THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. JUSTICE S.G. ENGWAU, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.

CRIMINAL APPEAL NO. 278 OF 2003

SANDE MARTIN :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from the conviction and sentence of the High Court at Tororo (Mwondha, J.) dated 24/3/2003 in Criminal Session Case No. 254 of 2003]

JUDGEMENT OF THE COURT

The appellant, Sande Martin, was indicted for defilement contrary to section 123(1) of the Penal Code Act. He was convicted and sentenced to 8 years imprisonment.

The following are the brief facts of the prosecution case as accepted by the learned trial judge. PW1, the victim of defilement, was aged 14 years. She lived at her parents' home at Buhumi village in Busia District. Isaac Wesonga, PW2 was the victim's father. From December 2001 to March 2002, the appellant used to collect PW1 from her parents' home at night. He would take her to his own home and have sexual intercourse with her. This was done more than ten times before the appellant was arrested. One night, during March 2002, while the appellant was taking away PW1 from her parents' home, he was arrested. After his arrest he was taken to the local council authorities and later to the police where he was charged with the offence of defilement.

The police of Buhumi Police Station requested Dr. Wamala Joseph, PW3 to examine PW1 and establish whether she was pregnant. On examination the doctor found that PW1 was below 18 years of age. There was evidence of penetration and the hymen had been ruptured less than three months ago. She had a virginal discharge, which was suggestive of venereal disease. There was no evidence of pregnancy. The medical examination report, PF3, was admitted in evidence as exhibit P1.

In his defence the appellant elected to keep quiet. The learned trial judge found that the prosecution had proved the charge against the appellant. She convicted him and sentenced him to 8 years imprisonment, hence this appeal to this court on the following grounds.

1. ***That the learned trial judge erred in law and fact when she failed to consider the burden of proof in criminal cases which is beyond reasonable doubt in relation to the participation of the appellant.***

2. ***That the trial judge erred in law and fact when she failed to consider the appellant's constitutional right of keeping quiet.***

3. ***That the trial judge erred in law and fact when she passed a harsh and excessive sentence against the appellant, in the circumstances.***

Mrs. Murangira Kansande Vennie, learned counsel for the appellant, argued grounds 1 and 2 jointly and ground 3 separately. We shall handle the matter in the same order.

Learned counsel's complaint on both grounds 1 and 2 was that whereas the legal position is that the prosecution must prove the charge against the accused beyond reasonable doubt, the learned trial judge shifted the burden on the appellant to prove his innocence. Counsel contended that the learned trial judge abused the appellant's constitutional right of keeping quiet. In consequence of that the learned judge commented that the evidence of the prosecution witnesses was unchallenged as they testified. Counsel submitted that the judge after finding that there was a prima facie case placed the burden of proof on the appellant and unfairly convicted him. Counsel further submitted that there was no evidence to prove that on the day he was arrested he had had sexual intercourse with PW1. Besides, medical evidence showed that PW1 had a venereal disease but the appellant was not examined to find whether he had the same. According to counsel, if that had been done, the appellant would have been connected to the offence.

Mr. Charles Kalungi, learned Senior State Attorney, who appeared for the respondent supported the conviction. He contended that the learned judge did not shift the burden of proof on the appellant. According to him, there was enough evidence, which placed the appellant at the scene of crime. He conceded that the appellant did not have sexual intercourse with PW1 on the day he was arrested. However, the particulars of the indictment specified that the appellant had unlawful sexual intercourse with the victim between the months of August 2001 and March 2002. Counsel submitted that any sexual encounter between the appellant and

PW1 was covered. He submitted that the indictment was drafted in compliance with the rules as is provided by the **Trial on Indictment Act (Cap 23).**

We note that the gist of appellant's learned counsel's complaint is that the prosecution did not prove the charge against the appellant beyond reasonable doubt. The learned judge shifted the burden of proof on the appellant to prove his innocence. It is our duty as the first appellate court to review the evidence in light of the findings of the trial court and come to our own conclusion based on our own findings. We have to take into account that we neither saw nor heard the witnesses testifying. See **Pandya v R [1957] EA336, Bogere Moses and Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997, Kifamunte Henry v Uganda Criminal Appeal No. 10 of 1997 (Supreme Court)**

In the appeal before us, the prosecution evidence was from PW1, PW2 and PW3. PW1 testified that the appellant started seducing her with effect from December 2001. He would collect her from her parents' home, take her to his home where they would have sexual intercourse. The day the appellant was arrested, he came to PW2's home at around 7.00 p.m. and hid somewhere. He got PW1 from her father's home and while they were going away together, the appellant was arrested. She ran away.

In cross-examination the appellant did not challenge the witness on the evidence which implicated him in the commission of the offence. In his testimony PW2 told court that the appellant had an affair with his daughter. He disapproved of the relationship and told his brothers about it. They advised him to arrest the appellant. One day in March 2002

when he was at home, he heard some people talking in the children's cottage. He called his brothers who came. When the appellant came out with PW1 he was arrested. The appellant did not at all challenge this witness's evidence regarding his arrest when he was taking away PW1 at night.

In his judgement the learned trial judge commented on the appellant's failure to cross examine PW1 and PW2 thus:

> ***"The evidence of PW1 was unchallenged as she was testifying. There was no other inference than that, the accused was the participant. She told court that when the accused was arrested he had gone to pick her and he was arrested while they were together. That the victim ran away. Though she was also taken to police where she made a statement and was released. PW2's evidence in regard to the arrest of the accused was not challenged at all. This meant that what was being said was the truth."***

The law is now settled that though the accused has no duty to prove his innocence he/she must by cross-examination challenge the evidence of the prosecution that implicates him/her. All prosecution witnesses must be cross examined. See **Section 72 of the Trial on Indictment Act.** Failure to cross-examine leads to the inference that the evidence is accepted as being true. As stated by their Lordships of the Supreme Court in **James Sawoabiri & Another v Uganda S.C. Criminal Appeal No. 5 of 1990.**

"An omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue."

In view of the above position of the law, the quotation from the learned trial judge's judgement is unassailable. PW1 and PW2 gave evidence which clearly implicated the appellant and placed him at the scene of crime. Counsel who represented him at the trial did not cross-examine these witnesses on the evidence that incriminated him. The complaint by appellant's learned counsel that the judge convicted the appellant after finding that there was a prima facie case against him and abused his constitutional right to keep silent is not, therefore, correct.

Regarding corroboration we have on record the evidence of PW3, the doctor who examined PW1. In his evidence he testified that the complainant was below 18 years. Her hymen had been ruptured about 2 months before and she had a venereal disease. This evidence corroborates PW1's evidence that she had been defiled from December 2001 to March 2002. We appreciate the submission by the appellant's counsel that the appellant was not medically examined to find out whether he too had venereal disease so as to corroborate PW1's testimony that it was the appellant who had defiled her and no other person. That notwithstanding, there is on record unchallenged evidence of PW1 and PW2, which implicates the appellant

Corroboration in sexual offences is a rule of practice. It was stated in **Chila v R (1967) EA 722** thus:

"The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."

In the instant appeal, the learned trial judge before convicting the appellant on the prosecution evidence warned herself and the assessors of the dangers of convicting on the uncorroborated testimony of the complainant. Having done so, she went ahead and convicted the appellant, as she was satisfied that the witnesses were truthful. We are unable to fault the learned trial judge on that.

It is rightly submitted by counsel for the appellant and conceded by the Senior State Attorney that the appellant did not have sexual intercourse with PW1 on the day he was arrested. We have carefully looked at the particulars of the indictment which specify that the appellant had sexual intercourse with PW1 between August 2001 and March 2002. We appreciate the Senior State Attorney's submission that any sexual encounter between these dates was sufficient to constitute the offence of defilement. The evidence of PW1 is clear that the appellant had sexual intercourse with her from December 2001 to March 2002 more than ten times until he was arrested.

The law provides that the indictment must contain a statement of the specific offence with which the accused is charged together with such

particulars as may be necessary to give reasonable information as to the nature of the offence charged. Regarding time, the law requires that it must be expressed in ordinary language as to indicate with reasonable clarity the time when the offence was committed. See **sections 22 and 25(n) of The Trial on Indictment Act.** We are of the considered view that the particulars of the offence in the indictment before us clearly specify the offence, the particulars and the time the offence was committed. The appellant had, therefore, reasonable information as to the nature of the charge and the time he was alleged to have committed the offence was indicated to him with reasonable clarity.

The appellant was convicted on a proper charge and there was sufficient evidence to prove the case against him beyond reasonable doubt. Grounds 1 and 2, therefore, fail.

We now consider ground 3, which is an appeal against sentence. The complaint by the appellant's counsel is that the sentence of 8 years imprisonment is excessive. The appellant was a first offender and had prayed for leniency. She criticised the learned judge for having been sentimental when passing sentence. She prayed court to reduce the sentence of 8 years imprisonment to 2 years imprisonment. The learned Senior State Attorney supported the sentence as in his view, it was not manifestly excessive.

Before passing the sentence the learned trial judge considered the fact that the appellant was a first offender and took into account the period he had spent on remand. She also considered that the offence was rampant and the circumstances under which it was committed. We find nothing sentimental about that. Sentencing is within the discretion of the trial

judge. The appellate court will only interfere with the sentence passed by the trial court, if it is evident that the trial court acted on a wrong principle, or overlooked some material factors or the sentence is either illegal, or is manifestly excessive or so low as to amount to a miscarriage of justice. See **section 139 of the Trial on Indictment Act** and **Ogoola s/o Owoura v R (1954) 21 EACA 270**

The maximum sentence for the offence of defilement is death. We find the sentence of 8 years imprisonment neither illegal nor manifestly excessive. We have no reason to interfere with it. Ground 3, too, must fail. We find no merit in this appeal. It is accordingly dismissed.

Dated at Kampala this 27th day of March 2007.

A.E.N. Mpagi-Bahigeine
JUSTICE OF APPEAL

S.G. Engwau
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL