

TAWANDA NYAMANDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 10 May 2021

Criminal appeal

A. Nyamupfudza, for the appellant
R. Chikosha, for the respondent

ZHOU J: This is an appeal against both conviction and sentence imposed upon the appellant by the Magistrates Court following a charge of aggravated indecent assault as defined in s 66 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Appellant denied the charge in the court *a quo*.

The allegations against the appellant are as follows. He is the father of the complainant, the latter having been borne out of a previous relationship of the appellant and complainant's mother. On 14 October 2019 appellant entered the complainant's bedroom, fondled her and inserted his fingers into the vagina. The insertion of the fingers into the vagina constitutes the basis of the charge of aggravated indecent assault.

The appellant denied that he fondled the complainant, and further denied inserting his fingers into her vagina.

The learned Magistrate noted that the versions of the defence and the state were mutually destructive, hence the matter had to be determined on the basis of the credibility of the witnesses. He found that the complainant was indeed a credible witness after considering the timeous manner in which she reported the alleged assault to her church pastor, the second state witness. But this was not the basis upon which appellant's credibility was being challenged. The challenge to her credibility was based on some aspects of her character which put her to a bad relationship with the appellant. The first such aspect was that the complainant was in the habit of stealing money and other items from the family home. This allegation was supported by the fact that complainant did

steal US\$50 from the appellant's pocket on the very same morning that she made the report of aggravated indecent assault. Her explanation about the theft is incoherent. In some instance she suggests that she wanted to use the money to run away, in another instance she suggests that she took the money so that if the appellant confronted her about it she would raise the issue of the assault. Both explanations do not make sense. In any event, she went on to spend part of the money, thereby defeating her own explanations for taking the money.

The other aspect of the complainant raised to impugn her credibility was that she was a naughty girl who slept away from home without the consent of her parents. This was confirmed by an incident in which she was disciplined by the appellant for that misdemeanor. Appellant suggests that this could possibly explain her motivation to make the allegations. Significantly, the complainant herself said she did not really intend to make a police report but was prepared to take an apology from the accused. This does not make sense given that she had already raised the issue with two strangers. If she had in fact been violated as she suggested she would have readily wanted the law to take its course.

But the matter does not just turn on credibility. The *actus reus* itself was not proved. The learned magistrate failed to address this critical aspect. In the absence of evidence that fingers were inserted into her sex organ there would have been need for corroboration. Such corroboration was lacking in this case. The medical report states that there was no visible evidence of penetration. The hymen was intact. Given the struggle described by the complainant, and the mention of appellant's long finger nails, it is inconceivable that no mark was left at all on any part of her body, particularly the part which she alleges was penetrated.

Equally, the Pastor, Nyasha Mubika, to whom the complainant made the report, had no recollection of the mentioning of penetration of her vagina using his fingers. Since this forms the basis of the charge it would have been the most significant aspect to mention. Instead, Mubika was told of fondling of the breasts and caressing of the rest of the body. This failure to mention the penetration is a fatal deficiency in the evidence of the complainant.

There is a further aspect of the case for the prosecution which causes anxiety but which the learned Magistrate in the court *a quo* did not consider. It is the complainant's and Mubika's evidence that the first person to whom the complainant made the report was a male adult who then accompanied her to the Pastor. Nothing else is said about this potentially critical witness, and why

he was not called to testify. This severely weakens the case of the State and makes the conviction unsafe.

The fact that a police station was just close by when the complainant in the company of this male adult chose to go to the Pastor is itself an issue that ought to have been interrogated.

In all the circumstances, this court finds that on the basis of the complainant’s lack of credibility and the absence of corroboration, the conviction was unsafe. This is particularly so given the history of the relationship between the appellant and the complainant, and the not so remote possibility that her mother might have influenced her. That the complainant was sensitive to the relationship between her father and her mother is evident from her quick mention of the fact that he had not paid lobola for her. This, as the record shows, was a bone of contention between the appellant and complainant’s mother.

In the result, this court makes the following order;

1. The appeal succeeds
2. The judgment of the Magistrates Court in terms of which the appellant was convicted is set aside and the following is substituted:

“That the accused be and is hereby found not guilty and acquitted.”

CHIKOWERO J agrees

Nyamupfukudza & Partners, applicant’s legal practitioners
National Prosecuting Authority, State’s legal practitioners