IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 15 OF 2021
(Being Criminal Case No. 66 of 2021 before the First Grade Magistrate Court sitting at Chiradzulu)

THE REPUBLIC
V
CECILIA NASIYO

Coram: Justice Vikochi Chima
Mr Chisanga, State Advocate
Mr Fostino Maele, for the appellant
Appellant, present
Mrs Moyo, Court Clerk

JUDGMENT

Chima J

1. This is an appeal against conviction and sentence. The appellant was charged with the offence of recording a child in a prohibited sexual act contrary to section 160E (b) of the Penal Code. The particulars of the charge stated that on 5 May 2021, the appellant, at Ngumwiche Village in the district of Chiradzulu photographed a child in a prohibited sexual act. The court below recorded a plea of guilt. In pleading to the charge, the magistrate recorded this:

> 'I understand the charge and I admit it. Yes, I did photograph the private part of the child. I found her having sexual intercourse with my husband in my house. She hid under the bed.'

2. The prosecutor then presented the facts of the case. It was stated that some people had told the mother of the complainant that photographs of her daughter while naked were circulating in the media. The girl was stated to be sixteen years of age. The complainant's mother having looked at the photographs confirmed that it was indeed her daughter who was depicted in them. She confronted her daughter about the pictures. Her daughter's account of how the photographs came about pointed to the appellant. The appellant

admitted to have taken the photographs using her phone after she had fought with the complainant over their common lover. She is said to have sent the photographs to two people.

3. Section 160E of the Penal Code states that:

> 'Any person who--
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> (a) causes or permits a child to be engaged in a prohibited sexual act or simulation of such act if the person knows or has reason to know or intends that the prohibited act may be photographed, filmed, reproduced, or reconstructed in any manner or may be part of an exhibition or performance;
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> (b) photographs or films a child in a prohibited sexual act or in the simulation of such an act or uses any device to reproduce or reconstruct the image of a child in a prohibited sexual act or in the simulation of such an act;
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> (c) knowingly receives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, sends, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers or agrees to offer any photograph film, videotape, computer programme, video game or any other reproduction or reconstruction which depicts a child engaging in a prohibited sexual act or in the simulation of such act;
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> (d) knowingly possesses or knowingly views any photograph, film, video tape, computer programme, video game or any other reproduction or reconstruction which so depicts a child, shall be guilty of an offence and shall be liable to imprisonment for fourteen years.'

4. Section 160A of the Penal Code states that:

> 'In this Chapter—
> "child" means a child under the age of sixteen years…
>
> "prohibited sexual act" includes sexual intercourse, anal intercourse, masturbation, bestiality, sadism, masochism, fellatio, cunnilingus, or nudity if the nudity is depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction…

5. Counsel for the appellant has submitted that since the complainant is sixteen years of age, the conviction cannot stand as she is not a child in the definition of section 160A of the Penal Code. The state is in full agreement with this reasoning. This court is also of the opinion that this element of the charge was not satisfied. The magistrate did not sufficiently put the elements of the charge to the accused, for her to admit to each of the ingredients of the offence so that a proper plea of guilt is recorded as the authorities state.[1] He ought to have defined what a child meant as per section 160A. Even after a plea of guilty had been recorded, when upon the presentation of the facts the age of the complainant was discovered to be sixteen, the magistrate could still have changed the plea of guilty to one of not guilty. Thus the conviction is unsustainable and I will go on to quash it.

6. Coming to this stage, this court has pondered that while the offence that was charged could not never be established, the facts disclose other offences. As an example, it would appear that the appellant should have indecently assaulted the complainant by undressing her and indeed she must have intruded upon the complainant's privacy. Indecent assault and intruding upon the privacy of a woman also known as insulting the modesty of a woman are offences under section 137 (1) and (3) of the Penal Code, respectively. There is also

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[1] Section 251 of the Criminal Procedure and Evidence Code; *R v Kingston* [1961-63] 2 ALR 59

the offence of making or producing obscene photographs contrary to section 179 of the Penal Code. These offences, however, do not share the same elements with the offence charged such that this court would not be able to convict the appellant of these offences as minor and cognate offences under section 150 of the Criminal Procedure and Evidence Code, even though the accused was not charged with them. I, therefore, have considered the possibility of ordering a retrial in these circumstances under section 353 (2) (a) (i) of the Criminal Procedure and Evidence Code, which states that:

> 'After perusing the record of the case and after hearing the appellant or his legal practitioner if he appears, the court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—
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> (a) in an appeal by any aggrieved person from a conviction—
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> (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial...'

7. There is authority on how the High Court should exercise its discretion on whether to order retrial or not in the case of *Banda (P) et al v Rep*,[2] where the Supreme Court of Appeal stated as follows:

> 'Before the court orders a retrial it must be satisfied that there has been an error in law or some irregularity as is not cured by s. 5 of the Criminal Procedure and Evidence Code. the power can be exercised in respect of a great number of faults, for example, misjoinder of charges, defective charges generally, improper rejection of evidence, the admission of or reliance on inadmissible evidence, failure to tell the accused that he may call witnesses, the wrongful admission of evidence of bad character, misdirection on the ingredients of the offence or on the burden of proof, and misdirection on corroboration. The list is not intended to be exhaustive and, in our view, the power can be properly exercised in respect of a great variety of errors. Before it is used on an appeal arising from a conviction after trial, however, the court should be satisfied that, leaving aside the error, the evidence discloses a case against the appellant in respect of the offence charged or some other offence. A retrial should not be ordered to enable the prosecution to fill up gaps in the evidence. It would, in our opinion, be wrong to allow the prosecution, where it had come to court with an insufficiently prepared case and gaps in the evidence, to have a second bite of the cherry.
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> We think also that the court also has to balance the interests of justice against a possible injustice to the appellant. Each appeal depends on its own facts and circumstances. In some there will be circumstances which would render it oppressive to put the appellant on trial a second time. In others, it would cause a greater miscarriage of justice to the community not to have him retried. The court should maintain a sense of proportion and avoid making an order for a retrial in respect of trivial offences. Again, it should not make the order unless there is some indication that the state intends to recharge the appellant.'

8. The present case is one in which a retrial may be applicable since it involves a misdirection as to the ingredients of the offence. As already stated, the facts disclose at least three offences. Indecent offence is a felony and is punishable with imprisonment for fourteen years. Insulting the modesty of a woman is a misdemeanour and punishable with imprisonment for one year. Making or producing an obscene photograph is punishable with a fine of K500, 000 and imprisonment for a term of two years. Thus only one of these three contemplated offences is a felony. I have not seen any indication that the state would want to retry the appellant. In the present case, I do not think there would be a greater miscarriage of justice that would be occasioned to the community if the appellant were not retried than

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[2] [1981-83] 10 MLR 142

it would be to her if she were to be retried considering these foregoing factors and also the fact that the appellant has already served seven months of the imprisonment imposed on her. The appellant is thus acquitted.

Made in open court this day the 19th of November 2021

V. Chima

Chima J