

FRANK MUJERE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 18 September 2014

Criminal Appeal

T. Mutebere, for the appellant
R. Chikosha, for the respondent

BERE J: On 3 January 2013 the appellant was convicted of the offence of rape as defined by s 65 of the Criminal Law (Codification And Reform) Act [*Chapter 9:23*]. Upon conviction the appellant was sentenced to 12 years imprisonment, 3 years of which were suspended on the usual conditions of future good behaviour.

This appeal is against both conviction and sentence on the following grounds:

The main ground of appeal is that the learned magistrate did not properly analyse the evidence that was led at the trial. The court *a quo* was further criticised for believing the evidence of the complainant who had been induced and coerced into making a confession of the alleged rape, the argument being that the complainant's report was not voluntary and spontaneous as dictated by precedent.

The criticism against the sentence imposed by the court *a quo* was that the court did not properly weigh the compelling mitigating factors which included the youthfulness of the appellant and the fact that the complainant did not suffer any damage or got infected with a sexually transmitted disease or suffer from any psychological trauma.

As the appeal court we have had the benefit of carefully reading the judgment of the court *a quo* as well as the learned magistrate's response to the notice of appeal.

The learned magistrate gave a fairly detailed analysis of the evidence that was presented to her. She was fully conscious of the fact that the complainant had not herself initiated the report on the alleged rape and went on to summarise her reasoning as follows:

"The defence in its submissions stated that when the court is dealing with the evidence of a child it ought to guard against the dangers of false incrimination. It also submitted that for the

complainant to be admissible it should have been made spontaneously, promptly and voluntarily. It is submitted that in the present case the report was not voluntarily made. The complainant only disclosed that she was raped by the accused after she had been taken for medication. The court accepts that the report was not made voluntarily. It should however be noted that there existed a love relationship between the accused and the complainant. At the age of 11 years the complainant was still very young and immature. She narrated how the accused had sexual intercourse with her. Her explanation is believable and looking at the way she says she was raped the court cannot really say she was raped in the strict sense of the word..... She did not raise alarm. She did not tell her sisters. When the mother came from South Africa she did not tell her about what had befallen her. Even when they were caught by the mother the complainant admitted that the accused was her boyfriend. When asked if anything had happened between them she denied until after the medical examination had been done. The court's analysis is that even though she says she did not consent to the sexual intercourse her resistance was very passive. She offered no resistance at all. Her conduct in a way led the accused on until he had sexual intercourse with her. She would say she consented to the sexual act by the way she conducted herself during the sexual act. As a boy who was in love with the complainant the accused must have believed that the complainant wanted to have sexual intercourse with. Even after having been found out by the mother the complainant was reluctant to tell that she had had sexual intercourse with the accused her boyfriend. It would appear that she was trying to protect her love relationship with the accused. The accused was still her boyfriend so there is no way she would have made a voluntary report that she had had sexual intercourse with the accused. It's true that the complainant was coerced into disclosing that she had had sexual intercourse with the accused. If the complainant was aged 12 years at the time the sexual act took place I would have convicted the accused with having sexual intercourse with a young person as defined in the criminal law code s 70. This is because it is very clear that the complainant was a willing partner in the sexual act. This is why she did not make a voluntary report. But then the complainant is protected by the law by virtue of her age. She was under 12 years old".¹

I have deliberately quoted part of the judgment of the court *a quo in extensio* to demonstrate the court's unmistakable thoroughness in its appreciation of both the facts and the law. The court *a quo's* reasoning and application of the legal principles relevant was fluid and it is impossible not to totally agree with it.

The trial magistrate found the complainant to have been a credible witness despite her initial reluctance to divulge the sexual intercourse. I am unable to challenge her findings on the credibility of the complainant, an issue which fell squarely within her province as a trial court. Finding otherwise would be to abuse her strategic placement as the court *a quo*. See *S v Mlambo*² where the often quoted instructive words of Gubby CJ were given as follows:

"The assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by an appellant court unless satisfied that it defies reason and common sense".

The complainant's mother gave a precise piece of evidence which the lower court had

¹ Pages 11-13 of record of proceedings

² 1994(2) ZLR 410 (S) at 413.

to accept in its totality owing to the appellant's failure to challenge not even a piece of that testimony. The complainant's mother must be commended for her vigilance for it was through her alertness that this offence came to light.

In all fairness, there is nothing that can be said in this case that would upset the verdict of the court *a quo*.

It is settled that an appeal court "does not have a general discretion to ameliorate the sentence of the trial court" unless there are compelling reasons to do so. See *S v de Jager and Anor*³.

I have followed the reasoning of the trial court that persuaded it to impose the 12 year prison term. There is no doubt that one of the issues that swayed the court *a quo* to impose this sentence was the age disparity between the complainant and the appellant. The complainant was 11 years and 11 months and the appellant was 19 years at the time. The complainant was a grade 6 pupil and the appellant was in upper 6.

As correctly observed by the court *a quo* the absurdity of the two having fallen in love is beyond any question.

Despite the disparity in ages it is clear that both the victim and the assailant were youthful offenders.

Further, despite the complainant having been 11 years and 11 months old, she was behaving like a mature individual. Indications are that she was a young girl of loose morals as evidenced by her willingness not only to indulge in premarital sex, but to exhibit a stout effort in shielding or protecting the appellant. It took quite some effort to have the complainant open up. She had to be coerced into disclosing her indulgence in sexual intercourse with the appellant.

The court *a quo* made a correct finding that despite her age, the complainant was a willing participant in the sexual intercourse and that no force was used on her by the appellant.

The two were clearly in love at the time despite the technical inability for the complainant to fall in love.

My persuasion is that if the court *a quo* had considered all these factors cumulatively at the time of sentence it may have been persuaded to consider a lesser period of incarceration

³ 1965(2) SA 616 at 628-629 per Holmes JA

than the one the appellant was given. The appeal court must therefore be at large on the question of sentence.

I sincerely believe that when the legislature framed s 65(1) of the Criminal Law (Codification And Reform) Act [*Chapter 9:23*] the primary objective was to protect young girls and women from being ravaged by men against their will. The morally loose character exhibited by the complainant in this case appears to be slightly off the radar of the objectives of the legislature.

Having carefully considered all the circumstances of this case including its being a peculiar case of rape as evidenced by the conduct of the complainant, the sentence imposed by the court *a quo* is set aside and substituted by the following one:

Sentence:

“The appellant is sentenced to five years imprisonment which is wholly suspended for five years on condition the accused does not within that period commit an offence of a sexual nature and for which upon conviction he is sentenced to imprisonment without the option of a fine”.

HUNGWE J: agrees

Mutebere & Company, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners