RABSON MATIMBIRE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND CHEDA JJ
BULAWAYO 21 & 31 MAY 2012

Mrs N. Tachiona for appellant
Miss A. Munyeriwa for respondent

Criminal Appeal

NDOU J: The appellant appeared before the court of a Regional Magistrate sitting at Gweru facing a charge of rape as defined in section 65(1) of the Criminal Law [Codification and Reform] Act (Chapter 9:23). He pleaded not guilty to the charge but was convicted. He was sentenced to 10 years imprisonment of which 3 years was suspended on the usual conditions of good future behaviour. Dissatisfied with his conviction the appellant noted an appeal against the same. The salient facts of the matter are the following. At the time of the alleged offence, the appellant was a headmaster at Umlala Park Secondary School and the complainant was a 15 year old pupil at the school. The complainant was a boarder. On the day in question, 9 October 2007 the appellant went to the girls' quarters at around 1900 hours. He requested some of the girls to accompany him to the boys' quarters where there was some problem. The appellant is alleged to have told the complainant to remain behind at the girls' quarters guarding their belongings whilst he went to the boys' quarters in the company of three girls. It is alleged by the state that after about 10 minutes the appellant returned alone and called the complainant to follow him and she obliged as she thought he was taking her to the boys' quarters. As the appellant took a different route she asked him where they were going to and at that moment the appellant grabbed hold of her by hand and pulled her to his room at the school. When they got into the room the appellant immediately locked the door and sat her on a bed and made advances to her. He then fondled her breasts and buttocks. The complainant tried to resist but the appellant overpowered her. He removed her pants and then raped her. The complainant is said to have cried out but the appellant continued with his act. The complainant bit the appellant resulting in the appellant stopping. He opened the door and told her, leave and go back to the girls' quarters and promised to give her something on Thursday if she did not tell anyone about the incident. The complainant went back to the girls' quarters and slept and told her friend Sithulisiwe Sibanda about the rape the following

morning. The latter advised her to report the matter to her parents and she took that advice. She went home and told her mother about the incident resulting in a report being made to the police.

The appellant's defence is that on the fateful day he found the complainant and the head boy standing by the anthill at night. He called them to his office for an explanation as the complainant had previously been involved in misconduct, he told her to go home and bring her parents for her disciplinary problems to be discussed with them.

There being no eye witness to the alleged rape, it is a question of the complainant's word against that of the appellant. That being the case, the matter fell to be determined squarely on the basis of the credibility of the witnesses. The trial court believed the complainant and the other state witness and declined to accept evidence of the appellant and his witness. As alluded to above, aggrieved by the conviction, appellant approached this court for redress. The approach to be adopted is such an appeal was clearly outlined by ZIYAMBI JA in *Chimbwanda* vs *Chimbwanda* SC-28-02. The learned Judge of Appeal had this to say –

"It is trite in our law that an appellate court will not interfere with findings of fact made by the trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its advantage point of having seen and heard them – (see *Hughes* v *Graniteside (Pvt) Ltd* SC-13-84). The exception to this rule is where there has been misdirection or a mistake of fact or where the basis the court *a quo* reached its decision was wrong." See also *Soko* v *S* SC-118-92 and *Nyirenda* v *State* HB-86-03.

So in this case we have to determine whether there is something grossly irregular, a misdirection or a mistake of fact. The appellant attacks the state witnesses' testimony on the basis that there are inconsistencies on the material points of facts. Ms *Tachiona* has pointed out a number of these inconsistencies in her oral submissions. The same inconsistencies were also highlighted in the notice of appeal and the heads of arguments. The trial magistrate did not apply his mind to these inconsistencies in his judgment. Some of these inconsistencies are material. Further, and more importantly, the trial magistrate did not address the issue raised by the appellant and the defence witness that the complainant was a delinquent at school who had a disturbing disciplinary record. The evidence of the defence witness that she had been sent home on account of her delinquency and ordered to come back with her parents for a hearing was not seriously considered. The witness, Marko Chiyangwa, evinced that teachers had a problem with the complainant. She would disappear from the school. She would be collected from school by a car. She, as a result, was not performing well. On two occasions her parents had to be summoned to school on the matter. Her father attended and her problems were discussed. It is apparent that her problems were to do with boys. Even the medical report

evinced a young girl who was sexual active. According to Dr Maponga, who examined her complainant two days after the alleged rape she admitted to him that she had had sexual intercourse twice in April with her boyfriend. Her examination was easy and she had no injuries. On remarks as to whether penetration was effected he/she commented as follows –

> "Not sure but possible victim had previous sexual encounter"

It is trite that the onus is on the state to prove its case and not on the accused to prove his innocence. There was no onus on the appellant to establish some defence. Once there was some material facts, whether adduced by the appellant or emerging from prosecution case, suggesting that a defence may be available the court *a quo* had to consider that defence. *S* v *Mapfumo and Ors* 1983 (1) ZLR 250 (S) at 253. *In casu*, there is evidence of an independent witness Chiyangwa of the complainant's delinquent behaviour. She had been sent home more than once to bring her parents. I am not saying a delinquent girl cannot be raped. All I am saying is that the trial court should have examined all evidence adduced carefully. As pointed out in *S* v *Banana* 2000(1) ZLR 607 (S) at 613-614 –

> "Despite the abandonment of the cautionary rule, however the courts must still carefully consider the nature and circumstances of alleged sexual offences." – See also *Katsiru* v *S* HH-36-07.

In his judgment the trial magistrate seems to have reversed the onus and placed it on the appellant to prove his innocence. As alluded to above, the trial magistrate did not carefully examine all the evidence adduced by all the witnesses. He dwelt at some length on the inconsistencies by the appellant and his defence witness. He subjected such evidence to microscopic scrutiny yet he did not place the prosecution testimony on the same standard. If he had done so, he would have seen the glaring material inconsistencies in the said evidence. It is not sufficient to make findings that I believe witnesses XYZ and do not believe ABC. All the evidence should be carefully examined and a determination made whether the state had proved its case beyond a reasonable doubt. If there is a doubt, the accused should be given benefit of that doubt. In this case, it was not safe to convict the appellant in the face of such glaring inconsistencies in the prosecution case. The appellant should have been given the benefit of doubt.

Accordingly, the appeal against conviction is upheld and the conviction is quashed and sentence set aside.

Cheda J …… I agree

Gundu & Dube, c/o Dube-Tachiona & Tsvangirai, appellant's legal practitioners
Criminal Division, Attorney-General's Office, respondent's legal practitioners