

EDSON CHARANGWA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 16 July 2015

### **Criminal Appeal**

*S. Chaka*, for the appellant  
*E. Mavuto*, for the State

DUBE J: The appellant appeared before the trial magistrate facing a charge of contravening s 70 (1) (b) of the Criminal Law (Codification Reform) Act [*Chapter 9:23*]. That is ‘performing an indecent act with a young person’. The allegations preferred by the State may be briefly summarized as follows. Sometime in 2013 and on an unknown date, the appellant who was a boyfriend of the complainant’s aunt entered the complainant’s bedroom whilst she was sleeping. He opened his trousers zip, showed the complainant his penis, took the complainant’s hand by force and ordered her to touch it. The appellant told the complainant not to tell anyone and threatened to assault her if she divulged what had taken place. He at that point left the room. The complainant later made a report to her aunt culminating in the arrest of the appellant.

The accused pleaded not guilty to the charge. The trial magistrate convicted the accused after a trial and sentenced him to \$200-00 or 4 months imprisonment. In addition 4 months imprisonment was wholly suspended for 5 years on condition the accused does not during that period commit any offence involving performing an indecent act with a young person for which he is sentenced to imprisonment without the option of a fine. Aggrieved by that decision the appellant has noted an appeal to this court. This appeal is directed towards conviction only.

The appellant’s grounds of appeal may be summed up as follows. That the trial court

erred in convicting the appellant for the offence charged after making a finding that the complainant had a motive to falsely implicate the appellant in that there was evidence of bad blood between the complainant and the appellant. That the trial court misdirected itself by convicting the appellant when it found that the complainant failed to mention the physical assaults she endured at the hands of the appellant when she made a statement to the police. Having disregarded the evidence of the complainant's aunt the court erred in accepting the complainant's evidence which contradicted that of the aunt. The court erred in accepting the evidence of the complainant when the complainant was unsure of the date when the offence occurred. That the court erred in convicting the appellant and erred when it failed to take heed of the guidelines laid down in *S v Sibanda 1994 (1) ZLR 394* regarding children's evidence. Finally, the court erred in that it failed to address the appellant's defence and in particular, to give an assessment of his credibility. In the result, the appellant does not know whether his evidence was rejected and why he was convicted.

The Prosecutor General does not support the conviction and has filed a consent in terms of s 35 of the High Court Act. At the hearing of the matter, we decided to hear argument in the matter and directed both parties to address us on the merits of the matter. The Prosecutor General holds the view that the court *a quo* misdirected itself by finding that the State had managed to prove its case beyond a reasonable doubt. He states that the appellant's defense that the allegations were false and that there was bad blood between him and the complainant's aunt was probable in the circumstances of the case. The Prosecutor General's representative Mr. *Mavuto*, concedes that the defense proffered by the appellant that these allegations were false and were made by the complainant's aunt in order to fix the appellant after he terminated their relationship was reasonably probable under the circumstances. The trial court correctly made a finding that there was bad blood between the complainant's aunt and the appellant. As such the trial court erred in finding that the complainant was a credible witness in light of these observations? The trial court failed to consider that the complainant was not consistent on the month she was abused. The fact that she mentioned three different months gave credence to appellant's averment that complainant was influenced by her guardian to fabricate a case against him. It defies logic to believe the testimony of the complainant when there was uncontroverted evidence that her

guardian had an axe to grind with the appellant. The State considers that the appellant's defense was not rebutted at all and that the appellant's explanation that complainant's guardian influenced the complainant to make a report since appellant had terminated the affair was reasonably possibly true. It finds support for this proposition on the evidence of several criminal and civil cases reported against the appellant by the second witness soon after appellant ended the fair. It was submitted that the learned magistrate also misdirected himself by accepting complainant's complaint which was not voluntary. The state conceded that the court a quo erred by failing to give reasons why it rejected the appellant's testimony.

The trial court convicted the appellant after having accepted the evidence of the complainant and found that the complainant was consistent in her story. It believed the complainant's version that the appellant made her to touch his penis and strongly warned her not to tell anyone leading her to fail to report the incident immediately. The court considered that the complainant did not remember the exact date the incident took place and that the report was not made voluntarily in that her aunt forced her to open up. The court found as follows;

“The complainant is 12 years old and the failure to remember the date is quite understandable considering her age. This court is alive to the fact that the evidence from children must be approached with caution since it has been proved that children tend to fantasize and where possible corroboration of such evidence is important. It is apparent that all the witnesses who testified have bad blood with the accused. The complainant clearly highlighted that she feared the accused due to the assaults she allegedly used to suffer at his hands. The second witness obviously explained how the witness had destroyed her life and has shown her bitterness and the possibility that she is out to destroy him cannot be ruled out.”

The court accepted that the complainant was 12 years old and that the failure to remember dates was understandable considering her age. The court noted that there was no proper explanation as regards why both witnesses failed to include the assaults of the complainant in their statements, only to do so in court.

The trial court treated the matter as a single witness case and relied on the evidence of the complainant only. The offence occurred when the complainant was 11 years old and she was 12 years old at the time that the trial was held. The court was alive to the fact that the complainant was a child. The court was alive to the dangers of false incrimination. Its approach to the failure by the complainant to remember the date of the incident cannot be faulted. It is explicable for a child that age to fail to make a timeous report of abuse after she was threatened. She reported the

incident only after the appellant had separated with her aunt and was no longer visiting the place and it appears that she felt safe to report only then and was no longer afraid. She also did not report because she was shy. That explanation is plausible when one has regard to the age of the complainant and the background that the accused used to assault her. The complainant remained consistent in her version that she was forced to touch the accused's penis. She had seen a penis before as her father's friend had tried to rape her in the past. The complainant stated in her evidence that she was forced to reveal the matter to her aunt when all the children were called by her aunt and asked what the appellant had done to them. There is nothing on record to suggest that she was forced to make a report. She reported only after she had been informed by her aunt that she had broken up with appellant and that he was no longer coming to their house. She does not state how she was forced. There is no actual suggestion that she was forced to reveal the incident from the actual evidence led. It appears that she was just asked and she revealed the incident. Unfortunately the assertion that she was forced was not followed up by the defense in cross examination.

It appears from the record that the complainant was interviewed by Childline and the witness did not tell them appellant assaults her. She did not tell them about these allegations because she was playing and she wanted to rush and play. This shows the type of witness we are dealing with. We do not know why she went to Childline. It is not clear from the complainant's evidence if she is aware why she went to Childline. It was not established why she went to Childline and if the inquiry at Childline was directed at the sexual allegations as well.

We are satisfied that the trial court was alive to the evidence of allegations of false incrimination and bad blood. We did not understand the court's finding that all the witnesses who testified had bad blood with the appellant to mean that because the appellant used to assault her, she would lie against him. There is no suggestion from the complainant's evidence that she was influenced to falsely implicate the appellant by the aunt. The court was alive to the dangers of false incrimination and discarded the aunt's evidence after finding that there was enmity between the aunt and the accused which was admitted by the complainant's aunt. It is clear from the complainant's evidence that the offence occurred. This court finds no fault with the manner in which the evidence of bad blood was treated. Besides the evidence of bad blood, the

complainant's witness did not exhibit that she was biased against the appellant. It does not appear that the complainant falsely incriminated the appellant. If she had wanted to falsely incriminate the appellant, she would have made allegations of a more serious offence like rape. We find the reasons given by the court for accepting the evidence of the complainant satisfactory.

The trial court also found that there was bad blood between appellant and the complainant's aunt, the second witness. It rejected her evidence on the basis that she had clearly exhibited her intentions and was not a credible and reliable witness. It also found against her that she was not being a good guardian as she allowed the accused to assault the complainant and did not give her the same care as other children. The court cannot be faulted for such an approach.

The reasons why the trial court rejected the appellant's evidence are not apparent from the judgment. The court simply dealt with the state witnesses' evidence and ended there. The trial court failed to analyse and give reasons for rejecting the appellant's defence. The judgement does not deal at all with the testimony of the appellant. In *S v Ncube HB 61/03* the court stated the following regarding the need to appraise each witness's evidence;

“..... a court's judgment in a criminal trial should contain a brief summary of the facts found proved and trial court's appraisal of the credibility of each witness stating what evidence was accepted or rejected and giving reasons for its decision. What is required is a complete and meaningful judgement touching on all material evidence let at the trial.”

See also the case of *Clever Howard v The State HH 39/05*. The court in this case also impressed on the need for a trial courts to always assess the credibility of witnesses appearing before it.

An offender who goes through a trial is entitled to know the outcome of his trial and the court's findings on his credibility. Each witness's evidence is required to be weighed and reasons given why the evidence has been accepted or rejected. Such an offender is also not just entitled to the outcome of the trial but to be furnished with the reasons why the defenses he raised were rejected. A judgment should be well balanced and is required to include reasons showing that both the offender and the complainant's versions have been considered. It must be shown that all the facts and issues raised have been considered and weighed. This judgment falls far short requirements of a good judgment.

The trial court did not apply its mind to its given mandate. We are not satisfied that the

proceedings were conducted in accordance with real and substantial justice. We consider the concession by the state to be proper in the circumstances. This is a fatal misdirection which vitiates the conviction. In the result, we order as follows:

Both the conviction and sentence is set aside.

Hungwe J: I agree.....

*National Prosecuting Authority*, respondent's legal practitioners  
*Mushangwe & Company*, applicant's legal practitioners\