

**REPORTABLE** (26)

DAVID EDWARD GARDNER  
v  
THE STATE

SUPREME COURT OF ZIMBABWE  
BHUNU JA, CHIWESHE JA & MUSAKWA JA  
HARARE: 01 JUNE 2023 & 12 MARCH 2024

*G. Nyoni*, for the appellant

*T. Kangai*, for the respondent

**MUSAKWA JA:** This is an appeal against the judgment of the High Court (the court *a quo*) which dismissed the appellant's appeal against conviction on 3 counts of sexually related crimes against minors.

### **FACTUAL BACKGROUND**

Although the complainants are now adults, for purposes of their privacy, they will be referred to by their initials only.

The appellant was arraigned before the Regional Magistrates Court facing two counts of contravening s 3 (1) (b) of the Sexual Offences Act, [*Chapter 9:21*] and two counts of contravening s 71 (1) (a) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*].

The charges on which the appellant was convicted read as follows:

“1. C/S 3 (1) (b) of the Sexual Offences Act [*Chapter 9:21*]: -

In that sometime in 2002 on a date unknown to the Prosecutor and at 146 Enterprise Rd, Highlands, Harare David Edward Gardner committed an immoral or indecent act upon a young person, that is to say the accused fondled the genitals of R, a 14-year-old boy.

2. C/S (3) (1) (b) of the Sexual Offences Act [*Chapter 9:21*]: -

In that in November 2005 but on a date unknown to the Prosecutor and at Afdis Camp, Nyanga, David Edward Gardner committed an immoral or indecent act upon a young person that is to say the accused put his hand inside the shorts and on or about the groin area of T, a 14-year-old boy.

3. Sexual Offences against young person outside Zimbabwe as defined in s 71 (1) (a) of the Criminal Law (Codification and Reform Act [*Chapter 9:23*]): -

In that during the month of August 2006 but on a day to the Prosecutor unknown and in Lausanne, Switzerland David Edward Garner a Zimbabwean resident committed an indecent act upon a young person that is to say the accused put his hand inside the jeans of J trying to find his boxer shorts flyer and did thereby put his hand on or about the groin area of J.

4. Sexual Offences against a young person outside Zimbabwe as defined in s 71 (1) (a) of the Criminal Law (Codification) Act [*Chapter 9:23*]: -

In that during the month of August 2006 but on a day to the Prosecutor unknown and in Budapest, Hungary David Edward Gardner, a Zimbabwean resident committed an indecent act upon a young person that is to say the accused in the early hours of the morning reached across to T, a young person whilst T was in his own bed inside his blankets and commenced to rub T’s leg with his foot around the ankle area.”

The appellant pleaded not guilty to all the charges. His defence was as follows:

The allegations were as a result of the complainants being influenced by their parents.

The complainants were simply plotting his downfall. The reason why the complainants raised the charges against him was because of the pending labour case he had against St John’s College (Ref LC/rev/H/160/66). In respect of the first count, he stated that he was not able to give particulars as the charge and outline of facts were vague and embarrassing.

Twelve witnesses who included the complainants and their parents testified against the appellant. On the other hand, three witnesses testified for the defence.

R first knew the appellant when he was only 7 years old. He was involved in triathlon when he was at Eaglesvale Junior School and the appellant was the coach. Regarding the charge against the appellant, R testified that the appellant invited him to spend the night at house number 146 Enterprise Road, Harare. The appellant had just taken occupation of the residence. The two slept in the same room but on separate mattresses. R woke up in the early hours to find the appellant stretched over him, with the appellant's hand inside his boxer shorts and fondling his genitals. R was shocked and frightened. He proceeded to the lounge where he spent the rest of the night.

During the course of the morning, R informed the appellant that he was not well. The appellant drove him to his residence. R later informed his mother. When the appellant returned on the same day in order to print a training programme, R remonstrated with him. The two were in the driveway. Their exchanges were overheard by R's mother. The appellant then apologized to R.

In the second count, T attended a triathlon training camp in Nyanga in February 2006. Whilst asleep during the night, the appellant placed his hand inside T's boxer shorts and fondled his groin. The appellant was in a kneeling position. Upon T waking up, the appellant went out and left behind a bottle of Johnson's baby oil. When T followed to the kitchen, he found the appellant shaking and pouring water on himself. Later when T confronted him, the appellant claimed to have been looking for his dog. This is despite their having been no evidence of the

appellant taking a dog to Nyanga. T reported the incident to the assistant coach, Rory Mackie. T did not report to his parents as he feared being barred from further training.

When T's parents arranged for him to attend a World Triathlon Championship in Switzerland as his birthday present, T insisted that he be accompanied by one of the parents. The trip was aborted as a result. Apparently, the parents paid for the third complainant's trip. Rory Mackie is the one who reported the abuse to T's parents. This prompted Gordon Mackie to lodge a report at Borrowdale Police Station. Gordon Mackie, T's father confirmed slapping the appellant over the issue.

J attended the Switzerland trip which T declined. He shared the same room with the appellant. Earlier on during dinner, R had told him that if anything happened to him, he should scream. Whilst asleep during the night, he felt a sensation in his groin. This was around 3 a.m. Upon waking up he found the appellant's hand inside his boxer shorts and touching his groin. The appellant dived behind a bed. J did not talk to the appellant then as he was frightened. During the course of the morning the appellant approached J who was seated on the stairs and was crying. The appellant sought to know what the problem was but J did not reply. When the boys met in some room someone asked J if he had slept well and he replied that there had been a problem but did not elaborate. Later, and at the race venue, J informed R about the incident. R later called his mother and Rory Mackie and informed them about the incident. In his letter of resignation to the Board of Governors, the appellant had apologised for the incident, which he termed a practical joke.

The trial court found the appellant guilty on the first three counts and sentenced him to a total of 24 months imprisonment of which 12 months were suspended for 5 years on condition that the appellant did not commit a similar crime within that period. Aggrieved by the verdicts of the trial court, the appellant filed his appeal before the court *a quo*.

### **SUBMISSIONS BEFORE THE COURT A QUO**

#### **Appellant's submissions**

Mr *Samukange*, who appeared for the appellant in the court *a quo* submitted that the evidence of Theresa Van Wyk, who testified as a defence witness afforded the appellant with an *alibi* which the trial court did not make a finding on. He further argued that there was a motive for pressing charges against the appellant which the trial court did not address. He also argued that the evidence of Mrs Gibbons was not credible and did not corroborate that of her son. He further argued that the evidence of the complainants was not consistent. It was also argued that the sentence was severe and induced a sense of shock given the modern trends in sentencing.

#### **Respondent's submissions**

The respondent made the following submissions: The appellant was convicted on the basis that the witnesses were credible. In that respect, the complainants had given detailed testimonies. There was no good reason as to why the appellant would want to play a practical joke on one of the complainants at 3 am. There was nothing to support the claim that there was a conspiracy against the appellant as all the witnesses highly regarded him. The similar fact evidence that was led was striking. On sentence, the trial court properly exercised its sentencing discretion and passed an appropriate sentence in the circumstances.

### **FINDINGS OF THE COURT A QUO**

The court *a quo* found that there was nothing grossly irregular in the proceedings of the trial court. In its view, the factual findings did not defy reason or common sense. With regard to sentence, it found that the trial court properly balanced the mitigating and aggravating factors. However, the court *a quo* held that the delay in the hearing of the appeal justified interfering with the sentence. It set aside the sentence and substituted it with 24 months' imprisonment of which 12 months were suspended for 5 years on condition of good behaviour, with the remaining 12 months being suspended on condition of performing 460 hours of community service.

Aggrieved by the decision of the court *a quo* regarding conviction, the appellant filed the present appeal on the following grounds:

### **GROUND OF APPEAL**

- “1. The court *a quo* misdirected itself in accepting the reasoning and findings of the trial court without first evaluating the evidence for itself.
2. The court *a quo* erred in finding that the trial court had exercised the requisite degree of caution in considering the evidence of the schoolboy complainants.
3. The court *a quo* erred in approaching the case from the viewpoint that the appellant was required to prove his innocence at trial.
4. The court *a quo* erred in failing to take cognizance of the fact that the trial court had ignored the inconsistencies, improbabilities and irregularities in the State Case.
5. The court *a quo* erred in accepting the finding of the trial court that there was evidence corroborating that of the complainant G.

6. The court *a quo* erred in failing to take cognizance of the fact that the trial court had ignored the glaring inconsistencies between statements made by the complainants T and J prior to trial and their evidence in court.
7. The court *a quo* misdirected itself in speculating that the trial court had considered the evidence of a defence witness, Mrs Van Wyk, which exonerated the appellant on the first count when the record shows that the court had not done so.
8. The court *a quo* misdirected itself in finding inadmissible reference to the judgment of the Labour Court No. LC/H/246/2007 which was based on facts that gave credence to the defence case.
9. The court *a quo* misdirected itself in finding that the trial court was correct in rejecting the appellant's defence of conspiracy when neither it nor the trial court considered the evidence on which the appellant relied in support of that defence and accordingly erred in failing to find that it was reasonably true."

The appellant later amended his grounds of appeal which state that:

- "1. The appellant did not receive a fair trial as required by s 69 of the Zimbabwe Constitution in that prior to the commencement of the trial, the state Prosecutor assembled state witnesses collectively in one office and discussed the case with them which conduct was irregular and prejudicial to appellant.

- 1.1 The said irregularity was fundamental especially if regard is taken of the following:

- 1.1.1 The complainants engaged in some discussion concerning the appellant's conduct prior to him allegedly committing the alleged offences and even after the alleged commission of the offences.

1.1.2 The complainants and the rest of the State witnesses had the opportunity to widely discuss the matter among and between themselves.

1.1.3 The conduct of investigations by one Margret Elizabeth Grobellar appointed by the Board of Governors at St John's College to act as the investigator for the Board in anticipation of the contemplated disciplinary action provided an enormous opportunity for the complainants and the rest of the state witnesses to discuss the alleged matter and thus consciously or unconsciously influence each or one another.

2. In any event the disciplinary hearing and its deliberations were irrelevant to the criminal proceedings and no reliance should have been placed on them.”

## **SUBMISSIONS MADE BEFORE THIS COURT**

### **Appellant's submissions**

Mr *Nyoni*, counsel for the appellant submitted that the appellant's right to a fair trial as enshrined in s 69 of the Constitution was violated. He argued that the Prosecution is an integral part of the court such that if a Prosecutor commits an irregularity, it should be taken that the court has committed the irregularity. Relying on the case of *Smyth v Ushewokunze* 1997 (2) ZLR 544 (S) he argued that the fact that the Prosecutor allowed the four complainants to refresh their memories whilst in the same room would lead any reasonable person to question the Prosecutor's impartiality.

Counsel for the appellant further argued that Mr Drury who was representing St Johns School, was allowed to correct one of the complainants' statements whilst in the Prosecutor's office. The correction related to the date of the alleged sexual assault. He submitted that the High

Court had considered the issue and concluded that there was no gross irregularity. He also urged this Court to exercise its review powers in terms of s 25 of the Supreme Court Act [*Chapter 7:13*].

Counsel for the appellant further submitted that the court *a quo* erred in its finding that the appellant had admitted one of the charges when he was not told what it is he had committed. He further averred that the Regional Court made findings not supported by evidence as there was no evidence on record to show that the appellant moved from his mattress to the complainant's mattress.

### **Respondent's submissions**

Mr *Kangai*, for the respondent argued that the issue of the Prosecutor's conduct was never raised in the lower courts. He also argued that there was never an application for review to the High Court. He argued that the appellant failed to timeously assert his right. He further averred that the court on appeal is confined to the four corners of the record and not to what could have been argued. He further highlighted that during the trial counsel for the appellant had left the issue of the Prosecutor's conduct hanging and did not cross examine the witnesses on the issue.

### **ISSUES FOR DETERMINATION**

The issues that fall for determination are:

1. *Whether or not the Prosecutor's conduct violated the appellant's right to a fair trial.*
2. *Whether or not the appellant's conviction was justified.*

### **ANALYSIS**

1. **Whether or not the Prosecutor's conduct violated the appellant's right to a fair trial.**

Mr *Nyoni* argued that the appellant did not receive a fair trial as a result of the trial Prosecutor's conduct which depicts that he lost his detachment and impartiality before the case even began. He argued that the Prosecutor refreshed the complainants' memories in his office with all the complainants assembled therein. He further argued that the complainants influenced each other in their evidence. It was argued that the conduct of the Prosecutor compromised the trial court's constitutional obligation to be fair, impartial, and independent.

The appellant raised the point about the trial Prosecutor's conduct for the first time on appeal. It is trite that an appeal is limited to what is on the record and not what could have been argued by the parties. This was articulated in the case of *S v Maphosa* 2013 (2) ZLR 29 (H) where the court held that,

"The essential difference between review procedure and appeal procedure indicates that where the grievance is that the judgment or order of the magistrate is not justified by the evidence, and there is no need to go outside the record to ventilate the particular grievance, then the more appropriate procedure to follow for relief is by way of appeal. However, where issues are raised challenging the propriety of the proceedings of an inferior tribunal and facts, which have to be proved in order to support the issues, do not appear as established on the face of the record, proceedings should be by way of review."

Counsel for the appellant moved that this Court exercise its review powers in terms of s 25 of the Supreme Court Act [*Chapter 7:13*]. This is a power that can only be exercised by the Court *mero motu* and not at the instance of the parties. Nevertheless, this Court took time to consider the argument brought by the appellant.

Mr *Nyoni* sought to rely on the case of *Smyth v Ushewokunze supra* in challenging the Prosecutor's conduct. The present appeal is distinguishable from *Smyth v Ushewokunze supra*. In

the case of *Smyth v Ushewokunze supra*, the court took note of occurrences which were not denied.

These were that:

- “(1) The first respondent (the prosecutor), without any foundation, accused the applicant of being responsible for the disappearance of the sudden death docket relating to the deceased Guide Nyachuru.
- (2) During February 1997, when the applicant was on holiday in South Africa, the first respondent informed Mr Drury that if his client did not return to Zimbabwe immediately, he would seek the assistance of Interpol.
- (3) The first respondent instructed the police to effect the applicant’s arrest on 15 September 1997 and to bring him to the Magistrates Court for remand, without the courtesy of pre-warning Drury of his intention.
- (4) At the remand proceedings, the first respondent omitted to correct allegations contained in the request for remand form handed to the Magistrate, which he knew were untrue and which aggravated the seriousness of the charges. More particularly, he failed to mention to the magistrate that the deceased Guide Nyachuru was a competent swimmer (whereas the form stated he could not swim) and that the applicant was not present at the pool on the evening in question (whereas the impression given in the form was that he was there). And with regard to the criminal injuria charges, he allowed the allegation that the applicant assaulted the complainants on their bare buttocks to go uncorrected.
- (5) During the course of his address at the remand hearing, the first respondent informed the Magistrate that on occasions subsequent to February 1997 police officers were sent to the accused person’s residence in Highlands, either at Zambesi House or at No. 6 Wilmar Close, Greendale where police officers were not allowed either by Mr Drury or

his client to effect a lawful arrest. The imputation that Mr Drury and the applicant were guilty of obstructing the course of justice was totally unwarranted.”

The applicant proceeded to seek relief under s 24 (1) of the repealed Constitution, claiming that;

- (1) his right to a fair trial would be denied if the first respondent were to continue to be in charge of and to deal with the case against him, because the first respondent had involved himself in a personal crusade against the applicant, lacked the necessary objectivity, detachment and impartiality, and had exhibited bias;
- (2) his right to trial within a reasonable time of being charged was being violated;
- (3) he would not be afforded a fair hearing due to the lapse of time since the commission of the alleged offences; and
- (4) his right to liberty under s 13 of the Constitution had been infringed, because there was no reasonable suspicion of his having committed a criminal offence.

The court held that the undisputed facts spoke for themselves and revealed that the first respondent’s conduct had fallen far short of the customary standards of fairness and detachment demanded of a Prosecutor. They instilled a belief that if the case were to remain in his hands there was, at the very least, a real risk that he would not conduct the trial with due regard to the basic rights and dignity of the applicant. The court noted that the instruction to arrest the applicant portrayed a biased and vindictive approach.

In the result, the court was satisfied that the applicant had shown that his right under s 18 (2) of the repealed Constitution had been violated. This is because the Prosecutor in that case was found to have lost objectivity and impartiality. The court proceeded to issue an interdict against the Prosecutor's further participation in the proceedings.

The facts of the present appeal can be clearly distinguished from the case of *Smyth v Ushewokunze supra*. The complainants in the present appeal had already tendered their statements before the incident in the prosecutor's office and those statements did not change even after the meeting in the Prosecutor's office. Moreover, the Prosecutor in this case did not display any partiality to the state witnesses or hostility against the appellant unlike in the *Smyth v Ushewokunze case supra*. The Prosecutor did not make any unfounded allegations against the appellant. There is no basis to hold that the Prosecutor was not detached or that he was not impartial.

In addition, unlike in the case of *Smyth v Ushewokunze supra*, in the present appeal the appellant did not take issue with the Prosecutor's alleged conduct when the matter was on trial. It appears the appellant did not realise the need to challenge such conduct at an early stage. Before this court the appellant argued that he cannot receive a fair trial even if a retrial is ordered, yet he did not challenge the Prosecutor's conduct from the very onset of the matter. This is illustrated by the fact that the appellant's initial notice of appeal did not raise the issue. He only raised the issue in the amended notice of appeal as an afterthought.

Counsel for the appellant submitted that the issue was raised *a quo* and the High Court found that there was no gross irregularity. However, the judgment of the court *a quo* does not relate

to the issue. During R's cross-examination, the witness conceded that he had discussed the matter with other boys in the Prosecutor's office. Despite this, no issue was taken to disqualify the Prosecutor or to subject the proceedings to review.

In the case of *Mukuruva v Hon.Maganyani* HH 87/17 an employee had been charged with fraud in terms of the employment code and it was held that,

“He fails to explain why he did not challenge the appointment of the arbitrator at all these stages. It is only after he was convicted that he decided to challenge the appointment of the arbitrator. He was expected to challenge his appointment the moment he realized these anomalies. The applicant failed to assert himself timeously. The applicant fell foul of Article 13 (2) and he cannot cry foul. A party who knowingly fails to challenge an arbitrator within the time frames stipulated by Article 13 on the basis of the grounds laid out in Article 12 cannot bring such a challenge in the ordinary courts.”

In the case of *Barker v Wingo* 407 U. S. 514 (1972), the accused appealed against a murder conviction and argued, among other things, that his right to a speedy trial had been violated and that the conviction should therefore be set aside and the indictment dismissed. He lost the argument in the courts of Kentucky and in the lower federal courts. On appeal, the Supreme Court noted that the delay from conviction to the hearing and decision of the case in the Supreme Court was due entirely to Barker who was the accused as he had delayed in requesting review by the Supreme Court by eight years. The delay was, in the court's words, “extraordinary”, but Barker had not only failed to object to the postponements of his trials over a very long time but also that he clearly did not want a speedy trial.

In the present appeal the appellant did not assert his right at the time he discovered that the Prosecutor had allegedly committed an irregularity. He now seeks to have the convictions

reversed for conduct which he chose not to impugn. This was not a matter of ignorance of the law but a deliberate intention not to raise the issue.

It is appropriate to quote McNALLY JA in *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C-E where he said:

“The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subvenient* — roughly translated, the law will help the vigilant but not the sluggard.”

The appellant failed to raise the issue of prosecutorial misconduct during trial and before the court *a quo*. He has belatedly raised the issue with this Court. The amended grounds of appeal have no merit.

## **2. Whether or not the appellant’s conviction was justified.**

The appellant has challenged his conviction and argues that there was no evidence to prove that he committed the crimes charged and that he never made any concession.

The appellant may have sought to argue that there cannot be said to be any corroboration of the complainants’ testimonies as a result of the Prosecutor’s conduct. However, the appellant’s own conduct tends to corroborate the evidence of the complainants. In tendering his letter of resignation from the employment of St John’s College, the appellant apologized for what he called a “practical joke” that he played on one of the complainants in Switzerland where he had written “three laps to go” on Jamie’s thigh while the boy was asleep at night.

It begs the question why he wrote on the complainant's thigh when he could have written on his arm. In addition, why write on the boy's body whilst he was asleep when he could have written it on a paper or on furniture nearby if he wanted to be playful.

The appellant denied having touched the boy but went on to admit that he realised that he was making an inappropriate practical joke. The fact that he realised that his supposed joke was inappropriate shows that the appellant knew he had done something which would most likely cause suspicion to be raised against him. The appellant claimed that he only went near the bed and did not do anything to the complainant. Why then did he feel the need to apologise for a 'practical joke'. Moreover, the fact that the appellant never checked if the complainant woke up shows that there was never an intention for the complainant to find out what he had done.

It is important to take note that the evidence of the complainants was corroborated by that of their parents. The parents had nothing to gain from the appellant's downfall. Equally, the complainants were young boys who had nothing to gain from the appellant's downfall. The appellant was in a position of trust with regard to the complainants. They trusted him and they looked up to him as he was their mentor. Thus, the complainants shared a close relationship with the appellant. It is very unlikely that the complainants would seek to bring the appellant to his downfall for no reason at all.

R, in his evidence stated that after he had been indecently assaulted by the appellant, the appellant came to his home where he apologized and bought him a present and a card. This evidence was corroborated by his mother Mrs Gibbons who confirmed that indeed R was

distraught after the incident and that she heard part of R and the appellant's conversation where R remonstrated with the appellant who in turn apologized. The complainant further went on to highlight that the appellant was a good coach and he had no reason to accuse him of something that never happened.

The evidence of J also corroborated R's testimony as the appellant came to him at night again and placed his hands inside his jeans. After the incident he confided in R who confirmed it in his testimony.

In line with the above, the evidence of Tyrone also corroborated the evidence of R and J who stated that the appellant came to his room around 12:30 am and placed his hands inside his shorts and started playing with his genitals. When he confronted the appellant on what he was doing the appellant said that he was looking for his dog. It was common cause that the appellant did not take a dog with him on the trip to Nyanga.

The fact that the appellant was not honest when he was confronted shows that he had something to hide. T also testified that J had warned him about the appellant and advised him that R had told him that if anything happened, he should scream. This evidence also corroborated that of J.

The appellant denied having apologized to R at any point. The appellant also argued in his evidence that the allegations were brought against him by R because he was jealous that he was now dedicating his attention to the other boys in training for the world championship. This argument cannot be accepted because this cannot explain the allegations made by the other two

complainants. The appellant also tried to raise an argument that probably the boys were dreaming. It is not possible that all of the boys would have identical dreams and of the same person. Therefore, the court *a quo* cannot be faulted in dismissing the appellant's appeal based on the evidence that was before it.

Corroboration played an essential role in proving the guilt of the appellant beyond a reasonable doubt. The three boys corroborated each other's stories and their parents corroborated their stories as well.

The appellant already proved not to be a credible witness when he denied the evidence that he apologized to R the day after the sleepover in question. The apology was corroborated by R's mother. The appellant also claimed that he was looking for his dog when the complainant in the third count asked him what he was doing. It was a known fact that he did not have a dog yet he still persisted that he was looking for a dog.

It is worth pointing out that there is remarkable similarity in the manner in which the three counts were committed. Concerning similar fact evidence, this Court in *S v Banana* 2000 (1) ZLR 607 (S) referred to the case of *R v P* [1991] 3 All ER 337 (HL) in which at 348 a-b Lord Mackay had this to say:

“... the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it, notwithstanding the prejudicial effect of admitting the evidence.”

And in the same judgment in *S v Banana supra* at 384 G-H GUBBAY CJ made the following remarks,

“The significance of this re-statement of the principle is that it focuses attention on the concept that admissibility turns on probative weight which, like the question of corroboration, is a matter of logic and common sense, and not of legal doctrine. Whether, of course, the evidence has sufficient probative value to outweigh its prejudicial effect depends on the facts of each case and is necessarily a matter of degree and value judgment.” In line with the above case, the corroboration and similar fact evidence provided outweighs its prejudicial effect and that the evidence is relevant and is of sufficient probative force to warrant its reception.”

Regarding similar fact evidence, PJ Schwikkard and SE Van Der Merwe in *Principles of Evidence*, 4<sup>th</sup> ed. at p 76 state the following:

“Similar facts are therefore facts that are directed at showing that a party to the proceedings (usually the accused) or a witness in the proceedings (such as a complainant) has behaved on other occasions in the same way as he is alleged to have behaved in the circumstances presently being considered by the court.”

And at p 77 the same authors state that:

“Similar fact evidence is generally inadmissible because it is irrelevant. It will be admissible only when it is both logically and legally relevant. When it is found to be sufficiently relevant it may be admitted in both civil and criminal proceedings. It is most frequently used by the state against the accused; however, there is nothing prohibiting the accused from seeking to have similar fact evidence admitted in his or her defence.”

It is also important to note that the particulars of the allegations are consistent in all of the three complaints. The three complainants were teenage boys, were in the care of the appellant at that particular time, it was at night and they all testified that the appellant placed his hands in their jeans and touched their groin area. In J and T’s evidence, they both stated that the appellant would thereafter behave like he had not performed any act on them. This is similar fact evidence that ought to be applied. It reflects and identifies the appellant with a characteristic hallmark that is exceptional to his behaviour.

Counsel for the appellant also argued that the court *a quo* erred in finding the evidence of R credible given the numerous inconsistencies in his testimony particularly when he said that he did not want to see the appellant but yet thereafter accompanied him on tours with his family to South Africa, Portugal and the United Kingdom for several years thereafter. This argument cannot stand at all. This is because the appellant confirmed that R's mother accompanied him on these trips. In addition, the fact that the appellant and R remained in contact is not proof that he is not guilty of the crime.

Mr *Nyoni* argued that Theresa Van Wyk corroborated the appellant's *alibi* when she testified that she was still in occupation of the house in question in December 2002 thereby, discrediting Ryan's claim that he was indecently assaulted between October and September 2002.

Theresa Van Wyk's evidence is not enough to exonerate the appellant. It is pertinent to note that cognisant of the uncertainty of when the offence was committed on account of the passage of time, the charge against the appellant was framed with that in mind. R himself appears to have been unsure of when the incident took place. The best he said was that it happened after he had enrolled at St John's College around the end of October 2002. This must be viewed against the fact that the appellant did not dispute that there was a time R spent the night at the residence in question. It is also common cause that at the material time the house was sparsely furnished as the appellant had recently moved in. R testified that they slept on mattresses which were on the floor. What ultimately stands out is the fact that the appellant was heard apologizing to R after the incident. The apology has no other explanation other than that it was linked to the said sexual assault.

There was also the argument that the court *a quo* erred by overlooking the length of delay before any police report was made and this proved conspiracy on the part of the complainants. Concerning the issue of delay in reporting sexual assault TSANGA J in the case of *S v Musumhiri* 2014 (2) ZLR 223 (H), at 226 had this to say:

“Research done in Zimbabwe through WLSA on cultural inhibitors to reporting gender-based violence and sexual assault indicates that silence cannot be equated with acquiescence. Fear of lack of support from the family, fear of the consequences that might befall the complainant, which may include being totally blamed for the event, being thrown out of the home...”

J testified that the reason why he did not report the matter was because he was only 15 years old and was scared that no one would believe him. Similarly, T and R, just like J also testified that they were scared to report the incident. In the case of R, he was 14 years old and the report was made when he was 18. These explanations by the complainants were reasonable considering that they were still young and they had a special relationship with the appellant.

The appellant has argued that the court *a quo* misdirected itself in failing to consider the import of the Labour Court judgment in case no LCH/H/246/2007 which set aside the disciplinary proceedings in which the Appellant’s employer St John’s College sought to dismiss him. This argument cannot stand at all because there is a clear distinction between the charges of indecent assault and the disciplinary charges. A criminal court is not bound to consider evidence in a civil case in determining the guilt of the accused. The Criminal Procedure and Evidence Act [Chapter 9:07] does not provide for the admissibility of such evidence.

In addition, the appellant’s argument that the allegations are as a result of conspiracy against him ought to fail. The fact that the allegations came from three different complainants

who were indecently assaulted at different places and on different dates is one that would ordinarily raise suspicion on such coincidence.

Therefore, with regard to the above, we are of the view that the evidence of the three boys was enough to prove beyond a reasonable doubt that the appellant was guilty of the crimes involved and therefore, dispels any claim that the allegations were as a result of conspiracy.

### **DISPOSITION**

The case of *Smyth v Ushewokunze supra* relied upon by the appellant is distinguishable from the present case. Further, the appellant sought to assert his right to a fair trial at a late stage when he could have immediately asserted his rights when he became aware of the alleged infringement. Instead, the appellant waited for a conviction and after it became apparent that the conviction would not likely be overturned, he sought to claim an irregularity which occurred before the commencement of the proceedings. In addition, corroborative evidence played a very essential role in proving the guilt of the appellant beyond a reasonable doubt. Therefore, there is no merit in the appeal.

In the result, it is ordered that the appeal be and is hereby dismissed.

**BHUNU JA** : I agree

**CHIWESHE JA** : I agree

*Venturas & Samkange*, appellant's legal practitioners

*National Prosecuting Authority*, respondent's legal practitioners