THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ., TSEKOOKO, KAROKORA, MULENGA AND KANYEIHAMBA, JJ.S.C.)

CRIMINAL APPEAL. 40 OF 2003

BETWEEN

BASHIR SSALI.....APPELLANT

AND

UGANDA

.....

RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ., Kitumba and Byamugisha, JJ.A) dated 19th November, 2003 in Criminal Appeal No.86 of 2001]

JUDGMENT OF THE COURT: This is a second appeal against the decision of the Court of Appeal which upheld the conviction of the

appellant by the High Court, (Maitum, J), for defilement. He was sentenced to 16 years imprisonment.

The facts of the case are simple.

In 1997, a young girl called Shamim Semugabi (PW1) was in Primary 3, where she was a class monitor in Kabowa Hidayat Primary School, in Kampala District. There was a mosque at the school. Shamim and the appellant, Bashiri Ssali, used to pray in that mosque. So she knew him.

On 13/3/1997, at 4.00 p.m, Shamim's class teacher asked her to collect mathematics exercise books from her classmates. In the process of collecting the exercise books, she realised that her own mathematics exercise book was missing. As her classmates went home, Shamim remained behind searching for the book. At about 5.00 p.m, the appellant appeared at the door of the classroom and called her. She recognised him because he used to frequent the mosque where she also prayed. Shamim greeted the appellant. He invited her to go to him. She refused. He then held her by the hand, gagged her with a handkerchief in her mouth to prevent her from making an alarm, and pulled her into the girls' toilet room. He put her supine on the floor where he defiled her. The incident lasted for about 30 minutes. She felt a lot of pain. Upon realising that the defilement had caused her to bleed from her private parts, he went to a nearby shop, bought cotton wool and a bottle of soda and returned to where Shamim was. Using the cotton wool, the appellant wiped the private parts of Shamim to remove blood. He gave her the soda to drink and shs 200/=. He warned her not to disclose what had occurred to any body including her parents and teachers. He also threatened her with death if

she ever disclosed the defilement to anybody in her school. Shamim went home.

The following morning, Shamim disclosed the defilement to her siblings one of whom informed their mother, Saula Semugabi (PW2). Because Shamim refused to disclose the name of the defiler to the mother, the latter gave Shamim five strokes of the cane. Consequently, Shamim was forced to disclose the name of the appellant to the mother and explained that she feared to disclose it earlier because of the appellant's threat to kill her. The mother reported the matter to the father, Hamad PW.4, who reported the defilement to the police and to a teacher (one Lukwago Yahaya Ahamed) (PW4). Shamim was taken to a clinic where she was examined by Dr. Barungi Tadoe (PW8). He noted that Shamim's hymen had been raptured less than 5 days earlier. She had sustained quite a big tear between the vagina and the anus. The appellant was arrested on 17/3/1997, and was also examined by the same doctor, Barungi. The appellant appears to have claimed to the doctor that he was impotent. So the doctor examined him and established that the appellant was not impotent. He was charged and prosecuted for the offence of defilement.

During his trial, the appellant denied the offence and raised an alibi to the effect that he had gone to Rakai on 28/2/1997 and stayed there till 17/3/1997 when he returned home. The trial judge believed the prosecution witnesses, disbelieved the appellant and his only witness both of whom the judge found to be liars. The learned judge convicted the appellant and sentenced him to 16 years imprisonment.

The appellant appealed to the Court of Appeal on four grounds. He abandoned the second ground which raised a complaint of lack of corroboration. The remaining three grounds were argued in that court. The first was couched in general terms to the effect that the trial judge erred when she held that the appellant was guilty of defilement.

In the third ground the complaint was that the trial judge ignored major discrepancies and contradictions in the prosecution case. Finally, in the last and fourth ground, the complaint was that the judge failed to evaluate the evidence as a whole.

The Court of Appeal considered the three grounds, the submissions of counsel for the two sides and dismissed the appeal. The appellant has now appealed from that decision and the appeal was originally based on four grounds. The fourth ground which was in the alternative was abandoned.

The remaining three grounds of appeal which are virtually similar to those argued in the Court of Appeal were framed this way: -

1. ***The learned trial Justices of Appeal erred in law and fact to hold that the offence of defilement was prove beyond reasonable doubt.***

2. ***The learned Trial Justices of Appeal erred in law when they failed to take cognisance of major discrepancies and contradictions and as a result confirmed the erroneous decision by the trial court that the appellant had been properly identified.***

3. ***The learned Trial Justices of Appeal erred in fact and law to reject the defences of alibi and impotence.***

We note that the reference in these grounds to the Justices of Appeal as **"Trial Justices"** is not correct. Ms. E. Luswata Kawuma appeared for the appellant. She argued grounds 1 and 2 together and ground 3 separately. Ms. Betty Khisa, Senior Principal State Attorney, represented the respondent.

On grounds 1 and 2, learned counsel for the appellant contended that the fact of defilement was not proved beyond reasonable doubt. (This matter was raised and argued in the trial court which rejected it). Learned counsel also argued that the identification of the appellant as the defiler was not properly proved. Counsel further contended that there were inconsistencies in the prosecution case and that the evidence of Shamim and of her mother, Saula Semugabi, contradicted each other. She again contended that Shamim's evidence was unreliable since initially she did not name the appellant as her defiler until she was caned by her mother. Counsel again contended that the evidence of Hamad Sengabi (PW4) the father of the complainant, and of Birungi Marriam (PW.6) is hearsay.

For the respondent, Ms Betty Khisa, supported the decisions of both the Court of Appeal and of the trial judge. She submitted, and we agree with her, that Shamim knew the appellant very well since both regularly prayed in the same mosque at the school where Shamim was a pupil. The learned Senior Principal State Attorney also argued that since defilement lasted 30 minutes, during daytime, Shamim was able to identify the appellant. The learned Senior Principal State Attorney, urged us to accept the fact that Shamim reported the appellant to her siblings and later to her mother (PW2).

With respect to Ms. Luswata Kawuma, we do not accept her contention that defilement was not proved beyond reasonable doubt. Firstly there is the unchallenged evidence of Shamim herself whom the trial judge found truthful. This is what she said on oath:

> "***He removed my pants and started having sexual intercourse with me..... ..... I saw his penis and he had a lot of hairs. He put it in my virgina (sic). I felt pain and I felt very bad. After that he went to the shop and bought some cotton wool. He was on top of me for 30 minutes. J was bleeding and he wiped the blood with the cotton wool.***"

In cross-examination, she does not appear to have been challenged on the act of sexual intercourse. She was asked about the cotton wool which she mentioned. There can therefore be no doubt that her evidence established the act of defilement which was fully corroborated by the evidence of Dr. Barungi Tadeo (PW8). In his evidence Dr. Barungi who examined Shamim on 17/3/1988, nearly four days after the defilement, and found her aged 8 years testified that Shamim's private parts showed an inflamed tear involving the haymen and fourchette and that the tear was compatible with penetration. That the injury was less than five days old. Certainly this evidence proved beyond doubt that Shamim had been defiled.

On the evidence reflected on the record, we have no doubt that both the appellant and Shamim regularly prayed in the same mosque situated at the school, where Shamim used to see the appellant. The conclusion that Shamim correctly identified the appellant is irresistible since the defilement took place during daytime at 5.00 p.m and there were only the

appellant and Shamim present at the scene of crime. Therefore the question of identification of the appellant does not arise. Both the trial judge and the Court of Appeal were entitled to conclude, as they did, that Shamim recognised the appellant as the person who caught her at school, dragged her into the girls toilet room and defiled her there, after which he warned her not to report him to her teachers, her parents or to any body or else he would kill her or cause her to be marked down in her class work. We appreciate that at the time of the defilement Shamim was a young child, aged only 8 years. It does not surprise us that she heeded the threat of the appellant by not reporting the defilement or disclosing the name of the defiler to her parents immediately she reached home. Any way she disclosed the defilement to her mother the following morning after she was caned. Occasionally, the failure by a victim of a crime to disclose the offender at the earliest available opportunity would lead to the drawing of adverse inference against that victim's testimony but this is not a general rule and certainly would not apply in this case. A court faced with such situation which affects the credibility of a witness has to consider all the surrounding material circumstances before drawing any such adverse inference about the credibility of the victim of the crime as a witness: See **R. Vs. Mange S/o Mulebi (1948) 15 EACA 69.** In the case before us, the victim of the defilement was a young girl, aged 8 years. She was badly ravished. She was threatened with death if she disclosed the name of her defiler whom she knew very well.

In any event, the period of silence was a matter of hours. In the morning when her brother saw her she was so afraid that she was trembling. The threat to kill her was operating. Her initial reluctance to name the

appellant as her defiler must have been influenced by the threat and nothing else. As to the identity of the appellant as the defiler, we have no hesitation in rejecting the submissions of Ms. Luswata Kawuma. The appellant was very well known to Shamim. She used to see him in the mosque at school and especially on Fridays during prayer time. The appellant was therefore no stranger to her. Before he defiled her, he held her and dragged her for some distance to the toilet room where he ravished her which means he was very close to her. He was probably facing her face to face having first put her down on her back.

After the defilement he went away, bought a soda and cotton wool returned to the scene, wiped blood from her bleeding private parts, gave her the soda to drink and shs **200**/=**.** All these activities took place during broad daytime. We notice from the record of proceedings that Shamim was subjected to what must have been rigorous cross-examination as a result of which she repeated all that she had stated in examination-in-chief, implicating the appellant. She appears to have been very consistent throughout the giving of her evidence both in examination-in-chief and in cross-examination. In these circumstances we agree with the concurrent findings of the two Courts below that Shamim was a reliable witness and a witness of nothing but the truth.

Ms. Luswata Kawuma contended that there were contradictions in the evidence of Shamim and her mother. Learned counsel did not point out such contradictions and we find none that is of material importance. The Court of Appeal considered this matter and found no material contradictions. Learned counsel contended that evidence of Hamad

Semugabi (PW4) as well as that of Birungi Mariam (PW6) is hearsay and contradictory. The information which Semugabi heard from his wife and children is hearsay. But what Shamim told him is evidence of Shamim's consistency. Otherwise Semugabi described what he actually did in relation to tracing and having the appellant arrested. That is not hearsay evidence at all.

Birungi Mariam's evidence regarding what Shamim told her about the defilement and what happened thereafter would be hearsay in as much as Shamim did not say in her testimony that she reported the defilement to Mariam. However, much of what would be hearsay was actually introduced through cross-examination. In the process the evidence supported Shamim's testimony as to the defilement, the giving of the soda and money (though of a different amount). As a matter of fact Mariam eventually corroborates Shamim to the effect that the appellant was well-known to the two, that he defiled her and that she bled after the defilement. Even if the hearsay part of the evidence of these two witnesses was ignored, in our opinion, the evidence of Shamim, her mother, and that of Dr. Barungi was sufficient to establish defilement, and that of Shamim is sufficient to establish the identity of the appellant. The trial judge properly cautioned herself against relying on evidence of a single identifying witness before she believed Shamim. We find no fault in her conclusions. Accordingly both grounds 1 and 2 must fail.

When arguing the third ground, Ms. Luswata Kawuma contended in effect that the prosecution did not disprove the appellant's alibi that he was in Rakai on the day he is alleged to have committed the offence. For the respondent Ms. Khissa submitted that once the prosecution evidence was

believed, the trial court was entitled to reject the alibi. In matter of fact our discussion and conclusions on grounds one and two dispose of the third ground. However, in our opinion, the prosecution evidence placed the appellant at the scene of crime. There is no reasonable doubt about the fact that the appellant was properly identified at the scene of crime by Shamim, the victim, and therefore the judge was entitled to reject his alibi. The Court of Appeal correctly concurred with that finding. Ground three must fail. There is a matter connected with this question of alibi. Apparently, the appellant made a charge and caution statement to police in which he denied the offence and never said he was in Rakai. The prosecution did

not tender that statement in evidence but instead used it to cross-examine the appellant after he gave his defence. During the cross-examination, the appellant disowned the statement. The prosecution made no attempt to prove it and produce it in evidence.

In her judgment the learned judge held that the alibi of the accused person was a fabrication especially since he had all the opportunity to have given it to the police during his arrest and did not. The judge made this conclusion after she had considered the appellant's answers during his cross-examination on the alleged charge and caution statement to police. She concluded "*that it transpired during the cross-examination of the appellant that he had given the police at the time of his arrest a different alibi*".

While the trial judge was entitled to adversely comment on the appellant's failure to disclose his alleged alibi to the police at the earliest opportunity,

it was irregular for her to reject the alibi on ground that he gave a different alibi in a statement to the police which statement was not proved in evidence. The judge should not have relied on the contents of a statement which was not part of the evidence before her. If we had not been satisfied that the appellant had been properly identified at the scene of crime by Shamim, the judge's rejection of the appellants alibi on the basis of evidence not before her would have affected our conclusion on the issue of the alibi and indeed the whole case.

We must also advert to the holding of the identification parade. It appears that the police held an identification parade at which the appellant was picked by Shamim. Yet apart from asking Shamim during the giving of her testimony about that parade, the prosecution did not adduce any evidence in respect of the parade. Therefore the learned judge quite properly and correctly ignored that bit of the evidence. In any case, we are puzzled as to what led the police to hold the identification parade which is normally held in cases where a witness claims he or she can identify a suspect who committed an offence in the presence of a witness who did not know the suspect previously. In this case, as Shamim knew the appellant very well, the identification parade was unnecessary and superfluous.

There is a matter which was not raised and argued by Counsel. This is the legality of the sentence. By virtue of clause (8) of Article 23 of the Constitution, a trial court when sentencing a convicted person is required to take into account, any period the person spent in lawful custody. In this case the trial judge does not show that she took into account the period of four years between 17/3/1997 and 18/7/2001 spent by the appellant in lawful custody before he was convicted. In a series of decisions in similar circumstances, we have on our own motion corrected the sentence. See

Sebide Vs Uganda (Criminal Appeal No.22 of 2002 (SC) (Unreported) and **Kabwiso Issa Vs Uganda** - Criminal Appeal No.7 of 2002 (SC) (Unreported). It is the duty of this Court to correct this error.

Having taken into account the period of four years which the appellant spent on remand, and the serious injury to the victim Shamim, we reduce the sentence of 16 years to 14 years imprisonment.

For the reasons we have given we find no merit in the appeal except as to sentence. The appeal as to conviction is dismissed. The sentence of imprisonment is reduced to 14 years.

Delivered at Mengo this 1st day of September 2005.

B. J. Odoki
CHIEF JUSTICE

J. W. N. Tsekooko
JUSTICE OF THE SUPREME COURT

A.N. Karokora
JUSTICE OF THE SUPREME COURT

J. N. Mulenga
JUSTICE OF THE SUPREME COURT

G.W. Kanyeihamba
JUSTICE OF THE SUPREME COURT