

ASHWELL MLOTSHWA

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO & MAKONESE JJ
BULAWAYO 28TH OCTOBER & 12TH DECEMBER 2013

Mr Chamunorwa, for the appellant
Ms Ndlovu, for the Respondent

CRIMINAL APPEAL

Moyo J: The appellant was charged and convicted by the regional court of contravening section 65 of the Criminal Law (Codification and Reform) Act (Chapter 9: 23). He was sentenced to 18 years imprisonment of which 8 years was suspended on condition of good behaviour.

The allegations against the appellant are that on the 22nd of January 2011 at around 07:15 hrs, the complainant was in a spare bed room when the appellant (who is complainant's uncle) came into the room carrying a stick and he said he wanted to show her something. The appellant then proceeded to close the main door and he forced complainant to remove her clothes and pushed her onto the bed.

The appellant then removed his trousers which was the only thing he was wearing. He then forcibly removed complainant's pant. The appellant then forced complainant's legs apart and had sexual intercourse with her once without her consent.

The appellant was interrupted by a knock on the door and he then let go of the complainant. He now appeals against both conviction and sentence. In his grounds of appeal, appellant states that:-

- a) the court *a quo* erred in finding that the complainant was a credible witness when she had contradicted herself on issues regarding the material whereabouts of the other family members on the day in question.
- b) that the court *a quo* erred in finding that the complainant had no motive to fabricate her evidence against the appellant.
- c) That the court *a quo* did not sufficiently attach weight to the fact that complainant admitted to delinquent behaviour and that she had a love affair at

the time with someone.

- d) That the court a quo did not adopt a cautionary approach yet the state was relying on the single evidence of a minor.
- e) That the court a quo erred in finding the defence witnesses unreliable or alternatively that the court did not attach sufficient weight on the evidence of the defence witness.

Assessing the complainant's version of events, one gets an impression that the version is plausible and convincing, she gives a general impression of wanting to tell the truth. This is so because the complainant admits even those things that paint a bad picture on her part, for instance when she was asked under cross-examination that she had once been guilty of delinquent behaviour, she admitted to this. She admitted that she had once taken her grandmother's cellphone and that she had been disciplined as a result.

The offence came to light 4 days later when complainant, at her school approached the Victim Friendly Unit with a letter and advised them of her abuse. The minute the complainant sent to the Victim Friendly unit creates a picture of a troubled person trying to seek intervention and help. It defies logic that one would concoct a story and exhibit such kind of behaviour wherein the person is fabricating a non-event. Reading the memorandum that she sent to the victim friendly Unit at the school creates an impression that the author is indeed facing a situation. At the age of 14 the minute she sent can not point to anything else but abuse. I cannot find blame in complainant's evidence that her grandmother and aunts on the date in question had gone to Gwanda for a funeral as she said she overheard them say such. It is therefore an unfounded averment that the complainant could not account for the whereabouts of the other relatives as the complainant told the court clearly that her grandmother and aunts had gone to Gwanda for a funeral as she overheard them say such. She also stated that her other uncle according to her knowledge had gone to the Polytechnic, although the uncle disputes that he had gone to the Polytechnic he admits that he was not there at the material time having left at 6 am for church. Mr Chamunorwa for the appellant sought to show complainant's lack of credibility by submitting that she referred to a stick and a reed mat on different occasions when she narrated her ordeal to the police and in court. This reference to the same thing as a reed mat and as a stick can not be held to be a material discrepancy that vitiates the complainant's evidence.

I therefore find that the complainant's evidence stands the test and nothing has been proffered that would discredit the complainant's testimony.

The cautionary approach that the appellant contends the trial magistrate did not

exercise, is irrelevant in the circumstances as the trial Magistrate was clearly satisfied with the complainant's evidence and thus found that she was indeed a credible witness.

The appellant's defence was that at the material time all his other relatives, his sisters and his mother were there at home together with complainant and appellant and that everybody left for church at about 09:00 hrs. He also called defence witnesses who supported his version of events.

The trial magistrate did not accept the version of the appellant and his defence witnesses for the simple reason that they had concocted a defence to save their brother's skin.

Of particular importance in relation to the credibility of the defence witnesses, is the issue of the memo that was sent by the complainant to the Victim Friendly Unit at her school. This she did 4 days after the alleged abuse. This is a 14 year old girl who stayed with her maternal aunts and her maternal grandmother as well as her maternal uncles. Why would she not report the alleged abuse to any one of them and choose to report to the Victim friendly Unit at her school? This conduct speaks volumes of the faith and trust she would have had in them as well as lack of it. She somehow did not feel secure making her report to them and decided to approach the Victim Friendly Unit at her school, perhaps with a view to getting an impartial ear listen to her plight. The complainant's conduct of reporting to the Victim Friendly Unit shows that the appellant's family could not be trusted in this whole issue because complainant herself found it not prudent to report to them. Again, one of the defence witness, Buhlebenkosi clearly was not being truthful with the court, as she gave evidence to the effect that she had good relations with the complainant, yet complainant stated in her testimony that the only person at the house she did not have a good relationship with was Buhlebenkosi. Why did Buhlebenkosi not tell the court the truth about her relationship with the complainant as obviously, she could not have had a good relationship with complainant and yet according to complainant their relationship was not good? This witness was not being truthful to the court. She could not be trusted.

There is nothing much that turned on the evidence of the defence witnesses except that they all made bold assertions that they left for church at the same time and that they could all remember the events of the date in question as it was the day that the complainant later alleged she had been raped by the appellant. The learned magistrate thus did not misdirect himself in disbelieving them. Again the schedules that were brought to court as the attendance registers did not assist the court in any way as they had no dates and were not properly explained by Betty Mlotshwa who kept on referring to them as being attendance registers for the 23rd of January 2012 yet the date of the alleged rape was 22 January 2012. The learned Magistrate thus did not misdirect himself in any way in not placing weight on them as they

absolutely are of no evidential value.

With regard to the sentence of 18 years imprisonment with 8 years suspended on the usual conditions, there is no misdirection on the part of the trial magistrate in this regard as the sentence imposed is in line with other cases of a similar nature.

The conviction and sentence are accordingly upheld and the appeal is dismissed in its entirety.

Makonese J: I agree

Calderwood, Bryce and Hendrie, appellant's legal practitioners
Attorney General's Office, respondent's legal practitioners