BLESSING MUDZAMIRI
and
STATE

HIGH COURT OF ZIMBABWE
MUZENDA & MUNGWARI JJ
MUTARE, 7 September 2023

CRIMINAL APPEAL

N. Mushangwe, for the Appellant
Ms T.L. Katsiru, for the Respondent

MUZENDA J: On 7 September 2023, after hearing both Counsel's Submission, we dismissed appellant's appeal against conviction. The following are our comprehensive and detailed reasons for the dismissal.

Background facts

Appellant, who was then aged 33 years old and self employed as a motor mechanic is the biological father of the complainant, then aged 13 years old and doing form 1 at a school in Mutare. Appellant has more than one wife, but all staying at one place in Dangamvura High Density Suburb.

Appellant was arraigned before the Acting Senior Regional Magistrate for the Eastern Division sitting at Mutare facing one count of Rape as defined in s 65(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23]* and second count for contravening s 66(1)(a)(1) of the same Act, as in count one. On the Rape charge the state alleged that on a date and month to the prosecutor unknown but between year 2021 and June 2022, at House No. 26392 Area 3 Extension, Dangamvura, behind Anglican Church CBD, and several other places in Mutare, appellant unlawfully had sexual intercourse with complainant without her consent. For count 2, state alleged that on 4 June 2022 at a bushy area near appellant's workplace, appellant asked complainant to lick his manhood without her consent.

On 12 May 2023, appellant was convicted and sentenced to 20 years imprisonment, 2 years imprisonment being suspended for 5 years on condition of future good behaviour. Appellant in his defence had denied the allegations and added that he never abused his daughter, complainant was being used by her mother to settle scores that exist between himself

and his wife, complainant's mother, whom appellant had caught red-handed with a stranger. The allegations of sexual assault were thus fanned by complainant's mother in order to get rid of appellant, hence fabricated.

In its judgment the court *a quo* made a finding that the relationship between appellant and complainant's mother was acrimonious. It also made a fact finding that a pattern had developed that complainant would after school, go to accused's workplace for this and other things, accused would either lay her in his office or car along the road, it also occurred once in the house. According to the trial court complainant gave a detailed account of how she was sexually assaulted. The court *a quo* also came to a conclusion that "it would appear complainant's testimony and her mother seem to dove-tail." About the juice, the trial court made a finding that appellant confirmed in court bringing the juice but denied spitting same, to the trial Regional Magistrate, appellant's testimony on the juice corroborated complainant's evidence to some extent. The learned Regional Magistrate went on to make a finding on the physical evidence of penetration relying on medical report. It was a further finding by the court *a quo* that the report by complainant was voluntary. She further got to a conclusion that complainant's evidence was trustworthy and that she did not fabricate the allegations. The court also alluded to caution on sexual matters more so relating to single witnesses, and ultimately accepted complainant's version and rejected appellant's defence. She further rejected appellant's allegations of complainant's mother's alleged extra-marital affair as a reason for fabrication, to the trial court that impasse between appellant and his wife had been amicably resolved long back before the allegations of rape and indecent assault. The trial court looked at the facts, the law and evidence and concluded that the state had managed to prove its case and convicted the appellant.

Grounds of Appeal

On 26 May 2023, appellant filed his notice and grounds of appeal and outlined as follows:

Ad Conviction

Both Counts

1. *The learned trial magistrate grossly misdirected herself by making a finding that complainant was a credible witness in circumstances where:*
   1.1 She did not make a prompt report about the alleged rape and indecent assault.
   1.2 The rape complaint was not voluntary but was elicited from her through probing.
   1.3 There were material inconsistencies between her written statement to the police and her viva voce evidence in court.
   1.4 Her evidence in court was exaggerated and included information that was not contained in her written statement to the police.
   1.5 Her evidence contradicted that of her mother in material respects.
      1.5.1 In regard to the place where she was raped in relation to the second count.
      1.5.2 The mother said she questioned her about whether appellant had sexually abused her but she (complainant) denied that her mother had persistently questioned her about the sexual abuse by appellant.
      1.5.3 Complainant said in relation to the first count, the mother saw appellant on top of her and actually attempted to push him off but the mother denied having made such an observation.
2. *The learned trial magistrate grossly erred by failing to consider the evidence of the complainant carefully and with circumspection given that these were sexual offences committed against a background of acrimony between complainant's parents.*
3. *The learned trial magistrate misdirected herself by believing an incredible story that appellant carried complainant from her bedroom and took her to his bedroom which he shared with complainant's mother and raped her in the presence of his wife. (complainant's mother).*
4. *The lower court erred by believing and giving full credence to the evidence of Chenai Jakachira (complainant's mother) in circumstances where she had a motive to falsely*

   incriminate appellant due to the fact that their relationship as husband and wife had turned sour as a result of an act of infidelity by her and the polygamous marital set up in their household.

5. *The lower court grossly erred by making a finding that appellant's guilty had been proved beyond a reasonable doubt in circumstances where crucial evidence from the investigating officer had inexplicably not been adduced.*
6. *The learned trial magistrate grossly misdirected herself by disbelieving appellant's defence without giving plausible reasons for such rejection and in circumstances where the story was reasonably possibly true and in those circumstances the benefit of doubt ought to have been resolved in his favour.*
7. *The lower court misdirected itself by returning guilty verdicts in circumstances where appellant's guilty was not proved beyond a reasonable doubt.*
8. *The learned trial magistrate erred at law and in fact by convicting appellant of a charge which is defective and therefore non-existent in that appellant was charged of*

   rape as defined in s 65(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] instead of s 65(1)(a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23].

Submissions by Appellant's Counsel

Mr *Mushangwe* submitted that the trial court did not make a finding on the issue of the timing of the sexual complaint, to the appellant that constitutes a misdirection. Counsel went on to cite the cases of *S* v *Banana* 2000(1) ZLR 607(S), *S* v *Makanyanga* 1996(2) ZLR 231(H), *S* v *Mukuku* HB 337/16 and *R* v *Petros* RLR (35) and highlighted the requirements of admissibility of sexual complaints. It was a further contention by appellant that from the facts in *casu* the report was not prompt for it was made 18 months later. Appellant impugned the conduct of complainant for failing to "timeously" report the sexual of assault and went on to cite the matter of *S* v *Brighton Mubvumba* HH 338/18.

Appellant's counsel also criticised lack of specificity on dates as to when complainant was raped so as to provide an accused with details of the charge in order to prepare his defence. (Counsel cited the case of *Douglas Mwonzora* v *The State* CCZ 17/16)

Appellant further submitted that the rape complaint was not voluntary and added that her mother asked why she came back late, as such, appellant submitted that complainant was probed and interrogated by her mother leading to her revealing the sexual assault. Appellant called this court to reject complainant's story of sexual abuse as improbable.

It was also the contention of the appellant's counsel that although the cautionary rule was done away with the trial court ought to have carefully scrutinised complainant's evidence and cited *S* v *Zenda* HB 167/16. It is appellant's further contention that complainant in *casu* may have had a motive to falsely implicate appellant especially given the acrimony between her parents, or complainant may have falsely told a story against appellant for no reason. Appellant also added that the court *a quo* did not exercise caution on evidence of a young child and gave reference to the case of *The State* vs *Sibanda* 1994(1) ZKLR 394 (S). Appellant equally condemns complainant's mother's evidence as false since she was caught with a boyfriend, hence her evidence is tainted with bias, malice and improbabilities.

It was further submitted on behalf of appellant that the trial court did not assess the evidence on count 2, for indecent assault. Appellant argued that there was no evidence of penetration of complainant's mouth by appellant's penis and urged the court to uphold that appellant's version as plausible. On the essentials of count 2, appellant added that the facts placed before the court *a quo* talk of contravention of s 65(1) as opposed to s 65(1)(a) and went on to concede that the defence should have excepted the charge before commencement of proceedings. Appellant prayed for the conviction to be set aside and that he may be found not guilty.

State's Submission

Ms *Katsiru* to the *contra* submitted that the credibility of a witness is the domain of the trial court and proceeded to refer the court to the cases of *S* v *Solano* 1985 (1) ZLR 65 (SC) and *Beckford* v *Beckford* 2009 (1) ZLR 271(SC). As such the state urged this court not to interfere with a finding on credibility unless it is apparent that a misdirection exists. On the aspects of discrepancies, the state further submitted that, discrepancies in a single witness' evidence are not necessarily fatal unless they are of such magnitude and valuable that they go to the root of the matter and cited *State* v *Nduna and another* 2003 (1) ZLR 440.

State counsel went on to submit further that the alleged inconsistencies of complainant's statement to the police and her oral testimony in court do not affect the credibility of the witnesses. The witnesses' statements to the police were not produced in court during trial and are not before the appeal court. In any case it was further submitted the trial court examined such inconsistencies and concluded they were not material to vitiate complainant's consent nor

to affect witnesses' credibility and in so doing committed no misdirection whether on points of law or fact.

The state counsel went on to reiterate that the factual findings of the lower court cannot easily be reversed by a superior court unless the lower court's findings are so outrageous or irrational that no tribunal would act upon it and referred this court to the case of *S* v *Mashonganyika* HH 131/18 and *Tendai Chigodora* v *The State* HH 348/19. Ms *Katsiru* also referred this court to s 38 of the High Court Act, [*Chapter 7:06*] which spells out circumstances under which this court may allow an appeal and quash a conviction, more so this court can only quash a conviction, when it will consider that there has been a substantial miscarriage of justice and cited *S* v *Gore* 1991 (1) ZLR at p 191. The state counsel consolidated its submissions by contending that the trial court did not misdirect itself in the manner it assessed the evidence placed before it.

It was further added on behalf of the respondent that the report was made voluntarily, timeously and that if there was a delay it was explained by the complainant and in this case it was argued, complainant was abused by her own biological father repeatedly and was told by appellant not to report the matters as complainant's life was in the hands of the appellant and the trial court in its judgment explicitly explained why it accepted complainant's version and rejected appellant's side of the story.

Complainant's mother was dragged as the source of influence by appellant, the state submitted that the witness told the trial court that she still loved appellant but failed to understand why appellant abused complainant. The complainant denied allegations of fabrication. It was also further added by the state that if the complainant's mother wanted to fix appellant why would she wait until 2022, else she would have done so after assaults by appellant immediately after she was caught adulterating.

Addressing the second count, interpreting s 65(1) of the Criminal Law Code, the state submitted that the second count is properly phrased. It called the court to interpret part (a) and (b) as conjoining. The two subparagraphs cannot be separated it was submitted. In any case, it was submitted, the evidence led by the respondent cured the charge and the court clearly assessed the evidence before convicting the appellant. It was further added by the respondent's counsel that at the time the trial commenced, appellant who was legally represented by two lawyers did not except to the charges. The state prayed for the dismissal of the appeal.

Grounds of Appeal

In total, appellant spelt our 8 grounds of appeal, ground 1 having 8 subparagraphs to make a cumulative 16 grounds of appeal all meant to attack the conviction. It is apparent from the onset the grounds of appeal are repetitive, argumentative and circuitous at the same time containing unnecessary information which naturally must be contained in the body of the heads of argument. Grounds of appeal should be short and precise then expanded in the heads. Appellant's grounds of appeal 1-4 all focus on credibility of state witnesses, grounds 5-6 attack the court *a quo's* rejection of appellant's defence and his conviction. The 8th ground of appeal related exclusively to the proper essential elements of count 2.

All the 8 grounds of appeal cane be abridged thus:

1. *Whether the court a quo erred at law to find state witnesses credible?*
2. *Whether the court a quo misdirected itself rejecting appellant's version?*
3. *Whether appellant was properly convicted of count 2?*

Applying the law to the facts

1. *Whether the court a quo erred at law to find state witnesses credible?*

   In *S* v *Banana* (*supra*), the superior court has explicitly and capably spelt out the requirements of admissibility of a complainant's evidence. Once a trial court finds complainant's evidence credible, it can safely proceed to convict an accused. One of the backbone attack by the defence in this matter is the allegation of a delayed report. The first alleged abuse took place at appellant's house at night in 2021 and the complaint was made on the 8th of June 2022. Counsel for the appellant urged this court to make an adverse inference for this delay of eighteen months as being suspicious and circumspect to the allegations of rape.

   From the precedence of our jurisdiction, prompt complaint requirements are procedural or based on evidentiary rules or practices that relate to the time frame between the incident of violence and when the report is made. An adverse inference can be made as a result of delay on the part of the victim in making a report. However a brief look at international standards specifically require that no adverse

> inference is drawn solely from a delay of any length between the alleged commission of a sexual offence and reporting thereof. Some of the countries that had explicit rules of prompt explicitly eliminate this rule. Counsel for the appellant cited two judgments of this court, *S* v *Mabvumba*, (supra) and *S* v *Kamupakare* (*supra)*, where reference to the delayed complaint continues to be an area of confusion in the law of evidence and is still used to damage a complainant's credibility. It has not been shown by empirical data analysis or practice that a prompt complaint is more plausible than a delayed report which is less truthful. It is trite in our law that it is not inherently "natural" for the victim to confide in someone or to disclose immediately following the violence. All these attitudes are premised and well inculcated on fertile distorting effects of myths and harmful gender stereotypes and further relies in the discredited belief that women complainants are generally less trustworthy.

During cross-examination of the complainant *in casu* and submissions made by the appellants' counsel, a delay in disclosing the rape was used as a threshold of a perception meant to discredit the credibility of the survivor. It was also laid upon a common assumption albeit wrong, that women tend to lie about rape, and because credibility is the determining factor in most sexual assault trials, a lack of recent complaint often serves as an argument for acquittal as postulated herein by the appellant. "Rational" ideals are frequently used by defence counsel to suggest that delayed reporting was suspicious while immediate reporting is considered ideal. There is no uniform globally accepted parameter about how "ideal" victims of sexual assault will, or should behave. This is more so given that there are many reactions to sexual violence including the victim's wanting to disclose to a close person first and only reporting to authorities after feeling supported. Ironically in some cases even prosecutors may also choose to rely on evidence of a recent complaint to support or bolster complainant's credibility whilst defence arguments may be grounded in victim or survivor blaming.

These courts should move gradually to debunk myths around delayed reporting. The Constitutional Court of South Africa delivered a judgment in June 2018[1] confirming the absence of time limits in which to institute a criminal prosecution for any sexual offence, regardless of how long it was committed or whether the victim was a child or adult. The court

[1] Nicole Levenstein & Ors v The Estate of Late Sydeny Lewis Frankel & Ors CCT 170/17, Judgment, 14 June 2015

declared the prescribed time limit as invalid as being irrational and arbitrary as it unjustifiably limits victims' rights to equality and human dignity. The court further accepted that survivors of sexual assault face similar personal, social and structural disincentives when reporting these offences.

In a Canadian case[2] a child was sexually assaulted when she was 5-6 years old, she told no one about the events for 2 ½ years. At trial, defence counsel cross-examined the complainant on the long-delay in reporting, suggesting that she had fabricated the story. The court held that:

> "*(t)he significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon rejected stereotypical assumptions of how persons…..react to acts of sexual abuse…. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear guilt or lack of understanding and knowledge. In assessing the credibility of a complaint, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant."*

Appellant went deep in attacking Chenai Jakachira as the one who influenced complainant to allege rape. The court *a quo* found Chenai's evidence credible. During trial she literally answered to every question put to her by appellant's counsel. She resolutely repeated that though she was caught red handed fornicating, she had amicably resolved the matter with appellant and reconciled. Although she would periodically question complainant why she would return from school late, on 8 June 2022, complainant voluntarily revealed to her, her ordeal at the instance of appellant. A close examination of her evidence shows no clue of exaggeration and we fail to see the misdirection about Chenai's credibility on the part of the trial court. As deductively ruled by the case cited above there is neither scientific proof nor research findings that is known of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences. Chenai Jakachira after receiving the complaint, texted appellant about the report and appellant did not respond. During trial, complainant's evidence to a large extent went unchallenged, it is Chenai's testimony which attracted a long cross-examination but as the trial court observed she remained forthright.

I am satisfied that the finding of credibility by the court *a quo* on state witnesses is appropriate in the circumstances, complainant was a biological daughter of appellant. After an

[2] R v D.D Supreme Court of Canada, File No. 27013 Judgment, 5 October 2000

elongated spate of abuse she was literally saturated with disdain and trauma and decided to confide in her mother. The mother reported the matter that very day. The grounds of appeal on credibility have no merit and are dismissed.

2. *Whether the court a quo misdirected itself rejecting appellant's version?*

   On p 41 *(of the record of proceedings*) appellant gave his defence precis. He denied sexually abusing complainant. He portrayed himself as a responsible, loving and good father, complainant was being used by her mother, Chenai Jakachira, to settle scores between her and appellant. He raised Chenai Jakachira's infidelity and Chenai's motive to self-enrich. He dismisses the allegations as fabricated. On count 2, he advances a duplicate of his defence accusing Chenai Jakachira of influencing complainant to lie against appellant.

   It is this defence that appellant motivates this court to accept as plausible and possibly true. The court *a quo* went at length to analyse the defence witness as well as state witnesses. From the record of proceedings the defence complained about the delay in reporting, the impracticality of the place where the first abuse occurred, that is appellant's bedroom and other alleged inconsistencies. In other words the defence raised doubt about survivor's story. The totality of the defence is founded on the myth that the daughter is fabricating her claims of sexual assault and women or wife dejected or disinherited by a spouse, are inherently unreliable and untrustworthy. In other words this specie of defence is intended to remind the court to be sceptical. Defence counsel alerts the court that "*given the lack of eye-witnesses, the victim's testimony need to be such that it left no shadow of doubt as to its accuracy and veracity and the witnesses' credibility and integrity*."

   Appellant's counsel left a lot of questions unasked during cross-examination of complainant whose evidence has a long bearing on credibility. On count 2, not much was asked of complainant, it was like a fast track cross-examination and as a result most of complainant's evidence went unchallenged. Appellant admitted bringing a juice home, which juice led to the allegations of the first occasion. Appellant conceded that complainant would go to his workshop after school, he would stay with complainant till late and proceed to the house at night. It is because of these

belated trips or occasions when complainant alleged she was abused. On the date the complainant informed her mother, upon arrival of police at home immediately after confronting complainant why she had told her mother, appellant drove away. He could not explain his conduct during trial. Chenai Jakachira virtually dismissed maliciously influencing complainant to fabricate false report of assault cases. We find no misdirection on the part of the trial court on reasons why it dismissed applicant's side of the case. These grounds of appeal have no merit, they are dismissed.

3. *Whether appellant was properly convicted on count 2?*

Second count indicates that appellant asked his daughter, complainant to "lick" his penis. When complainant gave evidence she told the court *a quo* that when appellant asked her to lick his manhood, she refused, then appellant forced complainant by penetrating her orally. Thereafter, he had sexual intercourse with her. This is the area, appellant's counsel did not dwell on to seek clarification. The court *a quo* believed complainant's evidence on this count and went on to convict appellant. Appellant did not accept to the charges on count 2, failed to cross-examine complainant meaningfully on what happened, and the trial court accepted that appellant forced complainant to have oral sex with him as alleged in count 2. We accept the submission by state counsel on the interpretation of s 65(1) of the Criminal Law Code and dismiss appellant's ground of appeal against conviction in count 2.

MUNGWARI J agrees:

Mushangwe & Company, appellants' legal practitioners.
National Prosecuting Authority, respondents' legal practitioners.