ISAAC NDLOVU

AND

THE STATE

IN THE HIGH COURTOF ZIMBABWE
NDOU AND MATHONSI JJ
BULAWAYO 13 JUNE 2011 AND 30 JUNE 2011

Applicant in person
Mr K. Ndlovu for respondent

Criminal Appeal

MATHONSI J: At the conclusion of submissions by the parties we upheld the appeal, set aside the conviction of the appellant and quashed the sentence. We pointed out that the reasons for doing so would follow. These are the reasons.

The appellant, who appeared in person, was convicted of 4 counts of rape by the regional magistrates' court in Bulawayo and sentenced to 60 years imprisonment that, is, 15 years on each count and of that total term of imprisonment, 10 years was suspended on condition of good behaviour. This left him with an effective imprisonment term of 50 years.

The appellant was not happy with both the conviction and sentence and launched an appeal against conviction and sentence. At the time we heard the appeal, the appellant had been languishing in prison for more than 5 years he having been convicted and sentenced on 25 April 2006.

The allegations against the appellant were that sometime during the month of January 2006 he had way laid his daughter, the complainant, then aged 11 years, on her way from school and raped her twice. It was further alleged that between January and March 2006 he had again way laid the same complainant on her way from school and raped her once. In the 4th count it was alleged that sometime in April 2006, he lured the same complainant to a kraal

at his homestead and raped her once but was caught red-handed by his wife who however did not report the alleged rape to anyone.

It was not until much later that his wife reported the rape but only after finding the appellant assaulting their son, leading to the arrest of the appellant.

In convicting the appellant aforesaid, the trial magistrate relied on the evidence of the complainant, her mother and the medical report prepared by the doctor who examined the complainant on 21 April 2006. The complainant told of repeated abuse at the hands of the appellant over a period of time. She said she did not report the rape to anyone because the appellant threatened her with assault.

The complainant's mother testified that after she had caught the appellant raping the child in the kraal she did not report the matter to the police or her mother in law, who was staying with them, because the appellant had threatened to kill her if she did. She testified that she had examined the complainant and observed that he "vagina was seriously ravaged."

The appellant himself gave evidence at the trial to the effect that the charges against him were trumped up because she was having serious matrimonial problems with the complainant's mother. He had caught her red handed having sex with a police officer who had earlier victimised him by arresting him on trumped up stock theft charges. He was acquitted of these charges and upon being released from prison he had found that officer being intimate with his wife, resulting in him fighting the officer. The appellant says he was arrested for that and the police officer was hospitalised for 5 days.

According to the appellant his wife never forgave him for that and she decided to cause his arrest again on false rape charges.

The appellant's story was corroborated by the second state witness, his wife who admitted even in her evidence in chief that she had indeed been caught with an officer, she preferred to call a neighbourhood watch committee member. His denial of having abused the complainant is also supported by the state case in the form of the medical report.

Although, the complainant's mother claimed to have observed that complainant's "vagina was seriously ravaged" this was not borne by the medical report. According to the

doctor, although the complainant's hymen was "absent" (which is not unusual), the 11 year old complainant was not sexually active, as would be expected of someone so repeatedly abused. More importantly, penetration was "not effected."

In my view, had the complainant been repeatedly abused as alleged and her mother had indeed observed a "ravaged vagina," the doctor would have observed this during examination of the complainant. If this is considered together with the fact that there was an undue delay in reporting the alleged abuse even after the mother had allegedly caught the appellant in the kraal, the inescapable conclusion is that there is merit in the appellant's claim that the preference of rape charges against him was motivated by an improper desire to punish him due to the matrimonial problems he had with his wife.

While corroboration of the complainant's evidence is no longer a requirement in our law (*S v Banana*) 2000 (1) ZLR 607(S), it is still necessary for the trial court to carefully examine the nature and circumstances of the alleged offence. The timeous reporting of the offence is an important factor. Our law still requires the courts to approach the evidence of a child complainant in sexual offences with great care and caution because there is always a danger of children falsifying evidence.

It is difficult to understand how the court a quo arrived at the conclusion that the appellant was guilty in light of the inherent weaknesses in the evidence presented for the state alluded to above. The situation is exacerbated by the fact that the trial magistrate did not give reasons at all for finding the appellant guilty. While the record states that the reasons are on tape, *MrNdlovu* for the Respondent submitted that no reasons were found on the tape recording of the trial.

It is therefore not easy to ignore the possibility that the magistrate did not apply her mind at all to the case before her. Courts have repeatedly stated the need for judgments to be reasoned and for those reasons to be stated. As stated in *S v Mapiye* S -214-88:

> "To confirm the conviction on the second count; would, in my view, result in a failure of justice. The omission to consider and to give reasons for convicting the appellant on count two is fatal to the prosecution case. It is a gross irregularity. Appeals are argued and decided on the contents of a certified record of the trial proceedings. If those

contents are stored in the mind of the trial magistrate, they are not good enough." (my emphasis)

It is a gross irregularity for a magistrate to omit to give reasons which reasons remain stored in his/her mind without being committed to paper. *S v Makawa and Another* 1991 (1) ZLR 142(S) at 146D. The judgment of the trial court must also contain a summary of the facts proved and the court's assessment of the credibility of witnesses. If the judgment of the trial court is inadequate, or, as in casu, is missing completely, the appeal may have to be allowed. *S v Marevesa* S 108-91.

Faced with all these insurmountable difficulties, *Mr Ndlovu* for the Respondent was forced to concede that the conviction of the appellant on all the 4 counts was not sustainable. The concession was properly made. That really disposes of the matter.

I must however mention that the court a quo adopted a tariff approach in sentencing the appellant which approach should be discouraged. It is unacceptable for the court to just pile up sentences for each court even when, some of the counts, like counts one and two, should have been treated as one for purposes of sentence. The result was that she ended up with 60 years imprisonment which was wholly excessive and induces a sense of shock.

It is for these reasons that we allowed the appeal against both conviction and sentence with the result that the conviction of the Appellant on all four counts of rape was set aside and the sentence quashed.

Ndou J agrees.....

Criminal Division, Attorney General's Office, respondent's legal practitioners