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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(APPELLATE JURISDICTION)

APPEAL NO. 79/2007

JAMES SUNGA

AND

THE PEOPLE

CORAM: LEWANIKA, DCJ, SILOMBA, MUSHABATI, JJS
On 4th and 5th September, 2007

For the Appellant: E.M. SIKAZWE, Acting Director of Legal Aid
For the Respondent: C.F.R. MUCHENGA, Director of Public Prosecutions

JUDGMENT

LEWANIKA, DCJ delivered the judgment of the Court.

AUTHORITIES REFERRED TO:

1. CHRISPIN CHANDA VS THE PEOPLE , APPEAL NO. 21/2007
2. PHIRI VS THE PEOPLE, 1970, SCZ 199

The Appellant was convicted of the offence of defilement of a girl under the age of 16 years contrary to Section 138 (1) of the Penal Code. The particulars of the offence were that the Appellant on 5th November, 2005 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia had unlawful carnal knowledge of a girl under the age of 16 years namely Beatrice Pasiku KUNDA. The Appellant was sentenced to a term

of 20 years imprisonment with hard labour. The Appellant was tried and convicted in the subordinate court but was committed to the High Court for sentence. The Appellant has appealed against both conviction and sentence.

The evidence on record is that the Appellant was the neighbour of the prosecutrix's mother PW 1. On 5th November, 2005 the Appellant called the prosecutrix, who was then aged 12 years, to his house and gave her K1,000.00 to go and buy kapenta for him. The prosecutrix went to buy the kapenta which she brought to the Appellant's house. The Appellant told the prosecutrix to take the kapenta inside the house and followed her. In the house the Appellant pushed the prosecutrix down and as she lay on her back undressed her and forced himself on her. He had sexual intercourse with the prosecutrix as a result of which she sustained some injuries on her private parts. The medical evidence also confirmed that the prosecutrix had been defiled.

At the hearing of the appeal, Counsel for the Appellant informed us that he was no longer pursuing the appeal against conviction but would only argue the appeal against sentence. Counsel for the Appellant has only filed one ground of appeal, namely that the learned trial Judge erred in principle when he sentenced the Appellant to 20 years imprisonment with hard labour,

a sentence which was excessive and did not reflect the leniency which should be accorded to a first offender.

In arguing this ground, Counsel said that the principle to be applied to first offenders has been set out by this court on numerous occasions. He said that a sentence of 20 years imprisonment with hard labour even though not coming to this court with a sense of shock is however on the high side. He urged us to allow the appeal.

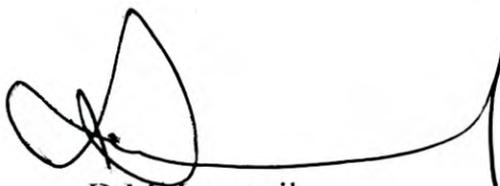
The learned Director of Public Prosecutions informed us that he did not wish to address us on the question of sentence.

We are indebted to Counsel for the Appellant for the submissions herein which we have considered as well as the evidence on record. In sentencing the Appellant the learned Judge in the court below stated that:

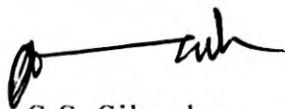
“The convict though a first offender deserves no leniency as I have taken a serious view of the circumstances under which the offence was committed and the longer he remained in prison, the safer young girls are.”

What the learned Judge stated was not correct as we have pointed out on numerous occasions in the past that a first offender, no matter the circumstances of the offence, deserves leniency and should be given some credit for that. The learned Judge in the court below misdirected himself and for that reason we are compelled to interfere with his sentence. We would therefore allow the appeal and set aside the sentence of 20 years

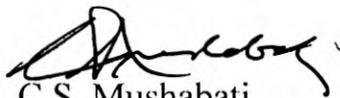
imprisonment with hard labour and substitute it with one of 18 years imprisonment with hard labour. To that extent only does this appeal succeed.



D.M. Lewanika
DEPUTY CHIEF JUSTICE



S.S. Silomba
SUPREME COURT JUDGE



C.S. Mushabati
SUPREME COURT JUDGE