote:

> 'They enjoyed the company of each other with no sense of restraint or guilt. When at it; they manifested pleasure and passion for each other's person. They crafted their own twisted, misguided and untimely sexual drive and amusement. Alas! The accused person was not the first in line neither was he the second nor perhaps the last, this I cannot say for certainty. He caused his penis penetrate into what I would ordinarily say an immature vagina of the victim in this case. However, young as they both are, but I am unable to use the term "immature" as I am not sure whether that would be a proper word to use in the prevailing circumstances. If I would, I must admit that, I would grudgingly so write. Perhaps, such precious words of passion must be reserved for appropriate cases. I am unable to acknowledge this one as such a case. It is sad, the victim's conduct leaves a lot to be desired…The two had their secret times together in merry…'[14]

Magistrates would do well to avoid putting personal views, humour or sarcasm in the judgment.

> 'Each judge has an individual manner of expression. Judgments should be expressed in a language and style which suits the decision-maker…When choosing a writing style, the judge should always be conscious of the effect of the judgment and particular findings on those who are concerned with it. **Care should be taken to avoid injection of personal views, by adhering to the purpose of the judgment. This consideration may temper an inclination to humour, irony, trenchant criticism, anger or morality, although there are occasions when humour or the expression of moral value may be appropriate.'**[15]

---

[11] Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 of South Africa and Criminal Code of Canada
[12] Supra note 4 at 97
[13] Judge L.O. Bosielo, "Judgment Writing for Apirant Judges", South African Judicial Training Institute, https://joasa.org.za accessed on 21 October 2021
[14] Page 1-2 of the judgment
[15] Justice Linda Dessau and Judge Tom Wodak, "Seven Steps to Clearer Judgment Writing" in A Matter of Judgment: Judicial Decision-Making and Judgment Writing

Prosser also writes:

> 'The bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.'[16]

Literary writing also needs to be kept in check when one is penning a judgment. Justice Linda Upadhyaya writes:

> 'Flowery language and literary allusion should be avoided as such overindulgence may detract from the seriousness of the judgment…while it is quite fitting to mitigate the austerity of a judgment by employing the arts and graces of literary composition, restraint should be exercised in doing so. Elegance of expression, aptness of illustration, well-chosen metaphors and an occasional happy literary quotation are both legitimate and desirable. But a judgment is not the appropriate vehicle for wit and pleasantry at large. To the parties concerned, litigation is not a laughing matter and they may well complain if the judge gives the impression of treating their case too light-heartedly. He must not allow himself to yield to the temptation of playing to the gallery and the press by comments which may distress the suitors who have come to his court not for entertainment but for justice.'[17]

All this is not to say that there are not those moments when a judicial officer cannot show that they find something funny for 'once in a while the facts of a particular case may be so absurd and bizarre that the omission of some appropriate comment may itself render the judgment excessively tedious and pedantic.'[18]

Subject to the views expressed, the finding of acquittal was a right one.

Made this day the 25th of October 2021

Justice Vikochi Chima

---

[16] W. Prosser, *The Judicial Humorist*, quoted by Justice Nicolas Kearns in "Some Thoughts on Judgment Writing", 10 November 2008, https://www.irishtimes.com, accessed on 21 October 21, 2021

[17] Justice Devendra Kumar Upadhyaya, "Skills of Judgment Writing" Judicial Training & Research Institute, http://www.ijtr.nic.in accessed on 21 October 2021, at 7

[18] Supra note 14