TAWANDA GEORGEMORE HAPARARI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 26 June & 3 July 2023

Criminal Appeal

TB Muvhami, for the appellant
F 1 Nyahunzvi, for the respondent

CHIKOWERO J:

1. Having been convicted and sentenced to 6 years imprisonment, 2 years of which were suspended on the usual condition of good behaviour on a charge of rape as defined in S 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], the appellant is before us challenging both the conviction and sentence.
2. In respect of the conviction the sole issue for determination on appeal is whether the factual finding that it was the appellant who raped the complainant was correct. This is so because it was common cause at the trial that the complaint had been raped.
3. As for the appeal against the sentence, we are called upon to decide three issues. Firstly, whether the magistrates court misdirected itself in sentencing the appellant as a youthful offender when the offence was committed at a time when the appellant was 14 years old and hence a minor. Secondly, we must determine whether the sentence was assessed on the basis that the appellant had continued to rape the same complainant on numerous other occasions from 2016 until December 2021 when the complainant put a stop to her ordeal. If the answer to the second issue is in the affirmative we then must determine whether the resultant misdirection (for such it would be) resulted in a gross miscarriage of justice. Thirdly, we will also decide whether the sentence itself is manifestly harsh and excessive as to induce a sense of shock.
4. Having analysed the evidence as a whole, including an assessment of the credibility of the complainant, the magistrates court made the factual finding that it was the appellant

(who was 14 years old at the time of the commission of the offence in March 2016) who had raped his then 8 year old cousin. Their fathers were twins. The appellant was in form 1 at the time while the complainant was in Grade 2. Their families resided at the same house, which belonged to their paternal grandparents, as did two other families. The complainant, in early 2023, gave graphic testimony of how the appellant had raped her in the latter's dining room at a time when other family members were not around and how he threatened her not only not to scream during the ordeal but also that he would assault her if she disclosed the offence to anyone. The Court *a quo* found as a fact that the offence only came to light in March 2022 when the complainant explained to her mother (who also testified for the prosecution) that she was bed – wetting as a result of the rape perpetrated on her person by the appellant in 2016.

5. The assessment of the credibility of witnesses is a matter for the trial court. An appellate court will not lightly interfere with factual findings of the trial court which were based on demeanour and credibility of witnesses unless the findings are outrageously irrational and not consistent with the evidence led. Where there has been no misdirection by the trial court, the presumption is that the conclusion is correct; the appellant court will only interfere and reverse the trial court's finding where it is convinced that the finding is wrong. Where the lower court's finding is grounded on demeanour and credibility an appellate court will be reluctant to upset the finding, provided that the evidence of the witness is otherwise satisfactory. Further, if the trial court misdirected ,itself and the misdirection seriously affected the court's view of the appellant's credibility, the appellate court will disregard the lower court's findings and approach the appellant's evidence as it stands on the record and determine whether the evidence on the record justifies the conviction. There may be a misdirection on fact by the trial court where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may also be a misdirection where the reasons are apparently satisfactory but the trial Court overlooked other facts or probabilities. See *S* v *Mashonganyika* 2018 (1) ZLR 218 (1) ZLR 218(H) and *Chimbwanda* v *Chimbwanda SC* 26 /02.
6. We agree with Mr Nyahunzvi that the trial Court did not misdirect itself in finding that the complainant was a credible witness. She gave a clear account of how the appellant had raped her. She gave sound reasons why she did not disclose the offence earlier than she eventually did. She was not only very young at the time that the offence was committed but did not, then, fully appreciate that what the appellant had done to her was

wrong. She was related to the appellant in the manner that we have already spelt out, had been born under the same roof and continued to reside there until the offence surfaced. She was in a dilemma on whether she would receive help from her family and teachers if she opened up. She had also been threatened to keep the matter a secret. The complainant, her mother, the appellant and his mother all testified that there were cordial relations between the two families such that the trial court found that there was no reason for the complainant to falsely incriminate the appellant. Even when the matter came out in the open it was the appellant's father, who was working and living in South Africa, who suggested that the complainant be subjected to a medical examination before the matter was taken to another level. Indeed, members of the two families appeared at a clinic for the medical examination after which the family held further deliberations before the matter was reported to the police. Thereafter the appellant's side of the family moved out of the common residence. The lower Court, which lived through the atmosphere of the trial, commented favourably on the demeanour of the complainant and her mother. It recorded that both displayed no ill will towards the appellant. The complainant made it clear that her concern was that what the appellant had done to her, namely the commission of the offence, was not right. Otherwise, she regarded him as a close relative considering that their fathers were twins and all were staying under the same roof, as a family. The complainant's mother testified that she regarded the appellant as her own son hence she first of all questioned him in the presence of his own mother before she, together with other family members, took the matter further. In a word, the trial court found that the complainant and her mother were being genuine and open with the court just as they had been genuine and open in their interaction with the appellant and his family members. Having been impressed with their demeanour, their simple and straight- forward testimony (which was not dented under cross- examination) inclusive of the sound reasons for the late disclosure of the offence ,there can be no basis for us to interfere with the fundamental factual finding that it was the appellant who raped the complainant.

7. We pause to record that the medical report confirmed the complainant's testimony that she was raped. We note too that it was in any event common cause that the offense itself was committed on the person of the complainant.
8. We also agree with Mr Nyahunzvi that the late disclosure of the offence is not at all suprising in the circumstances of this offence. We have already set out the reasons why the matter only came to light in 2022 and the circumstances under which it did so. *S* v

Musumhiri 2014 (2) ZLR 223 (H) sets out some of the cultural inhibitions standing in the way of victims of rape making early disclosures of their ordeals. The point is there made that there is no ideal rape victim. Survivors of rape react differently to the crime both at the time when it is being perpetrated and afterwards. We underline the fact that the learned magistrate was mindful of the fact that she was faced with the task of determining what was alleged to have been a rape committed in a family set up. She acquitted herself well. Her judgement is well- reasoned.

9. The discrepancies in the evidence of the complainant and her mother did not go to the root of the matter. These related to whether the complainant had bed –wetted over two consecutive nights or throughout the whole week. It is in explaining what she thought was the cause of this unpleasant occurrence that the complaint had disclosed the offence. That is the common denominator. Further, whether the appellant ignored the complainant's mother's invitation to respond to the revelation of the offence or whether he came forward in the company of his mother does not have any bearing on whether he raped the complainant. The trial Court acknowledged these discrepancies but concluded that they were immaterial. That can only be but correct. See S v *Lawrence and Anor* 1989 (1) ZLR 29 (SC).
10. The appellant's defence was considered and sound reasons given for finding that it was beyond reasonable doubt false. The appellant denied that he committed the offence. He suggested, without any evidentiary basis, that the complainant was raped either by her maternal uncle (Petros) or by male patrons who drank beer at the complainant's grandmother's residence. The complainant was clear that she slept at her grandmother's house, which was one residence away from where the offence was committed, only because her mother occupied one room. She said, without being challenged, that she slept in between her grandmother and aunt. Nobody sexually attacked her there- the unnamed beer patrons included. It must also not be forgotten that the defence was not examined in isolation from the rest of the evidence placed before the trial Court.
11. To merely aver, without any evidentiary basis, that the complainant may have been raped either by Petros because he abused drugs or by those who purchased beer at the grandmother's house could by no stretch of the imagination raise reasonable doubt on the identity of the person who raped the complainant. We agree with the trial Court that the appellant was inviting it to disregard the clear evidence before it and instead embark on an exercise in speculation. The complainant knew the appellant There could be no

question of mistaken identity. We also take the opportunity to remark that the trial court did not place an *onus* on the appellant to prove his defence. What it did was to give reasons why it rejected his defence. The reasons are sound.

12. Neither did the trial court convict on a balance of probabilities. What the appellant is doing by so contending is to fasten on a single sentence towards the tall-end of the judgment *a quo*, after the court had already thoroughly analysed the evidence, to complain that he was convicted on the civil standard of proof. Nothing can be further from the truth. The appellant is deliberately misreading that sentence out of context. An appeal cannot be decided on semantics.
13. The appeal against sentence is likewise without merit.
14. The appellant committed the offence when he was 14 years old. At the time of conviction he was 20 years old. In settling for imprisonment as the appropriate form of sentence, the Court apparently had in mind the provisions of S 351(3) of the Criminal Procedure and Evidence Act[*Chapter 9:07*] "the (CPEA"). It reads:

> "351 Manner of dealing with convicted juveniles
>
> (3) Any Court before which a person who is nineteen years of age or more but who is under twenty- one years of age has been convicted of any offence other than murder, treason or rape may, instead of imposing a punishment of a fine or imprisonment on him for that offence-
>
> (a) Order that he shall be placed under the supervision of a probation officer or any other suitable person designated……
>
> Or
>
> (b) ……. Order that he shall be placed in a training institute……."

15. The trial court was correct in determing that the relevant age of the appellant for purposes of assessing an appropriate sentence was as at the date of conviction, not his age when he committed the offence. See *S* v *Zhou* 1995 (1)ZLR 329(H) and *S* v *Chitiki* 1986(1) ZLR 60 (H). In any event, the statutory provision that we have cited does not prohibit the incarceration of twenty year old offenders convicted for rape where the circumstances so dictate. If he had been convicted while still a minor, he would have been sentenced as a minor. See *S* v *Tendai and Anor (Juveniles)* 1998(2) ZLR 423(H) and S 351(1) of the (CPEA.)
16. We agree with Mr Muvhami, in respect of the second ground of appeal against the sentence, that the court *a quo* misdirected itself in considering that the appellant continued raping the complainant even when he had become a major. He was charged with and

convicted of one count of rape. It may very well be that he could have been fortunate not to have been charged with numerous other counts of raping the same complainant. But the point remains that the Court a *quo's* advertence to the appellant having committed other counts of the same offence, when he was not charged and convicted of the same, was a misdirection. That, however is not the end of the matter.

17. We take the view that the sentence ultimately imposed is not manifestly harsh and excessive as to induce a sense of shock. It strikes the right balance between the aggravating and mitigating factors. The sentence considered the seriousness of the offence, the relationship between the appellant and the complainant, the age difference between them and, among other factors of aggravation, the trauma and embarrassment that the complainant went through in narrating her ordeal to the medical personnel who examined her, the police and the court. On the other hand , the court also took into account such factors as the appellant's age both at the time of commission of the offence and on conviction and the need to not only deter the appellant and like – minded persons but also to reform him in view of his youthfulness and status as a first offender. Although the court was not sentencing an eighteen or nineteen year old convicted of rape, we think that it was alive to the guidelines suggested in *S* v *Zaranyika and Ors* 1995 (1) ZLR 270 (H).
18. Indeed, since the offence of rape has now been codified and reformed, the Court *a quo,* although it did not cite the relevant statutory provisions, had in mind the dictates of S 65(2*)* of the Criminal Law Code in assessing an appropriate sentence. That Section reads ,in relevant part, as follows:

    "65 Rape

    (1)……

    (2) For the purpose of determining the sentence to be imposed upon a person convicted of rape, a Court shall have regard to the following factors, <u>in addition to any other relevant factors and circumstances-</u>

    (a) the age of the person raped;

    (b) the degree of force or violence used in the rape;

    (c) the extent of physical and psychological injury inflicted upon the person raped;

    (d) ……..

    (e) the age of the person who committed the offence;

    (f) Whether or not any weapon was used in the commission of the rape;

(g) whether the person committing the rape was related to the person raped in any of the degrees mentioned in subsection (2) of Section s 75;

(h) Whether the person committing the rape was the parent or guardian of, or in a position of authority over, the person raped;

(i) whether the person committing the rape was inflected with a sexually transmitted disease at the time of the rape."

(the underlining is mine for emphasis).

A sentence must not only fit the crime and the interests of the society but must also be sensitive to the particular offender and be blended with a measure of mercy. See *S* v *Shariwa* 2003(1) 314 (H). The other relevant factors and circumstances of this particular matter, as envisaged by the Lawgiver and considered by the Court *a quo*, were that it was sentencing a twenty year old young man who had committed the offence when he was a fourteen year old boy. It also considered that although the complainant was fourteen years old on the date of conviction she had been an eight year old Grade 2 pupil at the time of commission of the rape. The relevance of adverting to the age of the appellant at the time that he committed the offence was to take into account his immaturity, lack of experience of life and thoughtlessness. Similarly, that the complainant was a mere eight year old at the time of the commission of the offence was to properly assess the weight to be accorded to this aggravatory factor, particularly in view of the trauma to the complainant evident in having to recount her ordeal in court some seven years later.

The Court a quo was of the view, correctly so, that the complainant would have to live with the unpleasant memory that she had been raped by a cousin. The relationship was very close. Their fathers were twins. All said, the assessment of an appropriate sentence in this matter was not an easy task. We think that the Court *a quo* exercised its discretion to the full. It considered all relevant factors. It embarked upon a delicate balancing exercise of the aggravating and mitigating factors. The sentence that it imposed is not manifestly excessive as to induce a sense of shock.

19. Although it misdirected itself in so far as it adverted to the appellant having continued to rape the complainant up to 2021, that misdirection did not result in the imposition of a manifestly excessive sentence. Put differently, the misdirection did not result in a substantial miscarriage of justice.
20. In the result, It is ordered that :

The appeal be and is dismissed in its entirety.

CHIKOWERO J……

ZHOU J I agree **……..**

Muvhami Attorneys, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners