TALENT BONDIYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 23 & 30 March 2023

Criminal Appeal

Appellant, in person
Ms *KH Kunaka*, for the respondent

ZHOU J: This is an appeal against conviction and sentence. The appellant was convicted of rape as defined in s 65(1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. He was sentenced to 17 years imprisonment of which three years was suspended for five years on condition that during that period he does not commit an offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine.

The facts which were found to have been proved are that on 17 August 2019 in the evening, the appellant unlawfully and internationally had sexual intercourse with the complainant, an eight year old female juvenile who is incapable of consenting at law. The complainant is a sister to the appellant's wife. The court *a quo* found that on the day in question the appellant was noticed mounting the complainant under a mango tree. He tried to run away but was apprehended with the assistance of one Jonathan Magadza Masimba. The complainant's under pants were found in the pocket of the appellant's jacket which he had dropped.

In the court *a quo* the appellant pleaded not guilty to the charge and alleged that he went to the shops on the evening in question. Upon his return to his residence he found people gathered. He assumed that those persons were involved in an alteration with his wife. He violently assaulted everyone who was around and ordered them to leave his residence, including his own friends who had been drinking beer with him before he had gone to the shops. He removed his jacket and threw

it onto the ground when he was assaulting the persons at his residence. It was then that he was told about the rape allegations. The court *a quo* rejected his defence.

The appellant challenged the conviction on three grounds. Grounds 1 and 3 essentially challenge one thing, the finding that there was sexual abuse or, put differently, legal penetration in the context of the charge. On this aspect, the applicant contends that the court *a quo* erred in finding that penetration had taken place when the victim never said so as the medical report did not mention hymenal tears. The court *a quo* did not rely on the evidence of the victim because her evidence showed that she was probably intoxicated and remembered very little of what happened on that day. She remembered that she had consumed alcohol. As regards the medical report, the appellant is mistaken in thinking that hymenal tears are the only proof of rape. The authorities are clear that even the slightest penetration is sufficient for legal purposes. The hymen does not have to be perforated for the court to find that legal penetration took place. In this instance the court *a quo* considered all the evidence in its totality and came to the conclusion that legal penetration had been proved. The medical report concluded that penetration was "very likely" to have taken place. This conclusion was based on the abrasion that was found on the victim's ganitalia as well as the soil that was found around the same part of her body. The appellant does not explain where those abrasion and the soil came from when regard is had to the direct evidence of the State witness, Chiedza Kavhai, caught the appellant red-handed with his pants down. The area was well hit. The witness saw the appellant mounting the victim with his underwear at knee level. The girl was lying on the ground. He denied that. But the court *a quo* believed the testimony of this witness. None of the grounds of appeal challenges the credibility of this witness nor the reliability of her evidence. When the evidence of Chiedza Kavhai is taken together with the medical evidence, the fact that the appellant penetrated the victim is proved beyond reasonable doubt.

But there was other evidence which corroborated the intact evidence of Chiedza Kavhai apart from the medical report. The conduct of the appellant after he had been seen by Chiedza Kavhai shows that he had committed the offence. Appellant sought to run away while dragging the girl with him. The appellant suggested that he had assaulted the persons at his residence and ordered all of them to disperse. But he was apprehended by Jonathan Magadza Masimba who had seen him jumping over the fence. Masimba did not know the appellant prior to this day and had no reason to tell that story about him if it had not happened.

Most significantly, the victim's underpants were found in the pocket of the appellant's jacket. The appellant gives no reasonable explanation as to why such an item would be found in his pocket. He confirms that the jacket was his. His reason for abandoning it is manifestly false. The jacket links him to the offence. He left it hanging on the fence when he tried to escape. His wife is the one who caused Masimba to apprehend him because she was screaming that he had raped a child.

For the above reasons, grounds 1 and 3 are without merit. They must fail.

Ground number 2 is meaningless. It says that the court *a quo* "erred to uphold other witnesses ordinary testimony(ies) of which that does not outweigh victims story". This does not mean anything. The victim did not say that the appellant did not rape her. She simply remembered nothing, understandably because she was intoxicated. There was an eye witness to the sexual assault whose evidence was accepted by the court *a quo*.

In respect of the sentence, the appellant contends that the sentence is manifestly unjust and induces a sense of shock. The sentence of 17 years imprisonment of which 3 years imprisonment was suspended can hardly induce a sense of shock. This was a sexual assault that was aggravated by the relationship between the parties, the fact that it was perpetrated upon a minor child, and the fact that the appellant took advantage of the fact that the child was intoxicated. This was a small girl who looked up to him for guidance. The age difference between the appellant and the victim of about 18 years is significant as an aggravating factor. These aggravating factors were correctly weighed against the mitigating factors, particularly the fact that the appellant was a first offender.

In all the circumstances, the appeal against conviction and sentence is without merit.

In the result, the appeal is dismissed in its entirety.

ZHOU J:……..

CHIKOWERO J: Agrees……..…….

National Prosecuting Authority, appellant's legal practitioners