THE STATE

Versus

JULUMBA NDEBELE

HIGH COURT OF ZIMBABWE
KAMOCHA AND MATHONSI J J
BULAWAYO 24 FEBRUARY AND 3 MARCH 2011

C. Dube, for the Appellant
T. Makoni, for the Respondent

CRIMINAL APPEAL

MATHONSI J: At the conclusion of submissions in this matter we dismissed the appeal against both conviction and sentence and said our reasons for dismissing it will follow. These are the reasons.

The Appellant was convicted by the Regional Magistrates Court on 3 June 2010 of 3 counts of rape and 2 counts of aggravated indent assault and on 7 June 2010 sentenced to 18 years imprisonment for the 3 counts of rape and 15 years imprisonment for the 2 counts of aggravated indecent assault. Of the total 33 years imprisonment, 8 years imprisonment was suspended on the usual conditions.

He appealed against conviction and sentence in a lengthy notice of appeal the import of which is that the state failed to prove its case beyond a reasonable doubt as the state witnesses failed to positively identify the perpetrator while on the other hand the Appellant had a good alibi witness who placed him elsewhere at the time that the offence was committed. On the sentence the Appellant grounded his appeal on the fact that the court *a quo* erred in treating the 3 counts of rape separately from the 2 counts of aggravated indecent assault when they constituted a single criminal transaction.

The facts are that on the afternoon of 30 December 2009 the 2 complainants, who were heavily pregnant at the time, with the 1st complainant 9 months pregnant, were visiting their aunt who stays in Mathe village in Tsholotsho. They were walking in a bushy area in the company of their 9 year old cousin brother who is the son of the aunt they were visiting. The 2 complainants do not ordinarily stay in that area coming as they do from Gwayi 2 area in Nyamandlovu district. They therefore did not know the locals in that area.

As they made their way through the bushy area, they met a man carrying a stick who asked if they had seen his cattle before walking with them for a distance. Along the way, the

man got hold of the 9 year old boy, ordered the complainants off the road into a bush and when they resisted he assaulted them with a stick resulting in them complying.

Once in the bush, the man slapped the 1st complainant twice and forced her to lie down ordering her to remove her panties. He ordered the 2nd complainant and the 9 year old boy to sit down nearby as he raped the 1st complainant once. When the man finished raping the 1st Complainant the first time, he ordered the 2nd complainant to suck his penis before raping the 1st complainant the second time.

When the man finished raping the 1st complainant the second time, he demanded that she should thank him for what he had done which she did. He then ordered the second complainant to suck his penis the second time before ordering the 1st Complainant to bend over and raping her for the 3rd time. All this happened in the full view of the 9 year old boy who had been ordered to sit down a short distance away.

After the man had satisfied himself he returned to the road to check on passersby and finding none he directed the 3 victims to return to the road and resume their journey as he proceeded in a different direction. The complainants proceeded to their aunt's homestead where they awaited her return and made a report of the rape. The 2 complainants described the assailant and the clothes he was putting on to their aunt who immediately commenced investigations to establish the identity of the assailant. This led to the arrest of the Appellant.

At the trial, it was not in dispute that the complainants had been abused in the manner set out above. What was placed in issue was the identity of the assailant. While accepting that the 2 young ladies had spent a considerable amount of time with their assailant as to be able to describe him and his clothing, the trial magistrate was swayed more by the evidence of the 9 year old boy MN.

That witness was emphatic in his identification of the Appellant as the assailant. When giving his evidence in chief, the dialogue between MN and state counsel went like this at page 32 of the record.

''Q: How were you able to tell he is the one you met?

A: I know him.

Q: How?

A: Well.

Q: Did you recognise any features?

Q: No, I saw him in the car.

Q: When?

Q: He was driving a car but on the day we met him he was not driving.

Q: You saw him driving before?

A: Yes.

Q: Where?

A: I do not know where he was going.

Q: How long before going to Mathe had you seen him in motor vehicle?

A: Long time.

Q: How many times had you seen his motor vehicle?

A: Many times.

Q: After bush incident did you see him?

A: No.''

During cross examination defence counsel tried hard to discredict the boy. The dialogue between them went like this:

''Q: You said you know accused?

A: Yes.

Q: Who is he called?

A: Julumba.

Q: Do you stay in same area?

A: Yes.

Q: By which child is he called?

A: I do not know.

Q: How do you refer to his homestead?

A: At SaJulumba.

Q: You mean his father?

A: Yes.

Q: That is his father's homestead?

A: Yes.

Q: Do you know his homestead?

A: No.

Q: How did you get to know him at his home?

A: I saw him at his home.

Q: You mean SaJulumba's homestead?

A: Yes.

Q: Were you then going to school?

A: Yes.

Q: What type of car was he driving?

A: White.

Q: Where is the car?

A: Fana is the one driving it.

Q: Would you say it is his car?

A: It is not his car.

Q: Whose is it?

A: I do not know.

Q: When he met you with your sisters, you already knew him?

A: Yes.

Q: Even with name?

A: Yes.''

The trial magistrate believed MN. She analysed his evidence carefully and stated at pages 51 to 52 of the record as follows:

> ''M --- stayed in this neighbourhood unlike his sisters. He said he knew Julumba's father's place as the homestead where Julumba came from. He said the homestead is called SaJulumba's. This witness said he met accused a long time before this day when he saw him driving a white motor vehicle. He said this motor vehicle was not Julumba's. That it was driven by Fana and Julumba would be with Fana and others. He said he knew him and saw him abuse his sisters whilst he sat there. That he had walked for some distance before abuse.
> What weight can this evidence be given by court? The defence counsel quoted a case mentioning that court should apply caution when dealing with children's evidence. In this case, it was only brought out by this witness that accused drives a white car. This evidence was not disputed or challenged. It was again through this witness that Fana's name came out. This again came out to be true and not challenged. This witness mentioned that Julumba's father's homestead is identified by Julumba's name. This was evidence brought out by the young child and it was not disputed or challenged. The child was asked if he knew Julumba's homestead and answered in the negative ---. Can the court believe the 9 year old's evidence on identification? The Nkomo case (*S v Nkomo* 1989 (3) ZLR 117 (S)) said, if there is corroboration to an identification court can believe it. The evidence of the white motor vehicle that accused drives, the accused moving with Fana and the father's homestead can these be treated as corroboration in this case. The answer is yes. It can be taken to be independent evidence showing that the witness knew the person he was talking about. Will it matter now that the evidence was led by a child? The answer is no.''

In my view the trial magistrate applied her mind carefully and warned herself against the dangers of relying on the uncorroborated evidence of a young witness. She found corroboration of that evidence and believed it. She then proceeded to conclude that the state had proved its case beyond a reasonable doubt. In *S v Nkomo* 1989 (3) ZLR 117 (S) at 121C, McNally JA stated that good identification does not need corroboration or support, but poor identification does. In the present case, although MN's identification of the Appellant was, in my view good identification, as the witness had known the Appellant for a long time, the trial court stretched backwards to find corroboration.

I am unable to find any misdirection on the part of the court *a quo* in respect of the conviction of the Appellant. It made findings on credibility of witnesses which the appellate court cannot interfere with in the absence of a misdirection.

Regarding sentence, Mr Dube who appeared for the Appellant could not advance any meaningful argument. In *Mkombo v the state* HB 140/10 (as yet unreported), I stated at page 3 as follows;

> ''The position of our law is that in sentencing a convicted person, the sentencing court has a discretion in assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and in aggravation. For an appellate tribunal to interfere with the trial court's sentencing discretion there should be a misdirection. See *S v Chiweshe* 1996 (1) ZLR 425 (H) at 429D; *S v Ramushu & others* S 25-93. It is not enough for the appellant to argue that the sentence imposed is too severe because that alone is not a misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence.''

I abide by that pronouncement. I am again unable to find any misdirection in the sentence imposed. This was an extreme case of rape and aggravated assault where the Appellant exhibited callousness of the highest order and appeared to derive sadistic pleasure in abusing heavily pregnant women in the full view of a 9 year old child. He got his just deserts, as they say.

It was for these reasons that the appeal against both conviction and sentence was dismissed.

KAMOCHA J ..... I agree.

Lazarus & Sarif, Plaintiff's Legal Practitioners
Criminal Division, Attorney General's Office, Respondent's Legal Practitioners