ELDRICK ELVIS MAVHURA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 17 January 2013

Criminal Appeal

G C Manyurureni, for the appellant
J Uladi, for the respondent

MAVANGIRA J: The appellant was arraigned before the Regional Magistrate at Bindura on a charge of rape as defined in section 65 of the Criminal Law (Codification and Reform) Act [*Cap 9:23]*. He pleaded not guilty but was convicted after a trial. He was sentenced to 14 years imprisonment of which 31/2 years imprisonment was suspended on condition of good behaviour. He now appeals against both conviction and sentence.

The evidence of the 6 years old complainant was to the effect that whilst she was on her way home from school, the appellant who lives near her house, asked her about one Selina, who used to work for the complainant's family. Thereafter the appellant called or led her into the toilet at his house. He removed her panty and asked her to sleep on the floor. He then removed his clothes, went on top of her and raped her. After raping her he told her that if she told her mother about it he would cut (or stab) her with a knife. She said that she told her sister Lilian and later her mother about the rape.

Lillian Murevanhema, the complainant's sister said that the complainant came home from school and was crying. She asked the complainant why she was crying but the complainant did not answer. Later, Nelisa, her sister called the witness. She went to where the complainant was and saw that the complainant's panty was blood stained. This was at about 9:00PM. She called her mother to come and see as well. She later heard from her mother that the complainant had said that she was raped by the appellant.

Nelisa Mpamhanga is also a sister to the complainant. She said that she saw the complainant lying on the floor and saw that her panty was blood stained. She asked the complainant why her panty was blood stained and the complainant did not answer. She then called her mother.

Epiphania Makumbi, the complainant's mother said that she was not at home the whole day and when she came back home around 9.00pm the complainant's sister called her to come and see the complainant's panty. She removed the complainant's panty and saw that it was blood stained. She checked the complainant's genitals and saw that her vagina was swollen. She asked the complainant what had happened. After initially being afraid to tell her, the complainant later opened up and said that the appellant had called her when she was on her way home from school and asked her about Selina their former maid. She told her that the appellant then took her to the toilet and raped her and that he threatened to cut her with a knife if she divulged what had happened. He also said that he would ask Nelisa her sister to check if she had divulged the matter. The witness also said that her house and the appellant's are adjacent to each other and are only separated by a precast wall commonly referred to as a durawall.

In his defence the appellant denied having raped the complainant. He said that he spent the whole day at home with his mother, his sister and a tenant. He was performing household chores as his mother was not feeling well and his sister had recently given birth to a baby and could not go out with the baby yet. He only left the house around 3.00pm when he went to the market place to fetch relish. He said that he never spoke to the complainant and it was not possible to rape her in the toilet without being seen or heard by the people who were at home as the toilet door makes noise when opened.

The appellant's sister Elsie Chigwida testified for the defence. She said that the appellant could not have raped the complainant in the toilet as alleged because the dining room window is near the toilet and the spare bedroom window also faces the toilet. One entering the toilet can be seen from the spare bedroom or from the dining room and the door to the toilet also makes noise when opened. She said that the complainant could not have been raped because she did not hear her crying out. She said present at home were their mother, the witness herself, the appellant and the witness' baby. The appellant was doing the chores, cooking and washing dishes for the whole day. She also said that around 12.00 noon to 1.00pmthe appellant was playing with the baby under the Avocado pear tree. Asked what

the appellant was doing between 1.00pm and 3.00pm she said that he was playing with the baby. When she was reminded that he had just said that the appellant was playing with the baby from 12.00 noon to 1.00pm she said "Yes and he was outside selling freezits."

Elsie said that she had just given birth and was not yet strong and that she had to go and bath as she was bleeding. She said that at other times she was seated in the dining room. Their mother who was not feeling well would at times be in the dining room and at other times be in the verandah. She said that the toilet is separated from the house and is at the back of their house. The dining room window faces the back of the house. From the dining room where she was seated she would have seen the appellant committing the offence if he had done so. She did not see him going to the toilet and she did not hear the door of the toilet being opened.

When advised that the appellant had said that she was always in the spare bedroom, she said that that was not so and that she was in the dining room.

Abigail Mavhura, the appellant's mother also testified. She said present at home were herself, her young sister and her husband and another lady. She said that the appellant's sister who had recently given birth 3 days earlier was also at home. On 15 March 2011 the appellant was the one doing all the household chores, washing dishes, cooking and playing with the witness' 3 month old baby. She usually sees the complainant going to school but on that day she did not see her. She said that the appellant could not have raped the complainant as alleged as there were people at the house and that that is the only toilet at the house. They would have heard it and if the allegation was true the complainant should have cried out. She said that at 1.00pm she was at the verandah. She thereafter conceded that she could not say whether the appellant raped the complainant or not.

In convicting the appellant the learned Regional Magistrate stated *inter alia*, in her judgment, that the appellant and complainant know each other well as they are neighbours. She warned herself of the need to carefully analyse the young complainant's evidence with due care and caution to guard against being misled by the inherent dangers in testimonies of children. She found that the complainant, though a child, gave a clear testimony and gave her evidence well. She believed her. She disbelieved the appellant and his witnesses and gave clear reasons for the decision.

The appellant has raised 7 grounds of appeal against conviction. The first, second and third grounds of appeal in essence raise one ground of appeal the essence of which is that the

trial magistrate erred in accepting the 6 year old child complainant's testimony in the face of inconsistencies in that whilst she said that she first made a report of rape to her sister Lilian, Lilian in her evidence said that she did not receive a report from the complainant and only learnt of the rape from their mother.

The fourth ground of appeal is that the trial magistrate erred in placing reliance on evidence about a blood stained panty when no such panty was produced in evidence and there was no explanation as to what had become of it. It is noted however that the fifth ground of appeal as crafted by the appellant is in comprehensible although it appears to refer to the same issue as in the fourth ground; that of the blood stained panty. The sixth and seventh grounds also raise the same issue which is to the effect that the trial magistrate erred in failing to appreciate that the defence raised by the appellant was plausible and that it left a very remote possibility that the complainant could have been raped in the toilet where everyone at the house had access and at that time of the day.

As against sentence the ground of appeal raised is that the trial magistrate erred and misdirected herself in imposing a very severe sentence which in the circumstances was so excessive as to induce a sentence of shock.

Regarding the first, second and third grounds of appeal, this is what the learned magistrate stated in her judgment when dealing with the complainant's evidence that she had made the first report to her sister Lilian :

> "Yes the defence counsel, in its (*sic*) closing address said complainant said she had first told her sister about what accused did to her but the sister testified that she had only seen her pant (*sic*) blood stained and called her mother and that it was the mother who told her about the alleged rape after discussion with complainant about her blood stained pant. (*sic*) Now, such a somewhat inconsistency, does not go to the root of this case and it does not at all dent the State case, as totality of the evidence clearly support the State Case." (pp 12-13 of the record).

It thus appears that the trial magistrate viewed the inconsistency as one of a minor nature and one which did not discredit the complainant's evidence regarding the rape itself. In *Michael Gwanzura* v *The State*, SC 66/91 KORSAH JA stated at p7 of the cyclostyled judgment:

> "Whether or not the complainant is a credible witness is not to be judged by taking her evidence in isolation but by evaluating the evidence as a whole to determine whether her testimony can reasonably possibly be true."

The trial magistrate thus cannot be faulted for adopting the approach that she did in view of what is revealed by the totality of the evidence that was placed before the court.

With regard to the fourth ground of appeal, the appellant does not dispute the three State witnesses' evidence that they observed that the complainant's panty was blood stained. The non-production of the blood stained panty does not discredit or diminish the credibility of the complainant and the other State witnesses. As already stated earlier, that which purports to be the fifth ground of appeal though incomprehensible, seems to raise concerns with the same issue of the blood stained panty.

Regarding the sixth and seventh grounds of appeal, on a perusal of the evidence on record it is highly improbable that the appellant could have been and was within the sight of the defence witnesses at all times. There would have been no reason and in fact there is no evidence that they had any (reason) to check on the appellant's every movement at the house on that day. Furthermore, the appellant had the opportunity to rape the complainant as alleged, when she returned from school at about the same time that his sister Elsie said he was playing with the baby under the Avocado pear tree between 12.00 noon and 1.00pm and also that he was playing with the baby and selling freezits between 1.00pm and 3.00pm. The appellant himself said he only left the house at 3.00pm when he was going to the market to collect some relish.

The appellant's counsel has in his heads of argument and in oral submissions before the court, attacked the trial magistrate's reliance on the complainant's evidence on the basis that being a 6 year old child the complainant fitted into the category of witnesses who are known to be given to flights of fantasy and who may come up with a wholly fabricated case for reasons that are stranger than fiction as they do not appreciate the gravity of the allegations they casually make. He submitted that the trial court was enjoined to show a conscious advertence to the risk of false incrimination inherent in the testimony of this witness and then through a clear cut process of reasoning show how any such risk was eliminated in the circumstances of the case before it. He submitted that in *casu*, the trial court did not show a real awareness of the possibility of false incrimination and that this is a case in which the complainant could have misbehaved elsewhere. That in a desperate bid to cover her tracks, given the way the report was made; she then concealed her actual assailant for her own reasons and sacrificed the appellant.

In *Edmore Musasa* v *The State* SC45/02 at p(s) 4 – 5 of the cyclostyled judgment ZIYAMBI JA said:

> "As for the submission that children of tender age tend to fantasize, without professing to be an expert on the subject, it seems fair comment to say that a four-year-old girl is hardly likely to fantasize about a rape or sexual abuse. I am fortified in this by the expert opinion quoted by the learned judge (HLATSHWAYO J) at p 8 of the cyclostyled judgment (*Edmore Musasa* v *The State* HH52/02):
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> > "There is certainly no psychological research or medical case study material which suggests that children are in the habit of fantasizing about the sort of incidents that might result in court proceedings; for example, observing road accidents or being indecently assaulted. Children's fantasies and play are characterised by their daily experience and personal knowledge, and unusual fantasies are seen by psychiatrists as highly suspicious: 'The cognitive and imaginative capacities of three-year-olds do not enable them to describe anal intercourse and spitting out ejaculation, for instance. Such detailed descriptions from small children, in the absence of other factors should be seen as stemming from the reality of the past abuse than from the imagination.' Vizard E, Bentovim A and Tranter M (1987) *Interviewing sexually abused children.*"

In *casu* the evidence on record shows that the complainant arrived home from school crying. It also shows that her panty was bloodstained. On being questioned about it she said that the appellant had raped her and this was confirmed by the medical report which recorded that her external genitalia had tears and bruises, there was vaginal bleeding, the hymen was torn at 10.00 o'clock and at 2.00 o'clock. The report also records that penetration was effected. The complainant was not lying therefore when she said that she had been raped. The learned trial magistrate stated the following:

> "Complainant testified very well and I did not find any reason why she would have lied. In the case of *Musasa*HH52/02 Hlatshwayo J stated that; young children do not fantasize about being raped or other unusual horrific experiences."Indeed I do not believe that complainant could have imagined and or fantasized the rape. She sounded original and her evidence clearly rang bells of truths in it. (*sic*). Her mother corroborated her evidence. I am satisfied that evidence of complainant is indeed reliable and the highlighted dangers inherent in such testimony have been eliminated."

A perusal of the complainant's evidence reveals details that could not possibly be as a result of a flight of fantasy on her part. She clearly stated that the appellant called her as she was coming from school. He sexually abused her in the toilet, the details of which abuse she stated to the court, the appellant threatened to cut her with a knife if she reported what he had done. She must have been relating details of what she had experienced. At 6 years of age she

could not have fantasized about being raped. At her age the suggestion by appellant's counsel that she may have misbehaved elsewhere and then for no reason or for reasons best known to her she decided to shield whoever had abused her and chose to sacrifice the appellant instead must be dismissed with the contempt that it deserves.

On the evidence on record the court *a quo* was justified in convicting the appellant of the offence of rape. The appeal against conviction has no merit and must therefore fail.

With regard to sentence the appellant's counsel has submitted in his heads of argument that the trial court slavishly adhered to sentencing trends as reflected in precedents without taking the individual circumstances of the instant offence and the offender. He submitted that the trial magistrate fell afoul of the sentencing guidelines as espoused in the case of *S* v *Dube* 2000 (1) ZLR 386. He listed a number of factors that he submitted would have considerably lessened the appellant's moral blameworthiness had the trial magistrate taken them into account. These are listed as the fact that the offence was not premeditated and neither was it repeated, that the appellant did not have ample time to reflect upon his conduct and desist therefrom, that this was merely an unfortunate and uncharacteristic moral lapse; that the appellant did not infect the complainant with sexually transmitted infections; that there was no protective relationship between the complainant and the appellant; that there is no evidence of psychological trauma on the complainant. He submitted that the appellant ought to have been sentenced to a shorter term of imprisonment.

Mr *Uladi* for the respondent has on the other hand, in his heads of argument appositely made the submission that it is trite that an appeal court will only interfere with the discretion of a trial court where the sentence is disturbingly inappropriate or where the discretion of a trial court in respect to sentence has been exercised capriciously or upon wrong principles. See *S* v *Sidat* 1997 (1) ZLR 487 (S) at 490. The trial magistrate's reasons for sentence are clearly stated. On a perusal of the same it cannot be said that she did not exercise her discretion judiciously. Furthermore, in *S* v *Nyamimba* 2002 (2) ZLR 607 it was held that complainants in sexual cases are traumatised by the act of rape. It was also held that a rape perpetrated on a young girl should attract a sentence of at least ten to twelve years imprisonment. In that case a 44 year old man raped a 6 year old child. At page 611E the following was stated:

> "Given the high incidence of rape of innocent young children and their possible exposure to ... diseases, the courts must impose severe penalties in order to deter offenders from committing such offences. That this view is widely held in Zimbabwe

> is evidenced by the recent promulgation of the Sexual Offences Act (Chapter 9:21) and the severe penalties which are provided therein.

In *S* v *Makorisha* HH130/04 the following was stated:

> "Given the dangers to which a rape victim is exposed, a rape perpetrated on a young girl should attract a sentence of at least ten to fifteen years imprisonment."

In *casu* the appellant was aged 20 while the complainant was 6. The trial magistrate stated at the end of her reasons for sentence that considering the age of the complainant and the serious nature of the crime of rape, a lengthy custodial term is inescapable. Furthermore, that as the appellant was youthful she would suspend a portion of the sentence for his future deterrence. The trial magistrate thus for reasons that she clearly spelt out imposed a sentence that is in line with sentencing trends for the matter and circumstances before her. The appeal against sentence thus has no merit either and it must also fail.

For the above reasons the appeal is dismissed in its entirety.

HUNGWE J agrees .....