

ALBERT CHIMUNHU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE JP & DUBE-BANDA J
BULAWAYO 24 January 2024 & 25 April 2024

Criminal appeal

Appellant in person
B. Gundani for the respondent

DUBE-BANDA J

[1] The appellant, Mr. Albert Chimunhu was arraigned in the Regional Court sitting in Bulawayo, on two counts, i.e., aggravated indecent assault as defined in s 66(1)(a)(i) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (“Criminal Code”) and indecent assault as defined in 67(1)(a)(1) of the same Act. Despite the appellant’s plea of not guilty, he was convicted as charged. In count 1 he was sentenced to 9 years imprisonment with 3 years suspended on the usual conditions, and in count two he was sentenced to a fine of USD400.00 or 2 months imprisonment. The appellant has not appealed against the conviction and sentence in count 2 and nothing turns on it this appeal.

The factual background

[2] The appellant was convicted in the regional court in Bulawayo on a charge of aggravated indecent assault as defined in s 66(1)(a)(ii) of the Criminal Code. It being alleged that on 15 August 2022 he unlawfully and with indecent intent sucked the breasts of the complainant, a female adult, knowing that she had not consented to this act or realising that there was a real risk or possibility that she might not have consented.

[3] A summary of the relevant evidence led at the trial is as follows: the complainant testified that she worked for the appellant for a period of three days. She left employment because the accused started to fondle her. On the fateful day, the appellant invited her to a room that was dark inside. She hesitated to enter the room but he assured her that all was well. Inside the room the appellant got hold of her injured finger, kissed it and said sorry and hugged her. She testified that she told him that she did not like what he was doing, but he pulled her and closed

the door. He hugged her for the second time and started to fondle her. He tried to force his tongue into her mouth. He inserted his hand inside her trousers. She told him that she was having her monthly periods, and he said he did not mind. He was rubbing his hand inside her trousers and again she told him that she did not like what he was doing. He asked her to open her shirt because he wanted to see her breasts. She tried to force his hand out of her trousers, but he continued rubbing her vagina. He was not directly rubbing the vagina, but the pad. He then sucked her breasts. When he stopped sucking her breasts, she then managed to remove his hand from inside her trousers. He told her not to tell anyone about what had happened, and that it was their secret. She was crying. She reported to her aunt that the appellant had harassed her, and asked that her uncle come and collect her from the appellant's work place. The matter was reported to the police.

[4] The evidence of Beauty Magurasavi was that the complainant is her niece. On 15 August she received a call me back message from the complainant. She phoned and she told her that the appellant was molesting her. She met the complainant and saw that her eyes were puffy and she was still crying. She phoned the appellant who denied any wrong doing. The complainant told her that the appellant sucked her breasts and rubbed his hand on top of a pad as she was having her menstrual cycle.

[5] In his evidence the appellant disputed that he committed the offence he was charged with. He testified that the complainants planned these allegations in order to find a way out of his employment.

The court *a quo*'s determination

[6] The trial court found it proved by evidence that the complainant worked for the appellant for three days. On the third and last day of employment, the appellant invited the complainant to his room which was also used as an office. Complainant complied and entered the room and stood next to a dressing table. The appellant requested to see her injured finger, which he kissed. He forcibly hugged her. She remonstrated with him to stop what he was doing, but he continued regardless. He tried to force his tongue into her month, and fondled her breasts. He proceeded to insert his hand inside her panties rubbing her vagina and sucked her breasts. The complainant cried. The court found that the complainant withstood cross examination well,

answered all questions satisfactorily and she had no desire to fabricate or exaggerate her evidence. The court found that the complainant was a credible witness and proceeded to convict the appellant.

[7] Aggrieved by the conviction and sentence in count 1, the appellant noted this appeal on the following grounds:

Grounds of appeal

Ad conviction

The court a quo erred and misdirected itself when (*sic*) in convicting appellant of aggravated indecent assault in circumstances where the evidence pointed to a lesser charge of indecent assault.

Ad sentence

The court a quo erred at law and misdirected itself when it imposed a harsh sentence that induces a sense of shock.

Submissions before this court

Appellant's submissions

[8] The appellant does not challenge the factual and credibility findings of the trial court. It is trite that in the absence of an irregularity or misdirection, a court of appeal is bound by the credibility findings of the trial court, unless it is convinced that such findings are clearly incorrect. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S); *S v Pistorius* 2014 (2) SACR 314 (SCA) para 30; *Mthimkhulu v Nkiwane & Anor* S-136-01 at p 3-4; *Chioza v Siziba* SC 16/11; *Mupande & Ors v The State* SC 58/22. In *casu* the credibility and factual findings of the trial court cannot be disturbed. And the appellant agrees that it is indeed so.

[9] The nub of the appellant's case is that the trial court should not on the evidence convicted him of aggravated indecent assault, but of indecent assault. In the heads of argument filed by the appellant's erstwhile counsel, he submitted that the trial court failed in its interpretation of s 66(1)(a)(i) of the Criminal Code, in that it stretched or extended the meaning of "involving the penetration of any part of the female's body or his own body." It was submitted that the appellant's mouth and the complainant's breasts are not sexual organs. It was contended that a literal interpretation of the provision will lead to an absurdity where for example inserting one's figure into a female's mouth may be regarded as aggravated indecent assault. The provision is

said to target the penetration of a female vagina or anus, which the appellant did not do. It was submitted further that complainant's breasts and appellant's mouth cannot be said to be sexual organs. And that the sucking of the breasts cannot be an act of a sexual nature to constitute aggravated indecent assault.

[10] It was contended that the conduct of the appellant constituted indecent assault as defined in s 67 of the Criminal Code, in that he physically touched or handled the complainant in a manner she did not accede to and which was of an indecent nature.

[11] Regarding sentence, it was further submitted that the trial court passed a sentence that is extremely severe and disproportionate to the offence committed by the appellant. It was submitted that the sentence induces a sense of shock.

Respondent's submissions

[12] For the respondent, Mr *Gundani* submitted that s 66(1)(a)(i) of the Criminal Code defines aggravated indecent assault as penetration of any part of the female person's body or his own body. Counsel highlighted the phrase 'his own body' and submitted that by sucking the complainant's breast he inserted it into his mouth, thus penetrating 'his own body.' Counsel submitted that the mischief behind the inclusion of 'his own body' is because the legislature envisaged such encounters which are not sexual intercourse or anal intercourse but involving the penetration of the one committing the offence's own body. Counsel submitted further that the appellant was properly convicted of aggravated indecent assault as the complainant had not consented to her breasts being inserted into the appellant's mouth and sucked. It was submitted that the appeal against conviction has no merit and must fail. Regarding sentence, the respondent conceded that the is harsh and must be set aside and be substituted with one of five years imprisonment of which two years is suspended on the usual conditions.

Issues for determination by this court

[13] Considering the ground of appeal, the evidence on record as well as the submissions made before this court, the following issues emerge for determination:

- i. Whether or not the sucking of the complainant's breast amounted to aggravated indecent assault as contemplated in s 66 (1)(a)(i) of the Criminal Code.

- ii. Whether the sentence imposed by the trial court is disturbingly inappropriate to warrant intervention by this court.

Application of the law to the facts

[14] What differentiates aggravated indecent assault from indecent assault is penetration. The offence of aggravated indecent assault as defined in s 66(1)(a)(i) of the Criminal Code is committed when a male person, without consent of a female person, engages in a penetrative sexual act, other than sexual intercourse or anal sexual intercourse. S 66(1)(a)(ii) says:

“Aggravated indecent assault

(1) Any person who

(a) being a male person

(i) commits upon a female person any act, other than sexual intercourse or anal sexual intercourse, involving the penetration of any part of the female person’s body or of his own body.”

[15] Prof. G. Feltoe *Magistrates Handbook* (Revised August 2021) p. 243 says aggravated indecent assault by male on a female is a non-consensual act other than sexual intercourse or anal sexual intercourse, involving penetration of any part of the female’s body or male’s body. This includes: insertion of penis into the mouth of a female; insertion of a man’s tongue or object into her vagina; and insertion of an object other than a penis into her anus. Prof. Feltoe says the provision as presently formulated; it is doubtful whether it would include licking the genitalia of a female without inserting the tongue inside the vagina.

[16] The appellant sucked the complainant’s breast without her consent. The critical organs referred to by Prof. Feltoe are the vagina and the anus. I agree with the appellant’s submission that the sucking of a female’s breast cannot be elevated to aggravated indecent assault. To me this would amount to extending the horizons of aggravated indecent assault far beyond the limits of s 66(1)(a)(i) of the Criminal Code. The legislature would not have intended such an absurdity. In *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264 D – E the court stated the following:

“There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as LORD WENSLEYDALE said in *Grey v Pearson* (1857) 10 ER 1216 at 1234, ‘unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.’”

[17] The interpretation accorded to the words “of his own body” by Mr Gundani would lead to an absurdity. I would interpret the phrase ‘of his own body’ to envisage a case where a male person forces a female person to use her finger or tongue to penetrate his anus. These examples are not exhaustive. This to me would amount to aggravated indecent assault as contemplated in s 66(1)(a)(i). It is for these reasons that I conclude that the trial court misdirected itself in finding that the sucking of the complainant’s breasts amounted to aggravated indecent assault. It did not.

[18] For completeness, although the charge speaks only to the sucking of the breasts, in the outline of the State case it was alleged that the appellant rubbed complainant’s vagina. In her evidence the complainant testified as follows:

Prosecutor: You mentioned that he put his hand inside your panties and he was rubbing. Now I want to understand what exactly he was rubbing?

Complainant: He was rubbing my vagina.

Prosecutor: Was his hand directly touching it?

Complainant: Yes.

Prosecutor: Where exactly?

Complainant: I was wearing a pad so he could not go through he was rubbing on top of the pad.

[19] As stated above, the key to a conviction of aggravated indecent assault is that there must be penetration. The evidence is that the appellant rubbed his hand on top of the pad and he neither touched, nor did he insert his fingers inside the vagina. Again, without penetration the appellant’s conduct could not be brought within the ambit of s 66(1)(a)(i) of the Criminal Code.

[20] In the notice of appeal, the appellant contends that the evidence shows that he committed the lesser offence of indecent assault as defined in s 67(1)(a)(i) of the Criminal Code. Section 67 says:

“1) A person who

(a) being a male person-

(i) commits upon a female person any act involving physical contact that would be regarded by a reasonable person to be an indecent act, other than sexual intercourse or anal sexual intercourse, or other act involving the penetration of any party of the female person’s body or of his own body.”

[21] The appellant sucked the breasts of the complainant without her consent. He also put his hand inside her panties and without consent rubbed on top of the pad the complainant was wearing. The appellant’s conduct amounted to physical contact that would be regarded by a reasonable person to be an indecent act. He therefore is guilty of indecent assault as defined in s 67(1)(a)(i) of the Criminal Code. In the premises, the sole ground of appeal is meritorious and the appeal against conviction ought to succeed.

Sentence

[22] The success of the appeal against conviction has a bearing on the sentence. It cannot stand. It is not necessary to remit this matter to the court *a quo* for sentencing. This court has all the material before it to assess an appropriate sentence. In considering the sentence, this court takes into account the following factors: the appellant abused his position as the employer of the complainant. He sucked her breasts, and rubbed his hand on top of a pad she was wearing. This is a bad case of indecent assault. The complainant was traumatized. She cried immediately after the assault, and hours later her eyes were still puffy and she was still crying. She was humiliated by the conduct of the appellant, her employer from whom she expected protection. The penalty provided by s 67 of the Code for a conviction of indecent assault is a fine not exceeding level seven or imprisonment not exceeding two (2) years or both. A non-custodian sentence would trivialise an otherwise serious case. This is a case which warrants the maximum penalty sanctioned by the law.

Disposition

[22] In the circumstances, the State did not prove a case of aggravated indecent assault. The appellant is correct that the evidence discloses a case of indecent assault. In the result, I order as follows:

- i. The appeal against both conviction and sentence is allowed.

ii. The conviction of aggravated indecent assault is set aside and substituted with the following:

“The accused is found guilty of indecent assault as defined in s 67(1)(a)(i) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

iii. The sentence is set aside and substituted with the following:

“The accused is sentenced to two years imprisonment with six months suspended for five years on condition the accused does not within that period commit an offence involving indecent assault or an offence of a sexual nature for which upon conviction he is sentenced to imprisonment without the option of a fine.”

DUBE JP..... I agree

National Prosecuting Authority, respondent's legal practitioners