

THANDANANI MOYO

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MAKONESE AND MOYO JJ
BULAWAYO 23 NOVEMBER 2020 AND 11 MARCH 2021

Criminal Appeal

Ms A Masawi, for the appellant
T Muduma, for the respondent

MOYO J: The appellant was convicted of indecent assault as defined in section 67 (1) of the Criminal Law Codification and Reform Act Chapter 9:23.

The facts of the matter are that the appellant indecently assaulted the complainant then a 14 year girl by fondling her breasts and touching her thighs. The complainant was a Form 1 pupil at the material time and the appellant was her English teacher. The appellant was sentenced to 36 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual conditions and the remaining 24 months was suspended on condition the appellant completed 840 hours of community service at Ntenjaneni Police Post. Dissatisfied with both conviction and sentence the appellant approached this court.

The State Case

Ntombizondile Sibanda told the court that she regarded herself as complainant's mother and that complainant told her when she went to a school visit on 16 June 2017 that a teacher was proposing to her. Complainant did not tell her about breast fondling and the removal of tights. The parents then phoned the school head. She said she heard about the fondling of the breasts and the removal of the tights when the statement was being recorded. She said complainant seemed shocked and scared when she told her of the proposal and she believed the complainant because she was sincere about it. She said she did not question complainant about her failure to tell her about the fondling of breasts and the removal of the tights because

she thought maybe it happened after she had left the school since she saw the complainant only on visits.

Chantell Masuku told the court that appellant was her English teacher and that he sexually abused her. She gave a series of encounters with the teacher that made her uncomfortable and that sometimes he told her he loved her but the material aspects of her testimony are where she states that on a Tuesday night during studies appellant called her. They left the class and went to Beit Hall. He closed the door with one hand and held her by the left hand and fondled her breast using the right hand. He then tried to pull her skin tight and the siren rang. He then said he would see her the following day. She said she did not consent to the fondling and she tried to push him away whilst crying. She said she never thought of screaming but she was crying. The siren then rang and she found that other girls had left the classroom and she went to the dormitory. She was crying. She later told Leeanne and Mitchell Pfumo. They then went to sister Makumbe in the evening. After 2 weeks her parent came for the visit and she told her mother. The appellant later apologized and asked the complainant if she had told anyone and she said no. Complainant denied that she had a crush on the appellant and that most students just liked appellant because he was interesting and she said it is not true that she was bitter because he did not date her, since she did not go to school to date and accused had a wife at the school. Responding to this question the court noted that complainant's eyes were tearing up.

She was quizzed under cross-examination on the information she gave to the District Education Officer and she said she may have missed some of the things because she was being called a lot and called over the same thing and that she was traumatized. Complainant under cross-examination explained that she could not be precise on dates. She said she did not want to fall in love with the teacher she was at school to learn and she did not want him to destroy her future and she also did report the case for future students who might not have the courage to do so. She refuted that she ever told Form 3s that she had a crush on the appellant and that if any students come to court to state that they would have been bribed. She said it is a lie that she had a crush on him and was fabricating the charges because he did not reciprocate. She denied ever telling other girls that she liked the appellant's suit. She even asked why she would lie about a teacher and when she was told that it was because he did not love her back she said she did not see him that way and he was her teacher and she would not wish to date a teacher.

She further denied that she was an attention seeker and that if she really had a crush on the appellant as alleged, he should have cautioned her as a teacher or even told the female teachers to talk to her. She confirmed to the court that she first told either Mitchell or Leeanne. She said she was traumatized after making the report as other students said bad things about her and her family and that they even wrote on the walls. She also told the court she wrote a suicide note because she wanted to commit suicide because of the way people treated her after she made the report. Those were the material respects of complainant's testimony. She was not shaken under cross-examination, in fact she answered many questions relating to her relationship with the teacher so well.

She stated that she could not refuse when he called her because he was a teacher and she was a student. She stated that it is not true that she had a crush on the teacher, that she had gone to school to learn and would not destroy her future by being in love with a teacher and that the teacher in fact had a wife. She also refuted that she misbehaved towards the teacher and that she was not happy because of his failure to reciprocate her overtures, she stated that that was not true and that if the teacher felt she misbehaved he could have reigned her in or asked the female teachers to talk to her. She refuted that she ever told other girls that she liked the teacher and had a crush on him and that if any student came to testify in favour of that they would have been bribed. She also explained the differences in statements to the Education Officers and the Police saying she had been asked many times about the same issue and that she was traumatized. In my view the complainant was credible, stood her ground, explained any shortcomings in her testimony well and no holes were poked on her version during cross-examination which was lengthy and touched on many peripheral issues like several encounters between complainant and the appellant which had nothing to do with the incident being complained about.

The incident at the centre of the complaint is the one that complainant alleges occurred at the Beit Hall where the teacher allegedly fondled her breasts and tried to remove her tights.

Buhle Moyo was the next to testify. She told the court that she is a teacher at complainant's school and that as she marked Agriculture books she came across a note in Chantell's book saying she wanted to kill herself because of problems that she had at the school. The complainant then told this witness and another teacher that the appellant was proposing to her and that at some point he even called her to his office during evening studies and he held

her waist tried to undress her by lifting her tunic and also tried to remove her tights then the siren rang. (emphasis mine) She said she observed complainant's demeanor as she reported the alleged assault initially she was quiet but towards the end she started crying. (my emphasis) Nothing much arose during cross-examination as this witness was being asked numerous issues that did not pertain to the report that complainant had made to her about the incident when appellant had tried to remove her tights or tunic and the siren rang.

Catherine Makumbe was the next to testify. She said that she is a Convent sister and a teacher at Empandeni Mission. She said sometime in June the complainant came to the convent accompanied by a prefect called Mitchell. She said the complainant told her that the appellant had called her out during studies and proposed to her. He held her by the back and her chest. Then he asked to kiss her. She said he had also grabbed her tunic and pulled it up. She said complainant appeared nervous as she narrated her ordeal but her voice was very confident. She also told the court that the complainant did not give her exact dates and she did not press her about them as complainant was disturbed. The cross-examination of this witness again centered on peripheral issues, not on the crux of the matter, which is the gist of the report of a sexual assault by the complainant. This witness was asked about her own reaction to news, what advice she gave to the appellant and whether she once told appellant that complainant had a bad family background as well as whether other teachers threatened to handle the matter if she did not and also about whether she had heard a number of rumours around the school.

Mitchell Pfumo was the next to testify. She said that she was an upper 6th student at complainant's school and that complainant came to her and told her that appellant was always proposing and at some point he held her hands from the back. She then took complainant to sister Makumbe. She said complainant seemed to be scared and she was shaking. When asked under cross-examination if she went to report that complainant was held by accused and he had proposed to her, she said she accompanied complainant to go and make a report. She said she read the note where complainant had written but she only read part of it. She said she did not have time to read it all up.

After the testimony of Mitchell Pfumo the state closed its case.

The Defence Case

The appellant told the court that he is a teacher and Acting Deputy Head Master at complainant's school and that he used to teach complainant as well. He confirmed that complainant did borrow an unnumbered book and he called her for it to be numbered. He also confirmed that he asked the complainant for a book that complainant said she could not find. He said that on that day it was the 2nd of June. He said complainant then followed him and asked about the book's price as the appellant had been angry and told her that it needed to be replaced. He said he would give complainant the price the following day since the price would be in United States dollars. He said at that time the siren rang and a girl called Vacacy came, that is when complainant left. He denied any personal interactions with the complainant. He denied staring at the complainant and said that in class he looked at everyone. He told the court that complainant had a crush on him because she kept on coming to his office and that she once complained that he gave so much attention to the Form 4s. He said that he ignored her after noticing that she had feelings for him. He denied sending Chantell and other girls to collect chairs and that he sent any messages to students via the prefects. He denied telling the complainant that he loved her on that particular day. He denied the allegations of lifting complainant's tunic and touching and asking for a kiss when he heard them from sister Makumbe and he dismissed them as a fabrication. He said after the allegations complainant and other girls came crying saying he must not stop teaching them. He said complainant told many people about appellant proposing love to her. He said that later there was a demonstration at the school in solidarity with complainant. He also stated that he suspected that a third force was behind the sexual complaint. He said 2 teachers did not like his strict management style and the fact that he told on them after they were caught drinking beer in the evening hours. He said he was later called whilst on bail about an issue that complainant had missed her period and he asked the ladies to make her write a report. The report allegedly stated that she felt something entered her body when appellant touched her and complainant was not sure if it was a finger or what. Asked why the complainant being a child would go to such lengths in fabricating against him the appellant said she liked him a lot and told the other girls about it and that she was attention seeking towards the appellant and that so she wanted to save face and say bad things about the appellant and that she got angry when she realised he was taking the other classes. That she was showing her disgruntlement through the report.

Asked under cross-examination he confirmed that complainant fabricated the allegations because she had a crush on him he answered in the affirmative and asked further to explain why he concluded that she had a crush on him he said she would come to his office a lot and she was very possessive of him and was unhappy that he did not give her time. He said a group of girls told her that complainant had a crush on him. He confirmed that on a date he refers to as the 2nd of June complainant followed him to his office and he was alone and that that was contrary to standards as the students should have come being 2 but complainant just followed him. He agreed that when complainant followed him, he was alone with complainant then Vacacy came. At page 79 of the court record he was asked the following question

Q. Vacacy came and found you with complainant

A. I called complainant at 8 so all the activities could happen at 8. The siren rang and Vacacy came. (my emphasis)

Asked if he was allowed to entertain students at 8 pm he said after study time they can move around and about. He confirmed under cross-examination that as a teacher he did not take any steps about the alleged crush that complainant had on him. Those were the material respects of appellant's testimony.

Next to testify was the Headmaster Mandla Ndlovu who confirmed receiving the report from 3 teachers. He called the accused and questioned him and he denied the allegations. He confirmed that students consult teachers at night but that he tells teachers to be wary of being with the students alone at night. He confirmed that it is a school rule that they can consult teachers even at night because some lessons are done at night. Those were the material respects of Mandla Ndlovu's testimony.

Given Moyo was the next to testify. He said he is a guard at the school. He told the court about his duties and how they control student movement after 8 pm and that they lock gates and do not allow the students in. He said early June to about 15th of June he was not at the school. He said he does not know anything about the incident being mentioned and he knew nothing about the matter before court. He was told under re-examination that he had been called as a guard and that they wanted to know if in the generality of his duties was it possible for a Form 1 student to be at a teacher's office at 9 pm. He then said it has not happened because by 9 they would have knocked off.

In assessing this case, I will start with the notice of appeal. The notice of appeal itself does not have brief and concise grounds of appeal. It reads like heads of argument and is in fact argumentative rather than simply giving the concise grounds on where the court *a quo* erred.

Ground number 1 talks of fairness and due process lacking in the entire trial. On this aspect counsel attacks the manner in which proceedings are held in court in Zimbabwe and laments the lack of recording of court proceedings by either machines or independent personnel. However, it is clear from the appeal record cover that counsel did certify the record of proceedings as correct on 26 November 2019. One clearly then fails to appreciate the import of the preliminary point raised in the heads of argument in support of the first ground of appeal. Counsel, further in her heads, seems to have issues with the recording related to the objections that were made by the state and sustained by the court. However, counsel should have objected to the record of proceedings, decline to sign it and present her own version of notes to challenge the court's recording. She should have simply declined to certify the proceedings as a true reflection of the proceedings conducted in the court *a quo*. It presents a contradiction that on one hand she certifies the record as correct then on the other, she challenges the contents of the record on appeal. The very purpose of certifying the record of proceedings by all interested parties is so that a record of proceedings that is correct is referred to the appellate court. Appellant's counsel also submits that they failed to cross-examine the complainant on the statements she allegedly wrote at the school, 4 of them. This aspect is captured at page 31 of the court record. The complainant said she made one statement to the Police and that at school she wrote a report. It was put her that she made 4 statements and that they would be read to her. Complainant agreed that they be read. Defence counsel then asked her if she made some audios and she answered by saying she made 2 audios. At that juncture, the prosecutor said "I object" Then the court stated "Question not to be answered" Defence counsel then proceeded to question the complainant. It is not clear what the objection was to and what question the court was saying should not be answered. The objection and the sustenance seem to be about a question that complainant had been asked and the last question she had been asked she had already answered. If the transcribed record did not capture that event correctly counsel for the defence should have objected to signing it so that a clearer picture of what the objection was about and its sustenance would be clear to the appellate court. Counsel nonetheless proceeded

to cross-examine complainant about what the defence perceived were different statements and reports that she had made and she explained that in writing these reports she may have missed some things because she was being called a lot over the same things and that she was also traumatized.

It is this court's view that the issue of the different statements was canvassed with complainant explaining why that was so. However, at the end of the lengthy cross-examination complainant maintained that the incident did occur wherein the teacher, handled her, touched her breasts and tried to remove her tights. In my view, that is the crux of the matter. The complainant stated that it was on a Tuesday night during studies he came and called her. They left the classroom and went to Beit Hall. That is when the indecent assault is alleged to have occurred. She told Mitchell Pfumo about the incident and they then went to sister Makumbe to report in the company of Mitchell. The 2 witnesses also testified and confirmed receiving the sexual complaint. I have already alluded to their testimonies herein.

It is trite that issues of credibility obviously lie in the domain of the trial court and I have to mention that of all the witnesses that gave evidence for the state no one seemed to be bent on telling the court a fabrication and none had their evidence was poked during cross-examination. The complainant gave a vivid account of what transpired and answered the challenges thrown at her during cross-examination very well. For instance, she agreed that she left out certain information in some of the statements she had made at school but she gave a valid explanation of having been subjected to questions many times about the same incident and that she was traumatized. She was traumatized by the incident as she even thought of committing suicide per the note found by the other teacher in her exercise book. Certainly, this is a valid explanation. Again, she explained that she never had any crush on the appellant and that appellant was generally liked by most students as well as that she had gone to school to learn and she would not date a teacher. She further explained that if the teacher really felt that she had a crush on him and was therefore behaving inappropriately he could have reigned her in through the usage of female teachers. In a nutshell, complainant explained away the issues related to the statements and she also successfully challenged the issue of the crush she is alleged to have had on the appellant.

The trial court could not be faulted for accepting her version and it is clear that she did make a report at the earliest possible opportunity. That she never gave her mother the fuller

details, cannot be held against her so as to vitiate the complaint because she did tell sister Makumbe the fuller details.

The accused person himself admits to having been alone at some point with the complainant and that he was under the impression that complainant loved him and had a crush on him. He further states that the allegations were as a result of unreturned love wherein the complainant loved him and he did not reciprocate. He said complainant had a crush on him because she would frequent his office and she also told other girls. He further stated that he thought there was a third hand in the allegations presumably by teachers who did not like his strict management style. He however, does not go deeper in this theory and conspiracy to show how then the allegations of the sexual assault come about as a result of the third force. It is not clear whether his defence is that complainant was angry about the unreturned love and the 2 teachers then hijacked that and made her frame him. It is either complainant had a crush on him and out of lack of reciprocation she fabricated the allegations or the other 2 teachers out of their hatred for his management style called complainant and asked her to join them in their mission to discredit him. The defence is elusive in that clearly the 2 teachers who testified in court were not shown to be part of any project to discredit him and in fact sister Makumbe seemed not to have wanted the complainant's allegations to go far. The other teacher simply found a suicide note by the complainant in her exercise book. The defence by the appellant in the court *a quo* has problems in the following respects:

- 1) Not only is it fanciful, it is elusive in that the so called crush was not based on any factual basis save that accused read into complainant's frequent visits that she had a crush on him. He says other students told him as well but they never testified to that effect. The crush seems to have been in the accused's own perception as complainant vehemently denied same.
- 2) The appellant being a Deputy Headmaster alleges that a student had a crush on him and that she frequented his office but surprisingly he did not do anything about it. He says he just ignored it and he says this was left until a time that she got angry and decided to fabricate allegations of an indecent assault against him. His position, and his inaction and his allowing the complainant to frequently visit him in the circumstances is not consistent with the conduct of a person in

authority and in a *loco-parentis* position. His conduct of leaving such an undesirable state of affairs smacks of a person who liked the set up.

- 3) That complainant may have liked the teacher, or frequented his office, if true, cannot serve as a defence because it then shows that the appellant did have an opportunity to abuse the child as alleged most probably after misreading her intentions.
- 4) The appellant also comes up with another theory which was seemingly plucked from the air as there is absolutely no fact stated to sustain it. The theory that the 2 teachers who he caught on a beer drinking spree could be responsible for fabricating the allegations together with the complainant. This is what appellant terms a third force. We are not told how this theory came about and how the 2 teachers are linked to the report by the complainant. It is just a bare statement with no flesh at all that appellant throws in as a defence.

The learned Magistrate cannot be faulted for rejecting the defence case as other than appellant's testimony, the other 2 defence witnesses did not assist the defence case in any way as their evidence had absolutely nothing to do with the allegations appellant was facing they could not vouch for either side of the case, they simply did not know anything about the allegations. The guard gave a general outlook of what would happen after hours but he did not tell the court that as a matter of fact what complainant alleged happened did not happen. He in fact also told the court that he was away early June until the 15th of June.

The appellant attacks the manner in which the trial court reasoned the judgment, however, the crux of the matter is whether, with the evidence in the court record appellant's guilt was proven beyond any reasonable doubt? I have already shown herein that the complainant gave her evidence well and explained away any inconsistencies in her statements as well as standing her ground during cross-examination to deny any crush on the appellant and in fact to challenge the appellant's conduct as a teacher who thought that a student was behaving inappropriately towards him. Appellant himself came up with a fanciful defence and in fact admitted that complainant used to come to his office and even admitted that there is a time when he was alone with the complainant, a situation that he said was in fact not allowed. He allegedly further sat back and did nothing as a teacher faced with a student misbehaving

towards him and even if this version could be accepted for arguments sake, one would be inclined to believe that he just waited for an opportunity to pounce.

The state in this case had to prove that complainant was physically touched or handled by the appellant in a manner she did not accede to and which was of an indecent nature. Whether breasts were fondled or not, what comes out clearly is that accused did touch complainant and attempted to remove her tights. That is consistent in all the accounts she gave.

Indecent assault is defined in section 67 of the Criminal Law Codification and Reform Act Chapter 9:23 as:-

- “1) A person who
- (a) being a male person-
- (i) commits upon a female person any act involving physical contact that would be regarded by a reasonable person to be an indecent act, other than sexual intercourse or anal sexual intercourse, or other act involving the penetration of any party of the female person’s body or of his own body.”

In this matter the accused is alleged to have handled complainant and tried to remove her tights. There is also in some instances a mention of fondling of breasts. Although, the issue of breasts seems to be left out by some witnesses the allegations regarding the handling of thighs and attempt to remove her tights are consistent throughout the testimony of all the witnesses although there is also a mention of a tunic. The touching of thighs and attempt to remove the tunic or tights, even without the fondling of breasts fit squarely on the definition of the charge in section 67 of the Code. The defence counsel seemed to concentrate on the issue of the fondling of breasts but with or without the fondling of breasts the state would have managed to prove its case on the inappropriate touching of the thighs and an attempt to remove the tights. There is also the aspect of complainant having missed her period. She however explained that under cross-examination where at page 45 of the record of proceedings she was asked whether it was not correct that she said she missed her period because of him and she refuted that saying she was just confused and maybe it had been an issue with the diet. Counsel for the defence did cross-examination on many issues and had ample time to do so but clearly from the court record she dwelt on rumours that were going around the school, what the witnesses thought or what other people had said or done about the incident she then lost focus on the crux of the matter, which was a simple question whether the offence of indecent assault

could have been committed on the complainant and instead of just keeping to that point, defence counsel brought in numerous facts which did not assist the court in any way in resolving the matter at hand. For instance a lot of questions were asked about what other people did or said which had absolutely nothing to do with what could have happened between complainant and the appellant on the alleged incident. Defence counsel submits that the court did not use the evidence of the defence witnessed but such evidence tendered by the second defence witness Mandla Ndlovu (the Headmaster) and Given Moyo (the guard) did not advance the accused's defence in any manner. Even defence counsel told the witness Given Moyo that they had called him as they wanted to know in the generality of his duties if it was possible for a Form 1 student to be at a teacher's office at 9 pm. And he said it has not happened before because by 9 they would have knocked off. Such an answer would not be used to refute the specific allegations made by the complainant against the appellant for the obvious reasons that the evidence had to zero in on the specifics of the day in question for it to be relevant to the allegations the appellant faced.

The defence counsel also seemed to have issues with the information the complainant told her mother, however it is clear from the court record that she expressed her dissatisfaction with appellant's conduct to her parents who then without asking for further details referred the matter to the school authorities.

It is our considered view that the alleged inconsistencies do not go to the root of the complaint so as to vitiate it for the simple reason that any fears of fabrication were dispelled by the complainant herself during cross-examination. The other 2 witnesses that were called that is sister Makumbe and Mitchell Pfumo corroborated her evidence. Seemingly, Mitchell Pfumo upon receipt of the complaint did not seek for further details but decided to accompany the complainant to sister Makumbe where she would report the matter. In fact at page 62-63 of the court record she tells the court that she read only part of the statement that the complainant wrote when she accompanied her to sister Makumbe and she said she did not have time to finish reading the statement. She however confirmed reading the part about the appellant handling the complainant and trying to pull her tunic.

It is trite that where there are contradictions in the state case, it depends on the explanations given for the contradiction and the sum total of the evidence before the court. In this case there was consistency in the state case about appellant holding complainant and trying

to remove her tights or tunic. There is absolutely no contradiction on this respect and the court *a quo* would not have a reason to reject the evidence of the state witnesses in that aspect. Proof beyond reasonable doubt does not entail perfection in the state case. It entails proof that beyond a reasonable man's questions and doubts, a set of facts have been proven to have occurred at the behest of an accused. It means that the crux of the matter as per the charge the accused faces, has indeed been established beyond any reasonable doubt. Juxtaposing the evidence of the state witness and the fanciful defence given by the appellant in the court *a quo*, and also considering whether the defence proffered is reasonable and possible in the circumstances, the court *a quo* cannot be faulted in finding that indeed the guilt of the appellant in this matter was proven beyond a reasonable doubt.

Proof beyond a reasonable doubt is explained in Reid Rowland's Judges handbook for Criminal cases at page 97 as follows:-

“In our system, the state has to prove the guilt of an accused beyond reasonable doubt. Proof beyond reasonable doubt cannot be subject to exact measurement. For Judges and Magistrates it becomes a matter of experience and intuition rather than analysis. It is a matter of degree. Proof beyond a reasonable doubt does not mean proof to an absolute degree of certainty. It means that there should be such proof as leaves no reasonable doubt in the mind of an ordinary man capable of sound judgment and of appreciating human motivations. It means a high degree of probability not proof beyond a shadow of doubt. The state does not have to close every avenue of escape, and fanciful or remote possibilities can be discounted as these do not lead to reasonable doubt.” (my emphasis)

The author therein then refers to the case of *Isolano v the State* 1985 (1) ZLR 62 (SC). In the matter at hand, the fanciful theories that complainant was bitter about unreturned love and that a third force had a hand in the form of disgruntled teachers, are remote theories that indeed have to be discounted. Whilst the accused person bears no onus to prove the truthfulness of his defence, he however still has to come up with a defence that is reasonably possibly true in the circumstances. In other words accused must come up with a version sufficient to raise a defence and all that is required is that there be sufficient material evidence to make the defence a realistic issue. It is not realistic that complainant fabricated allegations because of unreturned love, neither is it realistic that because there are some teachers that the appellant once told of their wrongdoing then they could be the third force in the case. The defence proffered is a matter of surmise and conjecture, it cannot be held to be reasonably, possibly true in the

circumstances. This is juxtaposed with appellant's own evidence that complainant did frequent his office.

Reid Rowland further states at page 97 of the Judges handbook in criminal cases that:-

'To be a reasonable doubt, the doubt must not be based on pure speculation but must be based upon a reasonable and solid foundation created either from the positive evidence or gathered from reasonable inferences not in conflict or without weighed by proven facts. (It is sometimes said that accused should not be convicted unless there is moral certainty as to his guilt). However, it is not necessary for the state to prove every single individual fact in a criminal case beyond a reasonable doubt although the state must prove beyond a reasonable doubt a fact which is particularly vital upon which the whole state case hinges. The question which needs to be asked is: do all facts taken together prove guilt beyond a reasonable doubt?'

On the other hand Reid Rowland further states that accused must be acquitted if there is a reasonable possibility that his story is substantially true and that his explanation might be reasonably true. We have already found that appellant's defence is fanciful and more of a theory than the established facts. The appellant's counsel in the heads of argument and the grounds of appeal attacks the learned Magistrate's reasoning and it is clear from the learned Magistrate's reasoning that she just chose to believe complainant's story without assessing if the accused's defence is reasonably, possibly true, which in itself is a misdirection however, at the end of it all, the appellate court should consider the sum total of the evidence before the court *a quo* and satisfy itself either that the accused's guilt was proven or was not proven looking at the evidence in the court record. It does not necessarily follow that every misdirection vitiates a conviction. Regard should be had to section 38 (2) of the High Court Act which provides thus:

"Notwithstanding that the High Court is of the opinion that any point might be decided in favor of the appellant, no conviction or sentence shall be set aside or altered unless the High Court considers that a substantial miscarriage of justice actually occurred." (emphasis mine)

The Act further provides in section 38 (3) that:-

"If any point raised is decided in favour of the appellant and it consists of a misdirection by the trial court or tribunal of itself on a question of law or a question of fact or a question of mixed law and fact, the High Court shall dismiss the appeal if it is satisfied that the evidence which has to be considered has not been substantially affected by the misdirection and that the conviction is justified having regard to the evidence." (my emphasis)

It therefore follows that even if the learned Magistrate's reasoning fell short of the required standard *vis a vis* eliminating accused's defence, this court will not, where evidence led proves the state's case beyond a reasonable, doubt simply allow the appeal on that sole basis. The appellate court can still in terms of the aforestated sections of the High Court Act, make its own findings on the reasonableness, possibility or otherwise of the defence proffered as shown herein

On the other hand, the totality of the facts, that is considering the following issues:-

- 1) Complainant's vivid explanation of what transpired.
- 2) Complainant's explanation on pertinent issues during cross-examination which I have already alluded herein.
- 3) The consistency of the report relating to the touching of thighs and the attempt to remove tights or the tunic.
- 4) The appellant's perception that complainant loved him and therefore wanted a sexual relationship with him when there is no specific conduct or mention of complaining communicating as such to the appellant. This is coupled with the fact that he failed to tell the court where this theory emanated from as clearly complainant never told him as such and he says he read from her conduct of being always at his office which in itself is mere conjecture. He also says some other students told him.
- 5) His conduct of not acting like a teacher who is in *loco parentis* and reporting or dealing with complainant's alleged inappropriate conduct.
- 6) The fact that clearly from the totality of the evidence, complainant would sometimes be alone with accused a situation that was not permitted in the school.
- 7) Appellant using mainly unproven rumours to rely on in his defence. Rumours are just that, they are not facts neither can they be material to a determination that has to be made in a court of law.

- 8) The theory of the third force is inconsistent with complaint's anger over unreturned love, we are not even told if the 2 teachers appellant alleges had issues with his strict management, even got involved with the complainant's cause at any stage. This clearly is a desperate attempt by the appellant to throw in everything with the hope that something somehow might hold. It is thus our finding that the conviction of the appellant by the court *a quo* as charged is satisfactory as the state did prove its case beyond a reasonable doubt in the circumstances.

Ad Sentence

On the sentence, sentencing is the province and domain of the trial court and this court will only interfere if there is a misdirection. The penalty provision provides for a fine not exceeding level 7 or imprisonment not exceeding 2 years or to both such fine and imprisonment. The learned Magistrate erred and misdirected herself when she sentenced the appellant to 36 months imprisonment of which 12 months imprisonment was suspended on the usual conditions with the remaining 24 months suspended on condition accused performed 840 hours of community service at Ntenjaneni Police Station.

The sentence will accordingly be altered so as to remain within the permitted penalty provision. Accordingly it is ordered as follows:-

- 1) The conviction is confirmed.
- 2) The sentence by the court *a quo* set aside and substituted with the following:-

The accused is sentenced to 24 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition the accused does not during that period, commit any offence involving indecency whereupon conviction he shall be sentenced to imprisonment without the option of a fine. The remaining 18 months imprisonment is suspended on condition accused completes 630 hours of community service at Ntenjaneni Police Post on the following conditions;

- a) Community service starts on 15th March 2021

- b) It shall be performed on weekdays between 8 am – 4 pm on conditions set out by a probation officer.

Makonese J.....I agree

Abigail Masawi Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners