

DENZEL CHIKORE
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA & KWENDA JJ
HARARE, 25 September, 9 & 16 October,
16 November 2023 & 5 February 2024

Criminal Appeal

T L Mapuranga, for the applicant
E Makoto, for the respondent

FOROMA J: The appellant was charged with contravention of s 65(1) of the Criminal Law Codification and Reform) Act, [*Chapter 9:23*] it being alleged that he unlawfully had sexual intercourse with complainant without her consent as at the time complainant was drunk and asleep. Despite pleading not guilty to the charge and claiming that the sexual intercourse was consensual appellant was convicted of the charge and sentenced to 12 years imprisonment, 4 years of which were suspended for 5 years on conditions of good behaviour leaving an effective sentence of 8 years imprisonment.

Appellant was aggrieved by the result of his trial and noted an appeal against both conviction and sentence. Ad conviction appellant raised the following grounds:

- (1) The court *a quo* erred at law and fact in convicting the appellant based on a finding that the complainant was intoxicated at the time of sexual intercourse so as to be incapable of giving consent to the sexual intercourse as the performance of the act despite the existence of overwhelming evidence which proved that she was not intoxicated and was capable of giving consent at the time of the sexual intercourse.
- (2) The court *a quo* erred at law and fact by convicting the appellant despite the fact that the appellant gave a version of events which was reasonably and possibly true and was not demonstrated to be false by evidence led during the trial.
- (3) The court *a quo* erred at law and fact in convicting the appellant based on unreliable and unreasonable evidence from the complainant particularly in that she cannot

remember the sexual act although she could remember other activities that occurred during the night.

- (4) The court *a quo* erred at law and fact by finding the appellant guilty of rape as defined in s 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in the absence of evidence establishing that the sexual intercourse was not consensual.

Although appellant noted an appeal against sentence, such appeal was abandoned at the commencement of the hearing of the appeal. It is therefore unnecessary to list the grounds of appeal against sentence. The appeal against both conviction and sentence was opposed by the respondent.

Mr *T L Mapuranga* who presented the appeal on behalf of the appellant argued very strongly that although complainant had taken some alcohol (Vodka) she was not drunk and consented to sexual intercourse. He relied on the following to bolster his argument that the complainant was not intoxicated at the time of the sexual intercourse and that she was fully aware and consented to the events that transpired –

- (a) it was not disputed that the complainant safely drove Nashe Masekesa to his place of residence at midnight and thereafter the sexual intercourse occurred within a few minutes of her return to the venue.
- (b) Complainant walked herself to her room and recalls leaving the door open.
- (c) The second State witness testified that on the night of 13 October 2023, the complainant did not show any signs of being drunk or acted in a drunken manner.
- (d) The complainant testified that she did not suffer from any hangover and managed to conduct her duties as the Master of Ceremony without any problems.
- (e) When Grace Ngadze Tinotenda Maunganidze (erroneously called Tinotenda Machakaire in appellant's heads of argument) and Nashe Masekesa (in error called Nashe Masekesa) in the appellant's heads of argument) knocked at the complainant's door during sexual intercourse with appellant, the complainant interacted with Grace Ngadze whilst in her bedroom with the accused person.
- (f) The State failed to adduce evidence on the quantity of alcohol consumed by complainant and whether the consumption sufficed to intoxicate the complainant and the direct consequences of the consumption.

We comment on the arguments appellant relied upon for arguing that the complainant was not so drunk as to be incapable of consenting to sexual intercourse at the time of the alleged rape.

Regarding para (a) above, firstly it is incorrect to argue that the complainant drove Nashe Masekesa to his residence at midnight and that sexual intercourse with appellant occurred shortly after her return to the venue. In support of this argument appellant sought to rely on the second State witness's testimony in particular pp 70-71 where the following appears.

“Q. So, my question is can you confirm that from the knowledge you have or what you were informed, she was driving a car at midnight? - A. I am sure she was driving when she went to Nashe's house but I am not sure who was driving when they returned.

Q. But if I put it to you that she was the one who was driving the car at midnight. Can you deny that - A. That particular information was not given to me. I cannot deny or confirm that.”

It is clear that the witness's answer that (I am sure she was driving when she went to Nashe's house) cannot be considered as a statement of fact. The witness believed in the truth of what she was stating which clearly was clearly speculation as she had not herself travelled with either the complainant or Nashe on the way to and from Nashe's house. Beside the trip to Nashe's house by complainant was not made at midnight. In this regard p 70 makes the position quite clear p 70 and we quote-

“Q. You said around midnight the complainant and Nashe Masekesa they left and you confirm you said that.....

A. ...I said they returned around midnight.

Q. “But at midnight she (complainant) was driving her car from what you were told?

- A. No one provided me with that information so I cannot confirm or deny.

The record on p 60 also reflects that complainant's trip to Nashe Masekesa's house had been undertaken earlier than at midnight - we further quote from the record p 60

Q. Go on.

A. after that Tinotenda Mapara and I blew a few balloons. He proceeded but I was tired and hungry. Nashe Masekesa and Munashe Mapara left the venue a bit to attend to other matters at Munashe's house. They came back about an hour later.

Q. What time was it when they returned

A. I am not sure but it was after midnight. If I am not mistaken, I am not sure. I fell asleep.”

Q. Where was Munashe Mapara when you retired to bed. She had just arrived but I am not sure where she was.

Appellant in any event was incorrect to suggest that sexual intercourse between complainant and appellant took place shortly after the complainant's return to the venue around midnight as complainant actually testified that she estimated that she discovered appellant on top of her having sexual intercourse around 2.00am. See p 34 of record. This was not disputed during cross examination of complainant.

Regarding para (b) it is common cause that complainant did not close the door when she retired to bed. Appellant's position at trial was that this was by arrangement with complainant who had asked appellant to follow her at her room. This cannot possibly be true for the following reasons. If complainant had left the door open by arrangement with the appellant this would tend to support an inference of an invitation of appellant to complainant's bedroom for sexual intercourse and by consent. Had this been the case one would have expected appellant to highlight this in his defence outline as an illustration of sexual intercourse both by arrangement and by consent. To the contrary complainant's testimony which was not challenged was that she left the door open for her cousin Grace who was to join her to sleep later

It is important to note that at the trial appellant argued that complainant could not have remained asleep when he was having sexual intercourse with her as the hymenal tears as observed in the exhibited medical report must have been a result of the tearing of the hymen which would have caused some pain which pain would have woken her up. This is an erroneous assumption arising from a misunderstanding of the medical report. It is a fact that the ravishing by appellant was not complainant's first sexual encounter. Besides the medical report did not indicate that the hymenal tears were fresh or not healed to justify an inference that the tearing of complainant hymen would have been caused by appellant's penetration which would have caused complainant some pain.

Paragraph C – This is not common cause and is a misrepresentation of the witness evidence. On p 67 the following appears:

“Q. Yourself are you able to comment on whether the complainant was drunk or not? ...A. I slept earlier so do not know much on that”.

Paragraph C – This is not common cause. It is worth nothing that when asked to deal with this issue appellant gave what clearly was an untruthful answer. We quote in order to illustrate this observation p 90.

Q. What do you think they never bothered to inquire considering that you were just friends and you were not in an y known love relationship?

A. We have been friends for long and they were aware of our intimacy.”

It in fact is common cause that appellant and complainant had never been intimate in the past.

In regard to paragraph f) it is clear from the record that the state adduced from complainant’s evidence of excess alcohol intake. see p 42

Q. Can you allege that you were intoxicated from the quantity of alcohol you took?

A. When I went to sleep yes. Page 43.

Q. Can you say you drank excessively or it was just as usual.... I just drank quite a lot.”

As a matter of fact, the findings of the court *a quo* was not that the complainant was so intoxicated as not to be able to give consent to sexual intercourse. Rather the court’s finding was that “From the foregoing I am quite convinced beyond reasonable doubt that the accused person had sexual intercourse with the complainant who was asleep and drunk.” See p 17 of the judgment. This position is reiterated on p 18 of the judgment where the following appears – “Clearly the State managed to prove beyond reasonable doubt the complainant was intoxicated and asleep at the time of sexual intercourse. The evidence on record clearly shows the complainant was drunk. She gave uncontroverted evidence to the effect that she was drinking brandy. She clearly told the court he consumed too much and decided to sleep. The accused person went to her room and started having sexual intercourse with her when she was asleep. The complainant woke up when the accused person was in the midst of raping her.”

The learned magistrate correctly found that the complainant drunk brandy beer from 7.00pm up to around 12 mid night. During cross examination appellant never challenged the complainant’s version in that regard. Appellant only attempted to dispute, complainant’s evidence on her alcohol consumption during the defence case. This attempt to dispute complainant’s evidence after complainant had left the witness stand was dismissed by the court *a quo* and correctly too. The court *a quo* reasoned thus- “However during defence case and for the very first time the accused person stated that complainant drank only one glass of vodka beer. This was really an afterthought. No wonder why he never mentioned this in his defence outline. Moreover this issue was never raised during cross-examination..... Put differently the accused did not put this issue to the complainant during cross examination for her comment.” In the circumstances the position adopted by the court *a quo* i.e that a failure or omission to challenge the evidence in chief on a material or essential point by cross –examination would lead to an inference that the evidence is accepted cannot be faulted. There is therefore no merit

in the first ground of appeal. The court *a quo* in its response to the first ground of appeal also reiterated that it found it proved beyond reasonable doubt that complainant was asleep and drunk at the time of sexual intercourse. In our view no proper basis has been laid for us to interfere with the said factual findings. It is important to note that the court *a quo* found complainant to be a credible witness and accepted her evidence/testimony. The court *a quo* on the other hand did not believe the appellant's evidence for the following reasons (i) that the appellant did not challenge complainant's evidence on material issues and (ii) it found that the State proved that appellant's defence was dubious, false and incredible beyond reasonable doubt.

Although appellant argues that his evidence ought not have been regarded as false and yet the judgment of the court *a quo* is replete with illustrations of appellant's unreliable and/or false testimony. The appellant's version of how sexual intercourse took place was dismissed by the court as highly dramatized. It was described by the court as movie style fiction rather than real. The court considered and attributed complainant's inability to remember, the details of the sexual act as described by the appellant to the fact that this took place while complainant was asleep and drunk. The court *a quo* can be excused for the view it took of appellant's description of the sexual intercourse. It found that the appellant capitalised on complainant's lack of recollection of the events alleged by appellant and came up with a number of versions on how the sexual intercourse ensued well knowing that the complainant would not be able to deal with his version as she had been asleep and drunk. This did not detract from the court's finding on the complainant's credibility. In *S v Mlambo* 1994 ZLR 410 GUBBAY J (as he was then) made an important observation in regard to the approach of the Supreme Court on findings of credibility by the court *a quo* when he said:

“The assessment of credibility of the witness is par excellence the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies logic and common sense.”

In this regard see also IBRAHIM JA's remarks in *S v Soko* SC 118/92.

Second and third grounds of Appeal.

It would indeed be illogical that if complainant and appellant had had consensual sexual intercourse (which according to appellant they both enjoyed) complainant would then fabricate it as a rape bearing in mind that no one caught them in *flagrante delicto*. This is particularly so considering that by falsely alleging rape complainant would be exposing herself as a promiscuous character in view of the fact that the complainant and appellant were not in a love relationship in fact. On appellant's version complainant was more likely to keep the alleged

sexual encounter a guarded secret. It is also important to note that appellant did not dispute complainant's evidence that he also apologised to complainant for having unprotected sex with her. Clearly such an apology would not arise nor would it make sense given the circumstances alluded to by appellant. It is also common cause according to the record that complainant informed Tatenda Ngorima (her boyfriend) of the rape by appellant see p 59. The question arises if complainant had not been ravished by appellant in her sleep and drunken state, is it likely that she would disclose such an experience to a person such as Tatenda Ngorima? It must be obvious that if complainant made any report to Tatenda Ngorima it could only have been a complaint of sexual abuse. According to appellant, Tatenda Ngorima was complainant's boyfriend. It would be absurd that complainant would falsely report to Tatenda Ngorima her consensual sexual intercourse with appellant. All this demonstrates that the appellant's version was not only highly improbable but indeed false beyond reasonable doubt.

It should also be stressed that the gravamen of appellant's defence according to his defence outline was that the sexual intercourse with complainant was consensual and that complainant fabricated the rape allegation for two reasons namely- jealousy of his girlfriend and fear of her parents. According to appellant the jealous arose from the fact that that complainant did not take kindly to his girlfriend (Vongai)'s presence at the venue of the function. This suggestion was considered by the court *a quo* to be a far-fetched assertion which it did not find to be plausible at all given that appellant's girl-friend arrived at the venue of the function quite a while after complainant had already reported the rape to Anashly Ngadze which incidentally report brought complainant squarely within the scope and ratio of the case of *S v Banana* 2000 (1) ZLR 607 (S). Besides by the time the appellant's girl-friend arrived at the functions venue appellant had already apologised to complainant for the sexual assault an aspect on which appellant did not challenge complainant during cross-examination.

Appellant's assertion that Tatenda Ngorima leaked the alleged sexual intercourse to complainant's parents and uncle Tadzembwa before complainant knew about it was correctly dismissed by the court *a quo*. In our view the court *a quo* not only correctly considered the assertion as hearsay based on suspicion and speculation but we find it highly improbable that complainant would have reported to Tatenda Ngorima anything different from what she had reported to Anashly Ngadze (i.e rape). If as the record confirms complainant informed Tatenda Ngorima about the rape it would be quite strange that he would have passed on to complainant's parents and Mr Tadzembwa a report that would have caused the complainant to fear addressing the subject matter with her parents and her uncle John Tadzambwa. It is significant to note that

when challenged by the State on the source of the version that Tatenda Ngorima had informed complainant's parents of the incident (alleged sexual intercourse between complainant and appellant). Appellant indicated that he would be calling Tatenda Ngorima to testify (see p 110 of the record) which appellant eventually never did. It is common cause that appellant did not call any witness in support of his defence case.

The court *a quo* ruled that a lot of what the appellant said in his evidence during the defence case was an attempt to clutch at straws in a bird to exonerate himself from the consequences of his criminal conduct. In our view this remark is justified particularly since a lot of the assertions he made during the defence case were not put to the complainant for comment during cross examination of complainant.

The appellant's counsel over-played the argument that complainant was able to consent to sexual intercourse because she was not so intoxicated as not to be able to consent to intercourse. This argument clearly demonstrates a misunderstanding of the State's case which in fact was that the appellant having noticed the complainant's excessive alcohol intake took advantage of the likelihood that she would likely sleep like a log and decided to try his luck at having sexual intercourse with her while she was asleep and drunk. Appellant's version of the sexual intercourse with complainant was dismissed by the court as untrue and evidence of recent fabrication. The State though burdened with the obligation to prove the case against appellant beyond reasonable doubt had a very light task *in casu*. The record clearly indicates that when complainant had retired to bed because she was tired, she left the door to her room unlocked because her cousin Grace Ngadze was supposed to join her. Appellant's explanation for the complainant not locking her door was that it was deliberate and on account of an arrangement between him and complainant to allow him access to her room as they had planned to have fun (sexual intercourse). The appellant in his defence outline did not dispute the complainant's explanation for not locking the room when she went to sleep and yet it was such a material point to challenge in the defence outline since he needed to prove or confirm a prior arrangement to have consensual sexual intercourse. The appellant was defended at his trial. It ought to have dawned upon the appellant and his defence counsel the risk (consequences and implications) of not addressing material facts in the defence outline in terms of s 188(b) as read with the 189 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. This notwithstanding, appellant did not put in issue his defence outline complainant's explanation for leaving her bedroom door unlocked.

The court *a quo* was well within its right to find that the appellant after raping the complainant, appellant walked out of the room and put up in the sitting room and that this confirmed that there had not been consensual sex with the complainant. According to appellant it was complainant who had suggested after sexual intercourse that he leave the room as they might be found sleeping in the same room by elders who were sleeping next to complainant's bedroom. Appellant's explanation for complainant leaving the complainant's bedroom unlocked was rejected by the court *a quo*. It is significant to note that the explanation given by appellant for complaint leaving her bedroom unlocked did not constitute part of the defence outline despite the need to correct the assertion in para 7 of the State outline that the appellant sneaked out of the complainant's room after raping complainant. In any event if one has regard to the appellant's version as to how the alleged consensual sexual intercourse with complainant ensued with the alleged elder's presence in the next room it makes little sense that complainant would be the one to suggested that appellant leave the room after act for the reasons advanced.

Appellant's conduct the following morning after the rape incident seriously exposes the appellant's guilt. He did not dispute having sought a private talk with complainant. According to the complainant appellant apologized to her for the rape the night before during the private discussion. It was also complainant's testimony that the apology was followed up with whatsapp messages during which appellant also confessed and apologised for having had unprotected sexual intercourse. This as it happens took place after complainant had already made the rape report to Anashly Ngadze. It should be stressed that appellant did not challenge complainant on this evidence in cross examination.

Appellant's denial of confession and apology during the defence case was indeed an attempt at clutching at the straws as found by the court *a quo*. The record of trial indicates that complainant did not raise hue and cry nor did she bleed as a result of being ravished. Appellant's argument at trial was that the pain of being penetrated during rape ought to have woken complainant up and take flight or protest. That this did not happen was another indication according to appellant that she was a consenting party. It should be borne in mind that this was not complainant's first sexual encounter. As is clear from the medical report the complainant's hymen exhibited full thickness tears at 3, 6, 9 o'clock. These tears were not reflected as fresh or not healed. It cannot therefor be assumed that the penetration of complainant by appellant would have caused such pain as would have been expected to caused a sleeping and drunk complainant to wake up during the rape. Appellant's version of the sexual

encounter was disbelieved by the court *a quo* which found that the appellant did not prove that the complainant had consented to the sexual intercourse.

In ordinary rape cases the onus to prove absence of consent rests with the State. However, where the complainant places consent in issue and the State has produced evidence that intercourse took place while the complainant was asleep or intoxicated a person shall be deemed not to have consented to sexual intercourse- see s 69(2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ... the onus to prove that the complainant gave consent before falling asleep or becoming intoxicated being on the person to be charged.

The appellant's defence was not that even if the appellant was drunk, she was not so intoxicated as to be incapable of consenting to sexual intercourse. His defence which dismally failed was that complainant consented to sexual intercourse as she was neither intoxicated nor asleep. The court *a quo* found that the appellant had sexual intercourse with complainant when complainant was asleep and drunk. This court after considering the case holistically considers the result of the trial to be fully supportable. We did not find fault with the court *a quo*'s rejection of appellant's defence. As the appellant's appeal against sentence was abandoned at the commencement of the hearing of the appeal, we did not find any merit with the appeal against conviction and accordingly dismissed the appeal in its entirety.

KWENDA J, agrees:

Mundieta & Wagoneka-Madzivanzira, appellant's legal practitioners
The National Prosecuting Authority, defendant's legal practitioners