

COLLEN HUNDI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 27 FEBRUARY 2017 AND 9 MARCH 2017

Criminal Appeal

C Magwara for the appellant
Ms N Ngwenya for the respondent

MATHONSI J: The appellant, an employee of Zimbabwe Electricity Transmission and Distribution Company (ZETDC) in Gweru, was arraigned before a regional magistrate in Gweru on 8 June 2015 charged with one count of rape. Following a full trial in which he was represented by a legal practitioner of his choice, he was convicted and, on 25 June 2015, sentenced to 12 years imprisonment of which 3 years imprisonment was suspended for 5 years on condition of future good behaviour.

Left with an effective term of 9 years imprisonment, the appellant was aggrieved. He noted an appeal to this court against both conviction and sentence. On conviction he based the appeal on the grounds *inter alia* that the court *a quo* erred in convicting him when his defence had not been rebutted, the state failed to prove its case beyond a reasonable doubt, there was “overwhelming evidence of possible fabrication”, the bruises observed on the complainant’s genitals were inconclusive and there were contradictions in the evidence of the state.

His gripe with the sentence is that considering that there was no evidence of actual penetration, the mitigating factors and the fact that the court *a quo* elected to be retributive, the sentence imposed induces a sense of shock and is excessive in the circumstances.

The facts which the court *a quo* found as having been proved as set out in the state outline are that the appellant is the biological father of the 4 year old complainant who was staying with her grandmother Emmaculate Bhebhe along with her brother Cuthbert at No 3135

Mkoba 16 Gweru while the appellant lived at No 1860 Mkoba 6 Gweru. The appellant and the complainant's mother had divorced some years earlier.

On 8 February 2015 the appellant decided to exercise his right of access to the two children. He took them from their grandmother to his own house where, upon arrival the children started playing outside the house. At some point the complainant got inside the house where the appellant was lurking with intent leaving her brother playing alone outside. The appellant is said to have taken her daughter into the bedroom, laid her on the bed and removed her panties before sexually abusing her. He later took the children back to their grandmother intending to leave only the brother and return to his house with the complainant as she was not attending school. He was thwarted in that endeavour by the complainant's refusal to return with him.

On 9 February 2015 the complainant's grandmother tried to cut the complainant nails on the left foot but she promptly refused stating that if she did she feared bleeding from the vagina as had happened the previous day at her father's house. That raised suspicion on the grandmother who decided to examine the child's private parts. She discovered reddish marks resulting in a report being made to the police and the subsequent arrest of the appellant.

The nursing sister who examined the child at Gweru Provincial Hospital on 10 February 2015 noted that there were bruises and redness on her vagina. On the evidence of penetration she remarked:

“Its inconclusive but possible, there are bruises noted and also redness on the genitals as indicated above.”

In his defence outline the appellant stated that he and the complainant's mother separated in 2012 due to irreconcilable differences. From that time he had struggle to have access to the children and had to involve the Zimbabwe Republic Police at Nehanda. The children would be brought to the police station from where he would collect them. Alternatively he would access them through Precious Bhebhe their aunt. On the day in question he collected the children from Precious Bhebhe.

The complainant had spent the day playing with her brother and half-sister outside the house. He denied taking the child into the house and abusing her. As far as he was concerned the charges were trumped up in order to keep the children away from him. Emmaculate Bhebhe the

complainant's grandmother testified that when she bathed the complainant the morning following her visit to the appellant "there was nothing amiss and she did not complaint of anything." She however stated under cross examination that although the complaint had not complained about anything at night she had been restless. She could not see anything amiss with her clothing in the morning because the "clothes were in water already." The complainant had "bathed her genitals" herself because she was already training her to bath herself.

The grandmother explained that the child had injured a nail and when she tried to cut it that is when she resisted saying that she did not want the nail to be cut as she would bleed like she had done the previous day from her genitals. An inspection of the genitals revealed that it was reddish with bruises. When asked what had caused it she pointed an accusing finger at her father. She invited Precious Bhebhe, the aunt, to also examine her which she did. Upon further questioning the complainant revealed that her father had caused the injuries "by his own thing (organ) from his trousers."

The evidence of the grandmother was corroborated by Precious Bhebhe who added that when she questioned the child she had told her that the appellant had "pierced her with his organ." The 4 year old complainant also gave evidence and stated in her evidence in chief:

"Dad poked me using his thing from his house in the bedroom. He poked me with it and he slept. My brother was there in the bedroom. It was Dad only in the bedroom. I felt pain and blood stained my blood (*sic*) but it was washed by grandmother. The thing dad used is on this part of the doll-(trying to show the thing and which was used to poke onto the female doll). I told grandmother that dad had poked me."

This is the evidence of a 4 year old child which although a bit confused is clear firstly as to the identity of the culprit and secondly as to what was done to her. It is understandable that she would not have full appreciation of what was happening to her. The court *a quo* carefully assessed the evidence and decided to believe the state witnesses. At pp6-7 of the record it stated:

"By the way, complainant had already disclosed to grandmother that the source of the sexual molestation signs on her genitals, was her daddy – father-accused who had poked her with the 'thing' from his trousers, causing her to bleed, on the previous day at his house. The complainant repeated the mentioning of her assailant as 'daddy', to aunt Precious and subsequently to the Police. ---. For her age, the complainant (4 years), gave fairly credible evidence in the proceedings. From start to finish she maintained that 'daddy-the accused' had poked her genitalia, initially, with the 'thing' from his trousers and later on, with a 'stick'. It appeared understandable to this court when the 4 year old

described the object used to poke her private part, by the accused-father, as a 'thing' or a stick. Remarkably, the complainant-infant-girl remained steadfast as to her sexual assailant being the accused-father of hers. The court also found both Emmaculate Bhebhe (grandmother) and Precious Bhebhe (the aunt) to had given straight forward and/or credible evidence in these proceedings.” (The underlining is mine)

On the appellant's defence the court mused that there was absolutely no motive for the grandmother to falsely incriminate him. In the court's view there was no substance in the claim that he was being falsely accused because the grandmother wanted to prevent him from having access to his children because from the time that he divorced their mother in October 2012 right up to February 2015 he had been allowed access to the children. It is for that reason that he had taken the children to his house on the fateful day. While warning itself of the danger of false incrimination the court ruled it out. Proceeding with caution on the evidence of the child the court embraced that evidence as credible and gave reasons.

Mr Magwara for the appellant submitted that the evidence of the state was not only unreliable, it was also full of contradictions. He made reference to the fact that the grandmother had not observed anything amiss when bathing the child and also to the fact that the complainant had claimed that her grandmother had watched off the blood stains.

In our view the trial court dealt with all those issues meticulously. It accepted that the evidence of a 4 year old could not be expected to be perfect. It examined that evidence with caution. While it is true that there are inherent dangers in the testimony of children including the fact that children have difficulty in distinguishing between fact and fantasy, it should be accepted that children do not fantasise about being raped and other unusual, horrific occurrences but fantasise about play characterized by their daily experiences. See the remarks of HLATSWAYO J (as he then was) in *S v Musasa* HH-52-02

What is indisputable is that the child was sexually molested resulting in vivid evidence of such being left behind on her vagina. It was observed by the nursing sister who examined her. When asked about it, she pointed to the appellant as the culprit. The court *a quo* was mindful of that reality in its judgment. There can be no misdirection in that regard especially as the corroborative evidence of the grandmother and aunt was found to be credible. The suggestion by *Mr Magwara* that the child may have been deliberately injured by her grandmother to falsely incriminate the appellant cannot be taken seriously.

An attempt has also been made to discredit the state case on the basis that the medical report stated that evidence of penetration was inconclusive. As stated in *S v Khupe and Another* HB 30-83, penetration in legal terms means the slightest entry into the female body. It is not a requirement before conviction on a charge of rape for the hymen to be ruptured.

The redness and bruises observed on the complainant’s vagina were therefore sufficient for a conviction on a charge of rape. I conclude therefore that the conviction was proper. There is no merit in the appeal in that regard.

On sentence, while conceding that the conduct of a father abusing his own child is deplorable, *Mr Magwara* suggested that the court should consider that no real penetration occurred. He submitted that for that reason we should reduce the sentence to 4 years imprisonment. I do not agree. Sentencing is the province of the trial court. It is trite that the appeal court will not lightly interfere with that sentencing discretion. It will certainly not interfere with the sentence of the trial court merely because it is of the view that it would have arrived at a different sentence had it been the court sentencing the appellant.

Indeed an appeal court will not substitute its own sentence or interfere with the sentence except in circumstances where there has been a misdirection on the part of the court *a quo* in assessing sentence. The court *a quo* applied its mind carefully when considering an appropriate sentence. It stated that it was striking a balance between the interests of the complainant or society, the accused and justice. It expressed revulsion at the prospect of a father abusing a mere 4 year old daughter and noted with regret that the offence was on the increase. I am unable to discern any misdirection in that regard either.

In the result, the appeal against both conviction and sentence is hereby dismissed.

Takuva J agrees.....

Gundu & Dube, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners