

ABEL MASHINGAIDZE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & ZISENGWE J
MASVINGO, 25 July 2022

T.T Musina, for the appellant

Mr E. Mbavarira, for the respondent

Criminal Appeal

MAWADZE J: On 29 June 2022 after hearing submissions by counsel we proceeded to dismiss the appeal in respect of the conviction and partially acceded to the appeal in respect of the sentence *moreso* as the state (the respondent) had made concessions in respect the appeal against the sentence. We gave our reasons for doing so *ex-tempore* and granted the following order;

"IT IS ORDERED THAT

- 1. The appeal in respect of conviction be and is hereby dismissed.*
- 2. The appeal in respect of sentence be and is hereby partially upheld and the sentence of the court a quo is set aside and substituted with the following;
"13 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition accused does not commit within that period any offence of a sexual nature for which accused is sentenced to a term of imprisonment without the option a fine.
Effective: - 10 years imprisonment".*

During the hearing of the appeal the appellant was represented by *Mr T.T Musina* of Garikayi & Company Legal Practitioners. However, 16 days later on 15 July 2022 I received correspondence from a different law firm being Mutendi, Mudisi & Shumba who requested to be furnished with written reason for the order we granted on 29 June 2022. Filed of record was an assumption of agency by the same legal practitioners dated 15th July 2022.

I now proceed to give the reasons requested;

The then 24-year-old appellant and a student at Chibero Agricultural college was convicted of rape as defined in section 65 (1) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*] by the learned regional Magistrate sitting at Masvingo on 6 January 2022. This was after a fully contested trial in which the appellant even sought to be discharged unsuccessfully at the close of the prosecution in case as provided in section 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The charge is that on 22 January 2021 and at Batsire Village, Headman Masunda, Chief Chivi, Masvingo the appellant raped a 59-year-old complainant one Dubekile Kutse.

In brief the facts upon which the conviction is premised are as follows;

On 22 January 2021 the complainant was walking alone using a path in a bushy area en route to Chibi turn off at around 0700hrs where she intended to board a bus to visit a sick relative. The complainant was from her home. Along the said foot path, she met the appellant who was a stranger to her. As an elderly woman she greeted the appellant who did not respond. Instead, the appellant turned and started to follow her. Upon catching up with her the appellant produced a knife and grabbed the complainant. The complainant was then forced off the path into the bush at knife point. She was then lifted up and after a short distance was dropped on her back. Her protestations and resistance were met with more violence as she was slapped. The okapi knife was put on her neck as she helplessly lay down. The appellant then took her cash R200, US \$10 and Zimbabwean \$165. The accused then undressed and forcefully had sexual intercourse with her until he ejaculated. After the rape the complainant was released. She proceeded to Chibi turn off some 2km away where she met one Never Manyika is a businessman at Chibi turn off. The complainant described her assailant to Never Manyika. As result the accused was arrested two days later at Chibi turn off on 24 July 2021.

The appellant's defence is two fold. It is of an *alibi* and mistaken identity. He also puts into issue the identification parade held after his arrest. Indeed, in the course of the trial all manner of issues were raised.

In relation to the *alibi* the appellant said he left Chibi turn off in the early hours of 21 January 2021 and only returned to Chibi turn off on the day he was arrested [24th or 25 January

2021]. In essence therefore he said he was not within the area the complainant was raped on 22 January 2021.

The defence of mistaken identity is not raised with clarity especially in the defence outline. It can be inferred from how the complainant and other state witnesses were cross examined. It is also linked to the *alibi* as the factual issue that the complainant was raped is not contested.

The propriety of the identification parade was also raised vigorously. The appellant said the complainant saw him a day before the identification parade was held at the police station whilst in handcuffs and that he was jeered at by the complainant's relatives as a rapist. In fact, the appellant said the police, before the superfluous identification parade the next day had already asked the complainant a day before if the handcuffed appellant was her assailant which she confirmed. The appellant said another impropriety was that he was not allowed to change his attire before the identification parade as the complainant had seen him the previous day in handcuffs. Lastly the appellants said the participants in the identification parade comprised of some of the people who had mobbed him and attacked him at Chibi turn off upon his arrest and they were all known to the complainant. Needless to say this later allegation was abandoned in the course of the trial and is not borne by the evidence on record.

The court *a quo* disbelieved the appellant. He was convicted and sentenced 16 years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions of good behaviour hence the effective sentence was 13 years imprisonment.

The learned regional Magistrate gave a well-reasoned and detailed judgement. He was alive to the issues in contestation which had to be resolved and the applicable law. The reasons for judgement identifies facts in issue and those which are common cause. The testimony of the witnesses was analysed on item (7) on page 12 of the record of proceedings. The issue of possible mistaken identity was dealt with in meaningful detail. Thereafter findings of fact were made in the context of the case. This informed the guilty verdict.

The appellant was nonetheless aggrieved in respect of both the conviction and the sentence hence this appeal. The grounds of appeal are couched as follows;

“AD CONVICTION

- 1. The court erred in finding that the Appellant had been properly identified by state witnesses.*
- 2. The court erred in finding that the state witnesses were credible witnesses.*

3. *The court erred in finding that the state had proved its case beyond any reasonable doubt in that the Appellant had committed the alleged offence of rape, yet there was no evidence proving the guilt of the Appellant (sic).*

AD SENTENCE

4. *The trial magistrate erred by giving such severe penalty against the appellant as to induce a sense of shock for the reasons the appellant being a youthful first time offender.*
5. *The learned magistrate erred on harshly penalising the appellant on the basis of the prevalence of the offence.”*

The grounds of appeal in respect of the conviction are not precise, concise and succinct. For example, which state witnesses are said to have improperly identified the appellant. In what respect was each or all state witnesses deemed incredible? The third ground was simply a repetition of the first ground of appeal.

The question of sentence should not detain this court. It was resolved in the appellant's favour. We grudgingly acceded to the concession by the state on account of the fact that the appellant is a youthful first offender who is a student. Besides this we would have upheld the sentence by the court *a quo* in light of how the complainant was violently raped at knife point at her advanced aged.

The state relied on the evidence of the complainant Dhubekile Kutse, a local businessman at Chibi turn-off Never Manyika; Assistant Inspector Sidney Ranganai who carried out the identification parade and the investigating officer one Annah Homodza.

The accused gave evidence and called his mother Prisca Mutimukulu to testify.

Before I deal with the grounds of appeal it is prudent to summarise the complainant's evidence in respect of how the rape was perpetrated. This would contextualise the whole matter.

The complainant said when she was approached at knife point the appellant was not wearing any mask. She was grabbed and dragged into the bush for 10-15 metres as she screamed but was ordered to keep quiet. She said she was lifted further into the bush at knife point and laid down on her back. The appellant is said to have sat on her as she pleaded as to how the appellant at his youthful age could engage in sexual intercourse with the complainant old enough to be his mother and well after menopause. She said the appellant retorted that he preferred older women.

The complainant said when she protested, she was assaulted. She failed to resist in any meaningful manner, as she was strangled and a knife put on her neck. Her pants and the blouse were removed.

Her skirt was flipped up. She was then ravished. After the rape the said appellant took her mobile handset and when he was told it was not functioning, he threw it back together with the complainant's hat. She was ordered to then take a different route from the assailant.

The complainant said she described the assailant to Never Manyika both in relation to his facial appearance and the attire. The attire included a black jacket with a hood, blue work-suit trousers with reflectors and tennis shoes. The complainant was adamant that she could identify her assailant by his facial appearance being light in complexion, medium height, small mark below left eye and black mark on forehead.

At the identification parade the complainant said she identified the appellant as her assailant because of his facial appearance, his physique and that her mind literally captured the appellant's face during the rape.

In cross examination she said as an illiterate person she estimated that she spent two to three hours with the assailant during her ordeal. She disputed that she was influenced to identify the appellant at the identification parade.

I now turn to the grounds of appeal.

a) The credibility of state witnesses

The credibility of witnesses is generally within the province of the trial court. The only exception is that an appellant court may disagree with the trial court's assessment of credibility if such assessment of evidence on record and all circumstances of the case inclusive of inferences and probabilities the conclusion of the trial court can not be supported. See MB Ziko Pvt Ltd & Anor v Cestraron Investments (Pvt) Ltd & Anor 2008 (2) ZLR 1 (S)

The question of demeanour remains an elusive factor *albeit* important. It also affects the credibility of the witnesses. In my view the best approach is to contextualise the demeanour of all witnesses taking into account the circumstances of each case.

As already said the fact that the complainant was raped is not in issue. She made an immediate report whilst crying to the first person she would have been expected to make a report. Her body was covered in dust and grass.

Never Manyika simply received the complainant's report. He harboured now ill motive against the appellant. The assailant's appearance and attire was described to him. As he explained Chibi turn off is a small place and virtually as people know each other. He had seen the appellant previously few days before the rape. Three days after the rape he again saw the appellant who indeed matched the complainant's description and he caused his arrest.

Assistant Inspector Ranganai fully appreciated how to carry out an identification parade. He harboured no ill motive against the appellant. All manner of questions were put to him and were all well answered. He was clear the complainant made an independent identification of the appellant.

The investigating officer Anna Homodza said the complainant was clear she could identify her assailant facially and described his features to her and his attire. She did not take part in the identification parade of the appellant.

Prisca Mutimukulu the appellant's mother had problems in supporting the appellant's *alibi*. It is common cause the appellant was at Chibi turn off a day before the rape and again few days after the rape. The appellant is her son and she has cause to try and protect him. The court *a quo* disbelieved her and gave reasons.

I therefore find no misdirection in how the court *a quo* assessed the credibility and the demeanour of the witnesses.

b) Mistaken Identity

In rape matters the general rule is that where the assailant is a stranger to the complainant visual identification evidence should be approached with requisite caution. The reason for this is clear. Unlike the Pope we are all fallible. One can be genuinely mistaken.

The proper approach is to ensure that the witnesses' evidence on visual identification is clear and credible. It should be clear on any features, marks or

other peculiarities upon which such identification is based. The bottom line is that the danger of mistaken identity should be eliminated even in circumstances where a witness maybe truthful because as already said a witness may be genuinely mistaken. See *Makoni v State SC 67/89*.

The question is how this is achieved in practical terms. The courts have endeavoured to assist in this regard by outlining some of the factors which are useful. See *State v Ndlovu & Ors 1985 (2) ZLR 261 (S)*; *State v Nkomo 1989 (3) ZLR 117 (S)*.

Again the threshold of burden of proof remain proof beyond reasonable doubt. See *State v Chimusoro & 2 Ors HH 669/15*.

There can not be an exhaustive list of factors to be considered but they include *inter alia*

- i) amount of time the witness had the accused under observation. A fleeting glimpse maybe misleading.
- ii) the distance between the witness and the accused at the time of observation. The bigger the distance the chance is that the identification may be flawed.
- iii) the lighting conditions at the material time. If the lighting is bad there is more danger of mistaken identity.
- iv) whether any objects impaired the vision of the witness. If there is no such obstruction the witness is most likely to properly identify the accused.
- v) whether the witness's eye sight is good or bad. This is self-explanatory. A poor eye sight may be unreliable.
- vi) whether the witness was able to see properly and clearly the face and the stature of the accused. If indeed accused's face is partially covered or fully covered such an identification becomes unreliable.
- vii) whether an accused is a stranger. A familiar person poses no problem unless a witness in simply acting in bad faith. For a stranger caution should be exercised to eliminate genuine mistaken identity.

- viii) whether there are any peculiar features on the accused's face or physical appearance like scars, disability gait or voice attire etc.
- ix) the obtaining circumstances or situation.
- x) results of a properly carried out identification parade.
- xi) The accused's own evidence on why the identification may be unreliable.

As already said the above list is by no means exhaustive but helpful. Each factor should properly weighed and considered in the circumstances of each case.

In *casu* the trial court was alive to the need for caution and some of the relevant factors were properly considered. The complainant is a mature 59-year-old woman. The rape occurred in broad day light. Her eye sight is not faulty in any way. The face of the assailant was not concealed. The complainant was in close proximity with the assailant despite that he was a stranger. This was from the time they met, the time she was dragged and lifted, the time he sat on her during the forced sexual assault as he lay on top of her and at the time they separated. The complainant was able to see facial appearance of the assailant and his attire which she described to both Never Manyika and the investigating officer Annah Homodza. There are also peculiar and general features she observed on his face like healed pimple below the eye and his complexion. At the identification which was properly carried out she picked on the appellant despite his attempt to disfigure his face by twitching his face or mouth. It is clear that the complainant spent a fairly long time with the assailant and the danger of false incrimination is far fetched.

The accused's evidence is improbable. He literally threw the kitchen sink at the court during the trial. He raised all manner issues. What remains is that he was around Chibi turn off at the material time and was a frequent visitor of that place. His *alibi* was deemed to be false.

The court *a quo* did consider most of these factors correctly. I find no misdirection at all. The identification parade was properly carried out See Sate v Kambarami 2014 (1) ZLR 615 (H).

The appellant was properly convicted.

This explains the basis upon which we dismissed the appeal in respect of the conviction. As already explained the appeal in respect of the sentence partially succeeded.

ZISENGWE J agrees.....

Garikayi & Company, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners