

LOVEMORE PHIRI

versus

THE STATE

HIGH COURT OF ZIMBABWE

MUZOFA & BACHI MZAWAZI JJ

CHINHOYI, 12 June 2023

Criminal Appeal

F. Murisi, for the Appellant

K. Teveraishe, for the Respondent

Introduction

BACHI MZAWAZI J: This is an appeal against the decision of the Regional Magistrate Court. It is against both conviction and sentence. The appellant was convicted, in a contested trial of three counts of rape, in terms of s65 of the Criminal Law and Codification Act Chapter 9:23. He was sentenced to an effective 15 years imprisonment term.

The Grounds of Appeal

The four grounds of appeal which are on record need not be repeated. The defence counsel abandoned ground two as it was a duplication of ground one. The remaining summarized grounds of appeal challenge three aspects of the court's findings of fact and law.

The first ground attacks the lower court's findings of the admissibility of the complainant's report, which they allege had not been made timeously and to the closest person to whom she was expected to report. It is the appellant's argument that a delay of close to a month was an undue delay and that the complainant should have reported to closer members of her family than to the school teacher whom she eventually reported to. Further, that the reasons given by the complainant for the delay and choice of whom to report to made her an incredible witness.

The second ground of appeal after the withdrawn one, is that on credibility. The defence contended that the reasons for the reporting and the inconsistencies in the complainant's evidence when renditioning her story in court meant that she was not a credible witness. Therefore, the court ought not to have relied on her evidence.

The last ground of appeal is to the effect that the appellant's explanation that he was not at the scene of the crime during the stated periods, of 21 to 23 August should have been believed as his other wife corroborated the same as his alibi.

It is the appellant's averment that the court thus erred in making a finding that the court proved its case beyond a reasonable doubt as the benefit of the doubt should have been given to the appellant.

As such, they pray for an acquittal.

In respect to sentence, the appellant submits that an effective sentence without a suspended portion is unduly harsh. It is an indication that the court paid lip service to the appellant's mitigation, because if it did take mitigation into account part of the sentence should have been suspended to reflect that. As it were, they state that a sentence in the region of 8 years with a suspended term in all three counts will meet the justice of the case.

The summarised facts

The brief facts are that the appellant is the step father of the complainant who was 12 years and in grade 7 at the time of the commission of the offence. It is the state case that, during the period the complainant's mother who is a second wife to appellant, was detained in hospital giving birth, the appellant raped her on those three successive occasions and days. She described the manner and time of the rape and indicated that on all the occasions there was no one else at home.

The offence came to light, when she expressed the fear that she may be pregnant by her step father to her school friends. It is then when she tried to retract the statement claiming it was a joke but the alert young pupils reported the same to a school teacher in charge of counselling and social education at the school.

The complainant was called in, and it happened that the same teacher once taught her in her early primary school years. She did not open up at first. Then she broke down and cried for what is stated to be one and half hours. After calming down she then divulged her ordeal to the teacher. The teacher wanted to report to the headmaster, who was not available at the time but then took the child to the deputy headmaster. The complainant repeated the story but with some prevarication as to the number of times the rape took place. She had initially said it was on one occasion to the first teacher.

A police report was subsequently made leading to the appellant's arrest.

The trial Court's Findings

At trial the court a quo found the complainant's evidence credible given her age and the usual connotations surrounding sexual offences on young girls. She dismissed the minor variations as inconsequential in the context of the child's age. The court concluded that, in

the circumstances of the complainant and the case the report was made within a reasonable time to an appropriate person and voluntarily.

The trial court dismissed the appellant's defence of false incrimination on the basis that identity was not in issue and that the defence witness admitted that the appellant was on leave during that period. This in a way was said to have destroyed her testimony that he would only visit the small house over the weekend only and the three days fell on a weekend.

The Defence Case

As can be deduced from the grounds of appeal, the appellant's defence is that of total denial of the offence, and an alibi defence. He admitted that at one stage the complainant's Mother, his second wife, was admitted in hospital giving birth. He also admits that he visited the place where the crime was allegedly committed during the period the complainant's mother was in hospital to check on his step children's welfare. However, he stated that he visited the homestead on a date, that is on the 29th of August, 2022, different from those mentioned by the complainant. It is his averment through and through that during the 21st to the 23rd of the same month, he was with his first wife. He disclosed that he only visited the second wife's place over weekends which was in accordance with his conjugal rights rooster.

The State Case

In response to the grounds of appeal the state, outlined that there was no misdirection by the court both on the facts and the law. The state argues that the court was justified by taking a holistic approach in accepting that the report was made within a reasonable time framework, that it was made voluntarily and the minor discrepancies did not undermine the crux of the matter, that of rape. They cited the cases of *State-v-Chikukwa SC 661/18*, *State-v-Brighton Mubvumba HH 338-18* amongst others to support their averments.

The state also argued that the trial court cannot be faulted for exerting its sentencing discretion in the manner it did, as the sentence was within the region of already decided cases of that nature.

On appeal the defence maintained its position as portrayed in their grounds of appeal. They relied on the cases of *State-v-Banana 2000 (3) SA 885 (SC)*, *R V Petros 1967 ZLR 35 G at 399-H* and *State-v-Makanyanga 1996 (2) ZLR 31 H*.

Issues

The only issue is, did the trial court err in its findings both on the facts and the law? If so in what manner?

An Exposition of the facts, evidence and law

On the facts, the appellant was in a *loco parentis* relationship with the complainant. He was a father figure as he had taken over the fatherly role from the complainant's deceased father upon marrying her mother. He was thus, well known to complainant.

The medical report indicates that the complainant was sexually molested with three hymenal attenuations. This expert document is corroborative of the complainant's evidence that she was sexually violated and that it was her first sexual encounter. The offence is alleged to have taken place when the mother was in labour in hospital.

A critical evaluation of this state of affairs indicate that the child was introduced in a new world of sexual intercourse by a person whom she trusted and took as a father and was coming to terms with the whole ordeal. However, at the back of her mind due to the teachings at school she knew that sex would lead to pregnancy. It cannot be ruled out that during the confusions of accepting, coming to terms, or fighting what had been done to her, her fear of pregnancy as result of that impermissible act dominated and featured more in her mind. It did so to the extent of releasing or relieving that pressure and burden to her friends leading to the unfolding of the events surrounding the commission of the offence.

We agree with the State and the trial Court's factual and legal findings. The child was in turmoil of deciding whether to disclose or not hence, she cannot be faulted when she failed to report to her aunt, grandmother or her close relatives. This is the mental stress the rape victims or survivors go through ordinarily as expressed in several authorities and legal documentaries.

This is further exacerbated by the fact that in the African culture sex is taboo. Such topics are hardly discussed at family level as they may connote looseness and depreciation of the marital value attached to sexually active girls. As such, the victim may even end up feeling they are the guilt part. This was amplified by Prof Feltoe in the *Judges Criminal Handbook* Chapter 3 as follows:

“The requirements to be met by a rape complainant should therefore not be divorced from the cultural context that might contribute nearly to swift action pursued. A young girl who has been raped may not make voluntary report because her cultural context makes it difficult for her to do so without being re-victimized. She may fail to report without delay as expected by the law, because in the lived reality she has no idea if she will receive support or condemnation if not external damnation. She may not report to the first person she could reasonably be expected to report for fear of being reduced to a liar and a tease. It is these realities that must therefore, with equal measure, inform the scrutiny of the like, prospects of an appeal in a rape case.” See also *State-v-Mavhura HH 22/13*.

It is our considered view that the report was made within a reasonable time. The delay in making the report should be contextually measured. There was a lot happening in the

child's mind. The mother was in complicated labour as evidenced by the duration she stayed in hospital. She felt comfortable in confiding to her friends. She then later steeled or fortified herself to inform her teacher. There is no evidence of duress or invoking, probing questions. The only person pointed to was the stepfather. She could have pin-pointed anyone else. It does not matter that the offence came to the fore because of her fear of pregnancy. What is important is that she was sexually molested without her consent resulting in her fear of having fallen pregnant as a result of that rape.

There was never a defence of consensual sex. It was forced sex on a child. There are no reasons why a child would lie against the apparent bread winner of the family and care taker who visited them whilst their mother was in hospital. There was no evidence of bad blood or a conspiracy theory adduced.

We also find that the court was justified in negating the minor inconsistencies which defence counsel went to town on. This is a mere child for God's sake. What matters is that she was sexually violated and she gave credible evidence as to the perpetrator. In that regard her findings on credibility cannot be questioned. More so it is an established legal principle that issues of credibility are the domain of the trial court. See *Godfrey Nzira-v-The State SC 23/06*, *State-v-Ngara 1997 (1) ZLR 918 C*, *Beckford-v-Beckford 2009 (1) ZLR*, *State-v-Mlambo 1994 (2) ZLR 410 S*, *State-v-Mbada SC 184/90*, *State-v-Soko SC 115/92*.

The defence conceded that the offence was committed whilst the complainant's mother was in hospital. This rebuts the defence of false incrimination. The court correctly pointed out that the defence witness was not truthful. This is more so when she was informed that at the relevant dates the appellant was on leave.

This court had the occasion to research on which dates the 21st to 23rd of August 2022 fell. Whilst the 21st fell on a Sunday, the 22nd and 23rd fell on a Monday and Tuesday respectively. This attacks the notion that the appellant would only visit over weekends to perform his conjugal duty on the younger wife. She said he would visit the other wife on Fridays. This cannot be so when the 21st was a Sunday.

It is also evident that the wife was in hospital at the time therefore there was no routine conjugal duty to talk about.

State-v-Banana Supra is a locus classicus that children's evidence should not be readily discharged without justification. The approach in sexual complaints and single witness evidence was also explored extensively in this case, whilst criticizing the cautionary rule in sexual molestation matters.

DISPOSITION

The appellant was placed at the scene of the crime. He had the time and motive as the mother of the complainant was in labour with his twin children. He took advantage of that

situation by violating a child who looked up to him. He was a sheep in wolves clothing. He came under the pretext of overseeing the children in the absence of the mother and his lust got the better of him. He did not only do it once but thrice. See *State-v-Titiya HH 71/20*.

Thus, there is no basis to upset the trial court's findings both in fact and in law. The following authorities are of guidance in support of our stance.

In *Mudyambanje-v-The State HH 49/17*, it was noted that, the complainant's statement should be assessed on the basis that there is no standard reaction to rape, each case has to be considered on its merits.

In *State-v-Banana above at 138 D-F* it was highlighted that:

"If a court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict notwithstanding that he was in some respects unsatisfactory.

In *State-v-Mavhura HH 22/13* the court held that, "The inconsistencies of a minor nature do not discredit the complainant's evidence regarding the rape itself."

In *State-v-Micheal Gwanzura-v-The State SC 66/91* the court noted that:

"Whether or not the complainant is a credible witness is not to be judged by taking her evidence in isolation but by evaluating the evidence as a whole to determine whether her testimony can reasonably be true."

Accordingly, we are of the view that the court cannot be faulted both in its factual and legal findings.

The report was made in a reasonable time against the background of this case and the closest person in the circumstances of this case. It was voluntarily made, as already extrapolated. Medical evidence supports the sexual violation. There is no history that the complainant was of loose morals or misbehaved with those of the opposed sex. She mentioned the only person who raped her. The inconsistencies are minor and of little significance as they do not detract from the assailant's identity and the manner the offence was committed. The inconsistencies did not derail the truth and crux of the matter. The trial court weighed judiciously the evidence that was before it and decided that despite the few shortcomings, defects or contradictions in the testimony, in minor respects, she was satisfied that the truth had been told. See *State-v-Webber 1971 (3) SA 754*.

The sentence is in accordance with other decided cases. Nothing on record warrants this court to interfere with the discretion of the sentencing court. There is nothing indicating that the court in coming with the sentence did not encapsulate the appellant's mitigation.

See *Muhamba SC 57/13*, *State-v-Mangwenhe (2) ZLR and State-v-Zvondani and Ors 1983 (1) ZLR 111 (SC)*.

It is not a rule of thumb that a portion of imprisonment term should be set aside every time a court of law sentences an accused. The suspended sentence only serves as a deterrent factor for the person not to commit similar offences. It is like a sword hanging over the head of the perpetrator waiting to strike when the offence is repeated. The court was, in our view extra lenient. 15 years for three counts of rape in a relationship setup would have called for even a stiffer penalty.

In the result:

The appeal on both sentence and conviction is dismissed.

National Prosecuting Authority, the State's legal Practitioners.

Murisi and Associates, the Appellant's legal Practitioners.

Honourable Justice Muzofa J, Agrees.