THE REPUBLIC OF UGANDA

IN THECOURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.29 OF 1999.

CORAM: HON. MR. JUSTICE S. T. MANYINDO, DCJ.
HON. MR. JUSTICE J. P. BERKO, JA.
HON. MR. JUSTICE S. G. ENGWAU, JA.

NDAULA JAMES ……..……APPELLANT

VERSUS

UGANDA ……..RESPONDENT

JUDGMENT OF THE COURT

The appellant was on 31st March, 1999 convicted by the High Court of defilement, contrary to section 123(1) of the Penal Code Act and sentenced to 16 years imprisonment. He has now appealed against both the conviction and sentence.

The prosecution case against him was that on 4.5.1996 the seven year old victim (PWI) and her 6 year old friend Zawedde Florence (PW3) went to fetch water from a well. They found the appellant there. He had already collected some water and was about to leave the place. The appellant asked PWI to follow him, alone, to a nearby sugar cane plantation which she did. There he defiled her. The defence was an alibi. The appellant claimed that at the material time he was serving a sentence in a prison near the scene of crime. On the day of incident some of his inmates went to the well to fetch water. He did not go with them as he was sick. Later in the day he was arrested from the prison by Joseph Ssajabi (PW4). No reason was given for the arrest.
Mr. Michael Akampurira, Counsel for the appellant, presented five grounds of appeal. The first ground is that the trial judge did not hold a proper voire dire in respect of PWI and PW3 which caused a miscarriage of justice and for which a retrial should be ordered.

In respect of PWI the record reads thus:

"VOIRE DIRE

Court: Questions put to the girl witness. She obviously does not understand the nature of an oath. She says she is 10 years.

Court: Questions put to her. She can understand the duty of telling the truth. People who tell lies go to hell-fire. Girl victim can give an unsworn testimony. She is possessed of enough intelligence to know the duty of telling the truth."

In respect of PW3 the record reads;

Court: Questions put to young witness regarding nature of oath. She does not understand the nature of an oath. Cannot give sworn testimony.

Court: Questions put to witness about the duty to tell the truth, and test her intelligence. She understands the duty to tell the truth. People who tell lies go to the fire. She will give unsworn testimony."

Mr. Akampurira contended that it is incumbent on the trial judge to record all the questions put to the witness and the answers to those questions. Failure to do that amounts to a miscarriage of justice. On the other hand Mr. Vincent Okwonga, Senior State Attorney submitted that it is not mandatory for the trial judge to record the questions. Only the answers need be recorded. What is required is that the judge be satisfied, after talking to the child witness, that he or she is able or unable to give evidence on oath and if the child cannot testify, whether he or she is fit to make a statement not on oath. In his view the trial judge should have recorded the answers to his questions but the omission did not occasion a miscarriage of justice.

Now the purpose of the voire dire is to ascertain whether the child witness understands the nature of an oath. If he or she does then he or she may give evidence on oath. If he or she does not understand the nature of an oath then the court must satisfy itself that the witness is possessed of sufficient intelligence to justify the reception of his or her evidence, and understands the duty of speaking the truth. It follows that the trial court ought to deteirnine the age of the child witness first and then put it on record. The court should proceed to examine the witness as to his or her religious beliefs and if necessary, intelligence. We think it is good practice for the trial court to

record the examination whether by way of questions and answers or by notes. The court should then make the appropriate finding. This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear on the face of the record that there has been compliance with the provisions of Section 38(3) of the Trial on Indictment Decree which deals with the procedure of receiving the evidence of a child of tender years. We do emphasize the necessity of strict compliance with the provisions of the Section as non-compliance might well result in the quashing of a conviction in a case where the other evidence before the court is insufficient in itself to sustain the conviction.

In Kibangeny v R (1959) EA 92 the trial judge made no such investigation before affirming the two boy witnesses. He only noted that one of the boys appeared to be between 12 and 14 years old and answered questions intelligently. The Court of Appeal held, quite rightly in our view, that that was not enough. As was pointed out by Windham J.A; the investigation should precede the swearing and the evidence, and should be directed at the particular question whether the child witness understands the nature of an oath rather than to the question of his general intelligence.

In our opinion of the present case can be distinguished from Kibangeny (supra) since the two girl witnesses were questioned as to their religious beliefs and as to their intelligence. The findings of the trial judge were that the child witnesses did not understand the nature of an oath but that they were intelligent enough to distinguish truth from falsehood. They were therefore not sworn. We are satisfied that the procedural error of not recording the questions and answers is not fatal. The point is that the investigation was carried out. The situation would, perhaps, have been different if the children were allowed to take the oath when there is nothing on record to show how they qualified in that regard. We do not therefore see that there was a mistrial.

The second ground relates to the identification of the appellant. Mr. Akampurira’s complaint is that PWI and PW3 were with the attacker for a short time and they had not seen him before that day. We accept Mr. Okwanga’s submission that the appellant was properly identified. It is not quite clear what time the incident occurred. The trial judge thought it occurred at 10.00a.m. as stated in the summary of facts presented by the Director of Public Prosecutions. With respect, that was wrong since the summary of facts is not evidence. It was necessary for the prosecuting Counsel and even the Court, to ascertain the time of incident. But we have no doubt that the

incident occurred during daytime. It is unlikely that small girls and prisoners would be allowed to go in the bush at night. If the attack took place at night, then it would not have been necessary for the attacker to take the victim into a sugar cane plantation. She could have been defiled at the well.

The evidence shows that after the incident PW1 went and informed her mother (PW2) what had happened. She described the defiler as fairly young, with a long nose and described his clothes. PW2 then reported the matter to the authorities. PW4, a local Administration Police Officer, rushed to the scene and found the appellant there. He answered the description given by the victim. He arrested him and took him to a nearby Police Post where the victim easily identified him as the person who had defiled her. It is also remarkable that in his sworn defence the appellant claimed that PWI and PW3 knew him before the day in question when the girls had denied knowledge of him.

We are satisfied that the appellant was properly identified by PWI and PW3. Their evidence was corroborated by that of PW4 who arrested him at the scene of crime.

The third ground of appeal is that the evidence of the two child witnesses required corroboration and yet there is none. We have already found that their evidence on identification was corroborated by that of PW4. Mr. Akampurira argued that the fact of defilement was not corroborated. The medical evidence, which was supposed to offer the necessary corroboration, was inconclusive as it showed that penetration was partial. We cannot agree. It is trite that the slightest penetration is enough in law.

The fourth ground was that the trial judge erred in rejecting the alibi when it raised a reasonable doubt in the prosecution case. We see no merit in this ground. As we have already found, the appellant was put at the scene of crime at the material time by PW1, PW3 and PW4. It follows that his claim that he was elsewhere is a lie.

The fifth and last ground of appeal attacks the sentence as excessive. The record shows that the trial judge took into account the appellant’s age of 29 years, and his three years on remand. He also took into account the fact that the appellant was already serving a sentence for a violent crime and that he had defiled a very young girl of seven years. The maximum sentence for the

offence of defilement is death. The sentence given to the appellant is not illegal. It is not manifestly excessive in the circumstances of the case. It is certainly harsh as it ought to be given the gravity of the offence.

In the result we see no reason to disturb the conviction or sentence. Accordingly the appeal is dismissed.

DATED at KAMPALA this 5th day of June 2000.

S.T. Manyindo
Deputy Chief Justice.

J. P. Berko
Justice of Appeal.

S.G. Engwau
Justice of Appeal.