WITCLIFF MUGANHU
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE & TAGU JJ
HARARE, 25 February 2014 and 24 & 27 April 2015

Criminal Appeal

Ms *V.C Maramba*, for the appellant
T. Mapfuwa, for the respondent

BERE J: On 20 March 2013, and after a trial that had commenced on 13 July 2012, the appellant was convicted of rape as informed by s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant was sentenced to 18 years imprisonment 6 years of which were suspended for 5 years on the usual conditions of future good conduct. The appellant has lodged this appeal against both conviction and sentence.

The appeal against conviction is basically an attack on the manner in which the court *a quo* assessed the evidence led in the court *a quo*.

It was argued on behalf of the appellant that there was no evidence led by the complainant which confirmed that she had been raped.

Secondly the court *a quo* was said to have misdirected itself by ignoring the evidence of animosity that was allegedly there between the appellant and the complainant's mother.

Thirdly, it was stated on behalf of the appellant that both the medical report and the Doctor's evidence in court were not conclusive enough to support the occurrence of rape as alleged by the State.

Fourthly, it was argued that the whole tenor of the evidence led in the court *a quo* did not support a conviction on a charge of rape.

Finally, the attack against sentence took the usual argument that the sentence imposed was excessive in the light of the strong mitigatory factors which were advanced on behalf of the appellant.

I propose to deal with the issues raised in *seratium* being guided by the judgment of the lower court, for it is that judgment which is being put under scrutiny in this appeal.

The judgment of the court *a quo* appears on pp 5-10 of the record of proceedings. A simple perusal of the judgment in question shows that the learned magistrate did his best to deal with the concerns now raised in this appeal.

The learned magistrate was in my view able to capture and properly analyse the evidence of the complainant and her mother to whom the little girl complained of the pain she was experiencing from her vagina as a result of being "touched" by the appellant whom she related to as brother.

The evidence will show that the complainant referred to her female private parts as "Chibununu", a term which all those in the lower court understood to mean her vagina.

It will also be noted that whilst the complainant constantly referred to the appellant as having touched her "chibununu" using his hand, thereby creating some doubt as to whether she had indeed been penetrated, that doubt was completely erased by the complainant's report to her mother that the "finger" that touched her was a big finger that the "brother" (appellant) took from his trousers after unzipping his trousers. See p 38 of record.

In my view, if there was any doubt that the complainant had been sexually molested this evidence provided conclusive evidence to that effect. The learned magistrate therefore cannot be criticised for having made this specific finding that the complainant was raped.

The initial report made by the complainant to her mother, the second state witness which initially made reference to her having been injured by a stone must not be hijacked by the defence and taken out of context.

That position by the defence is not tenable because even the appellant did not suggest that the little girl had been injured that way. The appellant instead tried to create some theory around straddling as having injured the complainant, which position was thrown into the dust bin by the medical practitioner.

It should be accepted that reference to a stone was the complainant's initial explanation, clearly influenced by the appellant who desperately tried to cover up his abominable conduct by taking the reluctant or unwilling child to the shops. The complainant's mother, just as any responsible, caring and sensitive mother had to further probe the little girl who immediately opened up by pointing to the appellant as the author of her pain. This reading of the evidence by the trial magistrate is beyond reproach and cannot be faulted.

The complainant's timeous report and opening up to the mother and the observations made by the mother satisfy the requirements as outlined in the Banana case[1]as a guide in sexually related cases.

If there was any doubt as to the penetration of the complainant vis-a-vis the theory created by the appellant concerning the dramatic falling of the complainant from the appellant's bed, this theory was effectively dismissed by doctor Edmore Gwaze's evidence on pp 50-53 of the record of proceedings. This witness's evidence further confirmed the complainant's story that the appellant had hurt the complainant's genitallia.

There was an attempt by the appellant to grossly exaggerate or create out of nothing really his alleged enmity with the complainant's mother as the source of these allegations of rape against him. The evidence of Rumbidzai Gamanya was brought in to try and advance this theory of hatred. Even if it is accepted for argument's sake that the complainant's mother as a senior teacher quizzed or questioned Gamanya about the possibility of a love relationship between her and the appellant, this would not in any way lend credence to the alleged enmity between the complainant's mother and the appellant. I say so basically for two reasons.

Firstly, if it is true that the appellant and the complainant's mother had a strained relationship this would have under normal run of events, been the cornerstone of the appellant's case when he gave his defence outline in court.

Secondly and more importantly, the appellant in his detailed defence outline gave the impression that all was well between him and the complainant's mother hence his being allowed to be with the complainant and her other sibling both in his car and in his room. That interactive behaviour as described by the appellant in his defence outline and confirmed in his evidence in chief does not give room to the existence of hatred between the appellant and the complainant's family.

If there was any need to seek for corroborative evidence outside the evidence led by the State, then that corroborative evidence came from a very unlikely source- the accused himself. The accused's own defence outline and evidence in chief demonstrate beyond doubt that the appellant had all the opportunity to commit this offence.

According to the appellant, he was with the complainant at the critical time. He shared his bed with the complainant at the critical time and the complainant got her vagina injured whilst in the company of the appellant. The complainant's explanation of how she was

[1] S v Banana 2000(1) ZLR 607(s)

injured got confirmation from the doctor who dismissed the idle explanation given by the appellant.

It is difficult under these circumstances to believe the story told by the appellant. That story was both desperate and hopeless. I can only conclude by restating the observations made by Hlatshwayo J (as he then was), in *State* v *Musasa*[2] when he remarked as follows:

> Many judgments of this court and the Supreme Court have underlined the fact that it is highly unlikely for very young complainants to make serious allegations without any basis at all".

In conclusion, there is no merit in this appeal against conviction. It is accordingly dismissed.

I must now turn to deal with the appellant's appeal against sentence.

Despite the appellant's counsel having devoted almost two typed pages to deal with an attack on the sentence imposed by the learned magistrate, the truth of the matter is that there is no substance in those submissions. This is particularly so given generally the attitude of this nation to rape cases and the negative impact that these cases have on the innocent and invariably unsuspecting victims.

These offences continue unabated and it can only be unpardonable insensitivity to argue against the imposition of the sentence as imposed by the trial court.

The appeal against sentence is dismissed as well.

TAGU J: agrees: ……..

Thondlanga and Associates Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

[2] 2002(1) ZLR 280 @285