IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 11 OF 2022

(Being Criminal Case No. 28 of 2019 before the Senior Resident Magistrate Court sitting at Midima)

PATRICK JORDAN

V

THE REPUBLIC

Coram: Justice Vikochi Chima
Counsel Chimkango, for the Appellant
Counsel Layna Kulesi, Senior State Advocate
Mrs Moyo, Court Clerk

RULING ON APPLICATION TO ADDUCE FRESH EVIDENCE ON APPEAL

Chima J

I. THE APPLICATION AND THE ARGUMENTS

1. The appellant was convicted of defilement contrary to section 138 of the Penal Code and was sentenced to fourteeen years' imprisonment with hard labour. He seeks to appeal against both the conviction and the sentence. The appellant has now brought an application to adduce fresh evidence on appeal pursuant to section 356 of the Criminal Procedure and Evidence Code. It is supported by an affidavit sworn by counsel for the appellant. The fresh evidence that is sought to be adduced is of the mother of the victim and it pertains to the victim's age to the effect that she was sixteen years old at the time of the alleged offence.
2. The affidavit states:

'That the proof of the age of the victim in the lower court was adduced by the victim herself, a witness who was not available at the time of the victim's birth and the medical practitioner who did not conduct an examination of the age of the victim.

That for the offence of defilement to be established, the testimony of the parents, or a medical practitioner who conducted an examination of the age of the victim ought to have been adduced in the lower court.

That the mother of the victim did not attest to the age of the victim because at the time of the trial in the lower court, as the lower court's judgment shows, she was unable to travel since she was heavily pregnant, as such, her testimony on the age of the victim could not possibly be obtained and be used in the lower court.

That being the mother of the victim, her evidence on the age of the victim would be, for all intents and purposes, weighty and probably have an important influence on the result of the case whose essential element is the age of the victim.

That as a mother of the victim, she is a person who has personal knowledge gained at the time of the victim's birth and that her testimony is credible and presumably to be believed.'

3. Counsel for the appellant has cited the Supreme Court of Appeal decision of *Nizam Abdul Latif v Manica (Mw) Ltd*,[1] as the case that laid down some principles (applying principles from *Ladd v Marshal*[2]) that should guide courts in the exercise of the discretion of whether to allow fresh evidence on appeal. According to *Ladd v Marshal*, the court will allow fresh evidence to be adduced if it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial; the evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and the evidence is such as is presumably to be believed. Counsel for the appellant also cited *Auction Holdings v Harawa*,[3] as having followed the same principle that fresh evidence on appeal can only be adduced if that evidence could not have been accessible even after reasonable diligence.
4. Counsel for the appellant cites *Kayira v Rep*,[4] *Rep v Banda*[5] and *Chipala v Rep*[6] for the proposition that, on a charge of defilement, the age of the victim is an essential element that has to be proved to the satisfaction of the court. He also cites *Rep v Zobvuta*[7] and *Mzunga v Rep*[8] for the proposition that the age of the victim can be proved by a person who has personal knowledge gained at the time of the victim's birth, such as parents, or by a medical practitioner after conducting a medical examination on the victim.
5. Counsel for the appellant has argued that in the trial court, the testimony of PW2 should not have been admitted to prove the age of the victim as she was not present at the time of the victim's birth. He further argues that, similarly, the court should not have relied on

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[1] Civil Appeal No. 28 of 2007
[2] [1954] 3 All ER 745
[3] MSCA Civil Appeal 69 of 2009
[4] [2015] MWHC 432
[5] [2012] MWHC 17
[6] [1993] 16 (2) MLR 498 (HC)
[7] [1994] MLR 317 (HC)
[8] Criminal Appeal Case No. 38 of 2018

the evidence of the medical practitioner because she did not make any medical examination of the age of the victim but that the only examination that she conducted pertained to whether the victim was carnally known or not.

6. Counsel for the respondent has cited the High Court decision of *Kumitete v Rep*[9] on the practice to be followed in determining whether to allow fresh evidence in an appeal or not.

II. THE LAW ON ADDUCTION OF FRESH EVIDENCE ON APPEAL

7. In the present matter, it is on record that the prosecution failed to parade the mother of the victim as a witness because she was heavily pregnant and could not travel to court.
8. Section 356 of the Criminal Procedure and Evidence Code states that:

> '(1) In dealing with an appeal from a subordinate court the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.
> (2) When the additional evidence is taken by a subordinate court, such court shall certify such evidence to the High Court, which shall thereupon proceed to dispose of the appeal.
> (3) Unless the High Court otherwise directs, the accused or his legal practitioner shall be present when the additional evidence is taken.
> (4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.'

9. While counsel for the appellant has cited some civil cases as authorities that pertain to adduction of additional evidence on appeal and while the principles therein may be similar to those on the subject in criminal matters, there appears to be subtle nuances between the two categories.
10. In considering an application pursuant to section 356 of the Criminal Procedure and Evidence Code to adduce further evidence on the hearing of an appeal, Mead J in *Kumitete v Rep*[10] borrowed principles from an English case, *R v Parks*,[11] and an English statute, the Criminal Appeal Act 1968, on the practice to be followed since the Criminal Procedure and Evidence Code had no laid down principles for the same. Mead J said:

> 'The power of this court to allow additional evidence is provided by s. 356 of the Criminal Procedure and Evidence Code. Neither in that section nor in any other section of the Code is provision made for the practice to be adopted by this court when considering an application that additional evidence be taken. This court is therefore to be guided by the provisions of s. 3 of the Criminal Procedure and Evidence Code requiring that in applying the Code the principle that substantial justice shall be done without undue regard for technicality shall at all times be adhered to...In applying the provisions of s.356 of the Criminal Procedure and Evidence Code as read with s. 3 of the Code the test whether substantial justice would be done will be satisfied, in my view, by applying the principles enunciated by Lord Parker, C.J. in the *Parks* case, as embodied and enlarged by the Criminal Appeal Act 1968.'

11. Mead J observed that the *Parks* case had laid down principles guiding whether additional evidence was to be adduced on appeal based on a section 9 of the Criminal Appeal Act 1907 (a predecessor of the 1968 Act) which provision was as wide in its provisions as is

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[9] 8 MLR 117
[10] Ibid
[11] [1961] 1 WLR 1484; [1961] 3 All ER 633; (1961) 46 Cr. App. R. 29

section 356 of the Criminal Procedure and Evidence Code. Lord Parker C.J. in *R v Parks* had said:

> 'It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles on which this court acts must be kept within narrow confines, otherwise in every case this court would be asked in effect to carry out a new trial. As the court understands it, the power under s. 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way. First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.'

12. Mead J had noted that in addition to the above principles, the further requirements that were to be found in the Criminal Appeal Act 1968 Act were that the court should be satisfied that the proposed evidence was not adduced at the trial and that there is a reasonable explanation for the failure so to adduce it.
13. Looking at the evidence that it is proposed to be adduced, there is no doubt that such evidence would have been relevant to the issues at the trial and might afford grounds for allowing the appeal. The court also thinks the evidence may be capable of belief. The question that causes me concern is the failure of the appellant to call this evidence at his trial. It is stated that the mother of the victim was heavily expectant at the time of the trial and was not able to travel from Salima to Blantyre to attend court. Therefore, it must be that the evidence that the mother would adduce was known to the appellant at that time or it should have been discoverable with normal diligence what evidence she would adduce. Concerning why the appellant never made it possible for such evidence to be before the court, counsel for the appellant stated that the counsel who was previously representing the appellant at the trial was the one at fault, for he never made contact with the mother. Counsel for the applicant went on to state that even Patemba J had cautioned the previous counsel (for wasting the court's time with unnecessary applications) in this same case when that counsel had brought an application before the High Court even before the trial was concluded before the magistrate. I do not find that explanation reasonable for, it was held in *R v Watkins*,[12] that if an appellant is represented at the trial and his counsel deliberately refrains from calling witnesses, leave will not be granted to call the fresh evidence on appeal. And also:

    > 'Where people know of the existence of a witness, but take no trouble to call him, and the fact turns out that on some point his evidence would be more material than originally appeared, that is not a reason for allowing that witness to be called on appeal.'[13]

14. In this matter, the record will show that counsel never indicated to the court that the appellant felt that the mother was a crucial witness for the defence such that he would

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[12] (1908) 1 Cr. App. Rep. 183

[13] Per Pickford J in *R v Hewitt* (1912) 7 Cr. App. Rep. 219 at 222

make an application for the adjournment of the case until the witness should be able to travel to court or to allow the magistrate to make arrangements either for the court to sit in Salima or for some other arrangement.

15. In the absence of a reasonable explanation, the court still has a discretion whether or not to admit additional evidence and would only allow its admission if it is satisfied that failure to do so would cause grave injustice.[14] In deciding whether such an injustice would result, each case will be looked at on its own merits but the court will not normally allow the application unless it is satisfied that the evidence was such that if it had been put forward at the trial, it would have led to the appellant's acquittal and that it was not deliberately suppressed.[15] Should this court then exercise its discretion in favour of the appellant? I do not think so. While the intended evidence, if it was before the magistrate court could, if believed, lead to the accused's acquittal, it was not that the state had deliberately suppressed it. It was the appellant who deliberately chose not to indicate to the trial court that he intended to call this particular witness.

III. EVIDENCE OF AGE

16. It has been argued by counsel that the element of age in the charge was not proved as the victim as well as PW2 were not competent to testify on the same and he cites two High Court decisions to the effect that age of the victim can only be proved a person who has personal knowledge gained at the time of such birth, such as parents or by a medical practitioner after conducting an examination of the victim.[16] One of these decisions, the *Zobvuta* case, never decided that a child's evidence as to her age is inadmissible. In that case, the accused was convicted by the Senior Resident Magistrate Court, of defilement of a girl under the age of thirteen years of age. On review, the judge noted that, apart from the medical report stating the age of the child, there was no other evidence on her age. The judge held that the medical report was not supposed to have been accepted as evidence by the magistrate because in the absence of the maker of it being called as a witness, the conditions in section 180 of the Criminal Procedure and Evidence Code, should have been complied with first, before the report could be admissible. Those conditions were that the report must have been served on the accused and he should have consented to its being tendered or he should have been allowed seven days within which to enter any objection to it.

17. Concerning the evidence of age in the matter, Mwaungulu J said:

> 'On a trial of defilement of girls under the age of 13, it is very important that the age of the girl should be ascertained. There are two reasons. First, defilement could involve a child of very tender age. if a child is of a very tender age, the court may not even have to get her testimony. If the complainant is a child, the court may have to conduct a *voir dire* to decide whether the complainant appreciates the duty to tell the truth to the court. If the court decides that the complainant should give unsworn evidence, her testimony requires corroboration...it is important then to ascertain the age of a complainant in a trial for defilement because the testimony may require special scrutiny. Secondly, and most important, is that the age of the complainant has to be strictly proved *R v Rogers* 10 Cr App R 276. It is not necessary

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[14] *Hill v Rep* [1971-72] 6 ALR Mal. 157

[15] Ibid

[16] *Rep v Zobvuta* [1994] MLR 317; *Mzunga v Rep* Criminal Appeal Case No. 38 of 2018

that there should be a birth certificate. In Malawi this may be impossible. Age could be proved by those who have seen the child or even by a school teacher *R v Cox* (1898) 1 QB 179. The complainant's mother or guardian did not lead evidence on the age of the complainant. The learned Senior Resident Magistrate was oblivious to the need to prove that the complainant was under the age of 13 although the age is a crucial element of the offence.'

18. From the sentiments that the judge expressed, it is probable that the victim in that case was of very tender years such that she could not even be called as a witness, otherwise she could have given her testimony. Since the victim in that case never testified, the judge, never made any pronouncement concerning the admissibility or otherwise of one's own testimony on one's age.
19. There is the High Court case of *Chipala v Rep*,[17] which made such pronouncement. This, however, was the old position at common law, that a witness could not give admissible evidence of the place or date of his birth,[18] which was later relaxed. In the *Chipala* case Mtambo J had stated that:

> 'The age limit of 13 years is certainly an essential element of that offence. It must, therefore, be proved before the court enters upon the merits of the case. In the instant case, however, the only occasion when it was suggested that the complainant was a girl under the age of 13 years was during her evidence in chief when she herself said, "I am 12 years old. The question that immediately arises, therefore, is whether this can be sufficient proof that she was under the age limit fixed by law at the time when the offence was committed. **I have not had the benefit of any case authority on this topic**. It seems to me that, other than a certificate of a medical practitioner or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony by a person who has personal knowledge gained at the time of that person's birth, such as parents, no other evidence is receivable as proof of the age of such a person. There was no such evidence in the instant case. **The complainant's testimony as to her age cannot be relied upon because what she stated is either according to what she might have been told or she merely guessed it.'** (emphasis supplied)

20. Apparently, later on, the English law, which had already recognised the exception of hearsay as regards matters of pedigree, extended the exception to the reception of evidence of a witness of one's own age. MacRae on Evidence writes:

> '**As to admitting the statement of a deceased person regarding his own age, it was said that such a statement would be admissible under this exception** [*Sturla v Freccia* (1880) 5 App. Cas 623 at 641 In an earlier case it was ruled that "such declarations were not admissible in evidence for they regarded a fact of which he could not have personal knowledge" apparently not noting that the declarant under this exception need not have personal knowledge of the fact asserted but only of the family tradition regarding that fact, or rather that he was in a position, as a member, to know that tradition [*Doe d. Stephen v Ford* (1847), 3 UCQB 252]. And *quarre* whether the objection to a witness testifying regarding his own age because of absence of personal knowledge would now be regarded [see *R v Spera* (1915) 34 OLR 539]. As regards the form of the assertion, much latitude us allowed; it may be the assertion, oral or written, of a deceased individual member of the family; his assertion may be in the form of conduct or treatment, showing that they recognised it [*Sturla v Freccia* supra]. "An entry in a father's Bible, an inscription on tombstone, a pedigree hung up in a family mansion, are all good evidence" [*Goodright d. Stevens v Moss* (1777) 98 ER 1257; *Monkton v Att-Gen* (1831) 39 ER 350]; likewise engravings upon rings [*Vowles v Young* (1806) 33 ER 247; 13 Ves. 140]. An entry or writing by father in any kind of a book or a piece of paper is admissible [*Berkeley Peerage Case* (1811) 171 ER 128]'[19]

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[17] [1993] 2 MLR 498
[18] *R v Erith (Inhabitants)* (1807) 8 East 539; *R v Rishworth (Inhabitants)* (1842); *R v Day* (1841) 9 C. & P. 722
[19] *MacRae on Evidence* (1952) 2nd Ed

21. In the case of *R v Hayes*,[20] it was held that family discussions as to birthday and acts done on the reputed day are evidence for the jury as to the age of an infant prosecutrix on whom a rape is charged to have been committed. In *R v Turner*,[21] which was followed in *R v Recorder of Grimsby*,[22] the fact that an accused had stated that he was a certain age was held to be sufficient proof of his age. Phipson on Evidence notes that the case is explainable on the basis that the fact of one's age is something one is reasonably expected to know.[23]
22. Keane and McKeown write on how evidence concerning age has for a long time been a recognised exception to the rule against hearsay in the English law and how it has been preserved in the English Criminal Justice Act 2003. They state that:

> 'Section 118(1)1(d) of the 2003 Act preserves the following rule of law in criminal proceedings:
> (d) evidence relating to a person's age or date or place of birth may be given by a person without personal knowledge of the matter.
> Since the date of a person's birth is contained in his or her birth certificate, the normal way of proving a person's age is to produce a certified copy of an entry in the register of births, which is admissible under section 34 of the Births and Deaths Registration Act 1953 as evidence of the matters stated, accompanied by some evidence to identify the person whose age is in question with the person named in the certificate. At common law, the accompanying evidence of identification may be given by a person without personal knowledge of the matter, such as the evidence of a grandmother who, although present at the birth of her grandchild, was not present at the registration (*R v Weaver* (1873) LR 2 CCR 85 CCR. See also *Wilton & Co v Phillips* (1903) 19 TLR 390, KBD). **Similarly, the courts have acted on evidence as to age given by the person whose age is in question** (*Re Bulley's Settlement* [1886] WN 80, Ch D) or by another who has made enquiries as to his or her age [*R v Bellis* (1911) 6 Cr App R 283, CCA. *R (Y) v The London Borough of Hillingdon* [2011] EWHC 1477 (Admin)].[24]

23. The point is that under the English common law, though evidence of one's age may normally be proved by a birth certificate (which is an exception to the hearsay rule based on statute) and the further evidence identifying the person named in the birth certificate as the person in question (which in most cases involves the reception of hearsay),[25] it is also admissible for one to testify to one's own age as an acceptable exception to the rule.
24. In the Canadian case of *R v Spera*,[26] the accused was indicted under section 212 of Criminal Code for an offence committed upon a woman under twenty-one. The mother of the girl was dead. The judge admitted the evidence of the girl herself that she was nineteen years old; and also the evidence of a Mrs C., a woman with whom she had gone to live when she was quite young, to prove the girl's age. The Court of Appeal held that the evidence of both of them was clearly admissible.
25. In the Irish case of *R v Fitzpatrick*,[27] on an indictment for carnally knowing a female infant above the age of ten and under the age of twelve years, the parents of the child were dead but her aunt was still living. The testimony of A, who was not related to the child, but who

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[20] (1847) 8 L.T.O.S. 518; 2 Cox C.C.
[21] (1910) KB 346
[22] [1951] 2 All ER 889
[23] *Phipson on Evidence* (1982), 13th Ed, at 377
[24] A. Keane & P. McKeown, The Modern Law of Evidence, (2011) 9th Ed.
[25] *Cross on Evidence* (1974), 4th Ed
[26] (1915) 34 OLR 539
[27] (1840) Craw & D. 392

stated that he resided in the immediate neighbourhood of her parents for thirteen years, and had seen her for the first time in 1829, when she was apparently newly born and had known her ever since, was evidence to go to the jury on the age of the child.

26. In 1898, the Montana Supreme Court affirmed a conviction of "rape upon a child of less than 16 years" by her father, Bowser. The defendant argued that the victim's testimony as to her own age was inadmissible hearsay. The Court rejected this view, largely on practical grounds:

> 'Recent authorities hold that the age of a prosecuting witness alleged to be under the age of consent may be proved by her own testimony. Underh. Cr. Ev. § 342; Whart. Cr. Ev. § 236; *People v. Ratz*, 115 Cal. 132, 46 Pac. 915; *Bain v. State*, 61 Ala. 75. **The fact that the witness derived her knowledge of her age from statements of her parents, or family reputation, does not make it inadmissible. Persons of the age of discretion, and many who are of even tender years, know enough of themselves to state their ages with intelligence and accuracy.** Such testimony is often essential to prove age, and for this reason it is competent; being excepted from the rules generally excluding hearsay evidence.'

27. Even under the Child Care, Protection and Justice Act, a statement from a child on his or her own age is acceptable. Section 122 of the states that:

> 'The provisions of this Part shall apply to the determination of age for the purposes of criminal responsibility under section 14 of the Penal Code and for the purposes of this Act.'

28. Section 123 of the Act states:

> (1) For the purposes of determining the age of a child, a probation officer shall obtain any relevant information as regards the age of the child concerned and complete an age estimation form.
> (2) If the age of a child brought before a probation officer is not known, the probation officer shall make an estimation of the age of that child.
> (3) In making an estimation of the age of a child the information available shall be considered in the following order of cogency—
> (a) a birth certificate;
> (b) a previous determination of age under this Act;
> (c) statements from a parent, guardian, or person likely to have direct knowledge of the age of the person;
> (d) a baptismal certificate or other religious records, school registration forms, school reports, under-five clinic cards and other information or document of a similar nature if relevant to establishing a probable age:
> (e) an estimation of age by a medical practitioner; and
> **(f) a statement by the person who is claiming to be a child.**
> (4) The form referred to in subsection (2) shall be available at the child's appearance at a preliminary inquiry for purposes of age determination by the inquiry magistrate in accordance with section 41.

29. The Child Care, Protection and Justice Act aims at protecting children against such things as exploitation. Thus even in offences that are against children, the determination of who a child is must be guided by what it prescribes. As can be seen from section 123(3)(f) of the Act, when determining the age of the child, evidence from the child himself or herself as to their age can be taken into account.
30. I am thus saying that the evidence of the victim on her age was very much admissible. The evidence of PW2 on the victim's age cannot be relied on because her testimony does not show how long ago she came to know the victim, for, she (PW2) got the victim from the care of her parents to be looking after the victim.

IV. DISPOSAL

31. If the appellant's claim is that PW1 was not competent to testify as to her own age and that PW2 could not be expected to know PW2's age, then the appeal cannot turn on new evidence being adduced by the defence concerning PW1's age. In that case, the accused should not have been found with a case to answer and there should be no need for calling for his defence. The appeal should have been claiming that one of the elements of the offence of defilement was not established, which is that of age, and that the magistrate should have acquitted him on that basis.
32. However, having shown that PW1 was a competent witness on her age, then the accused was properly called to his defence since all the elements of the offence were established on a prima facie basis. In that case, PW1's mother could have been a competent witness for the defence on PW1's age.
33. Therefore, seeing that there is no good reason why the applicant never adduced the kind of evidence he now intends to bring and considering that the evidence already tendered was cogent and admissible on the point he wishes to bring fresh evidence on, I see no reason why in the interest of justice the applicant should be allowed to adduce further evidence in the matter now.

Made this day the 1st **of February 2023**

V. Chima

Chima J