EDZAI MUSUNGADZAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & MANGOTA J
HARARE, 22 October 2015

Criminal Appeal

S Chako, for the appellant
Mrs S Fero, for the respondent

MANGOTA J: The appellant was convicted, after trial, of rape as defined in s 65 (1) (a) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. He was sentenced to 10 years imprisonment, 3 ½ years of which were suspended for 5 years on condition of future good conduct.

The State allegations were that on 4 May 2008 and at Matemamombe B Village, Chief Chiswiti, Mukumbura, the appellant did have sexual intercourse with one Fungai Mazhanda without her consent.

- The appellant appealed against conviction. He stated, in his grounds of appeal, that the court *a quo* erred:

(1) in convicting him on the basis of circumstantial evidence notwithstanding the existence of the following apparent facts:

"(a) appellant's defence of *alibi* was not challenged;
(b) complainant did not disclose nor state how he (*sic*) identified the culprit as the appellant especially that it was in the dark;
(c) chances of the complainant wanting to fix the appellant for political reasons cannot be ruled out;
(d) complainant did not see the person who raped her;
(e) the medical examination result was inconclusive."

(2) by failing to carefully consider the nature and circumstances of the alleged sexual offence to outlay fears of false incrimination – and

(3). when it failed to treat the identification evidence with caution particularly in the instant case where the evidence of identification was given by the complainant alone.

The respondent opposed the appeal. It stated that the trial court did not misdirect itself when it assessed the evidence which had been placed before it. It submitted that the totality of the proved and unchallenged facts led to only one reasonable inference. The inference, it said, was that the appellant raped the complainant. It discounted the appellant's claim which was to the effect that the complainant concocted a story against him as a way of fixing him for political reasons. It moved the court to dismiss the appeal.

The court *a quo* remained alive to the fact that there was no direct evidence which linked the appellant to the offence. It recognised, and in our view correctly so, the principles which *R* v *Blom* 1939 AD 188 laid down in cases where proof of a matter is by way of circumstantial, as opposed to direct, evidence. This court re-stated the same principles in *S* v *Tambo,* 2007 (2) ZLR 33. The principles, in a paraphrased form state that, where proof of a matter is by way of circumstantial evidence:

(a) the inference which is sought to be drawn must be consistent with all the proved facts - and

(b) the proved facts should exclude every reasonable inference from them except the one which is sought to be drawn.

The trial magistrate fell into a grave error in the instant case. He treated the evidence of the state witnesses as proved facts when it was not such. Other than the finding which was to the effect that the complainant was a woman, all what the magistrate did was to repeat what the complainant and her husband said in court. He inexplicably upgraded the evidence of the state witnesses to the degree of "proved facts". He failed to carefully analyse that evidence and objectively assess it with a view to establishing, from it, proved facts if such were existent in the case. The state witnesses' respective pieces of evidence came nowhere near proved facts from which inference could be drawn.

The record showed the following matters to have been proved facts of the case from which the magistrate could have drawn inferences:

(a) the appellant was a youth league leader of the Zimbabwe African National Union, Patriotic Front, [ZANU (PF)] party in his home area;

(b) the complainant's husband was a member of the Movement for Democratic Change – Tsvangirai (MDC – T) party in the same area;

(c) the two political organisations were rival parties – and

(d) so intense was the tension between the two parties that the complainant's husband was forced to flee his home at about the time of the alleged rape.

We take judicial notice of the fact that, at about the time of the alleged offence, the country was engaged in a lot of political activity. Each of the two political parties was gearing itself for the Presidential run – off election which was slated for June, 2008.

The tension which existed between the two parties led the appellant to submit that:

(a) chances of the complainant wanting to fix him for political reasons could not be ruled out – and

(b) the court *a quo* failed to carefully consider the nature and circumstances of the alleged rape to outlay (sic) fears of false incrimination.

The appellant's submissions in the above mentioned regard could not be considered to have been far-fetched. We demonstrate the view which we hold on this aspect of the case as follows:

(i) the complainant was allegedly raped on 4 May 2008. She did not report the alleged rape to anyone for four (4) months running. She said she was afraid to report because the appellant threatened to kill her if she reported. She stated that the threat was issued to her after the event.

(ii) the complaint's narration of events on that aspect of the case did not read well. She said:

> "I decided to go to Blanket to see my parents to report to them. When I got to Banket, I learnt (*sic*) my mother had died in March so my only brother who was there (*sic*) I could not tell him as my mother had passed away I was afraid to stress him more".

(iii) whatever weight that can be placed on the above quoted piece of evidence remains a matter for conjecture. The complainant could not make us believe that she was unaware of her mother's death from March to the time that she went to her parents' home in Banket. She could not make us believe that she decided to save her brother from stress by not reporting what had happened to her when the object of her travelling to Banket was to report the alleged rape to her parents. She advanced no reason as to why she did not report the offence to her father who was one of her parents to whom she intended to report the alleged rape.

(iv) The complainant's evidence was that she was raped on 4 May 2008. She said she reported the alleged rape to her husband some four months after the event.

Simple mathematical calculation showed that she reported in September, 2008.

(v) Neither the complainant nor her husband, Tendai Guvheya, told the court *a quo* the exact date that the alleged rape was reported to the police. Mr Guvheya stated, under cross-examination, that he did not know the length of time which he took to report the offence to the police.

(vi) The date on which the state witnesses reported the matter to the police is pertinent. That date was completely absent from the witnesses' evidence. The closest clue to the date is contained in the outline of the state case. The state outline was to the effect that the state witnesses reported the matter at Avondale Police Station on 5 May 2009. It stated, further that, on 9 June 2009, the complainant's case was referred to Mukumbura Police Station for further investigations. Mukumbura Police recorded the case under number CR 716/09.

(vii) The court *a quo* should have found, as a fact, that the alleged rape was reported to the police some eight (8) or so months after the complainant had reported the same to her husband. The witnesses' explanation of the delay in reporting the alleged rape to the police was very unconvincing.

(viii) The complainant did not give any reasons for the delay. Her husband made an attempt at proffering what may be regarded as an explanation for the same. He said when he received the report from the complainant, he took some time to report. He stated that his initial reaction was to ensure that his wife received treatment. He said he only reported after his wife had been treated.

(ix) Mr Guvheya did not clarify the treatment which he was making reference to. His wife who was allegedly raped did not ever state that she was injured when the event occurred. All she said was that she was raped and threatened by the appellant not to report the rape to anyone. One is, therefore, left to wonder what treatment was administered on the complainant if she was not injured at the time of the alleged rape.

(x) It may be accepted, for argument's sake, that the complainant required treatment. The question which begs the answer is what treatment did she require or receive some four months after the event. A corollary question to the one which has just been posed is why was the complainant's alleged treatment

prolonged by some further eight (8) months after her initial report to her husband. The long and short of the above analysed set of matters is that it took the state witnesses who are husband and wife a stretch of twelve months running to report the incident to the police.

(xi) The conduct of the two witnesses is not, in our view, consistent with that of persons one of whom had fallen victim to the crime of rape. It is a well-known principle that rape evokes serious emotions on, firstly the victim, and secondly, all those who are dear to him or her. It is for the mentioned reasons, if for no other, that courts have insisted and continue to insist, that victims of rape are expected to report the offence which is perpetrated against them at the earliest opportunity which offers itself to the victim. Where, as *in casu*, the victim takes four (4) months to report the incident to her husband and, the victim and her husband take a further eight (8) months to report the same to the police and the explanation which the two advance for the delay is flimsy, the alleged assailant will not be faulted if he or she claims that the allegations were fabricated with a view to fixing him or her.

The above analysed matters constitute the gravamen of the appellant's submissions which the respondent could not challenge in any convincing manner. On the strength of the proved facts which we stated in some parts of this judgment, we remain of the view that the court *a quo* adopted an arm chair approach to the matter which was before it. It fell into a serious misdirection in the mentioned regard.

It has often been stated that rape is a crime which is easy to allege and is generally difficult to refute. Judicial officers who deal with this type of crime are, more often than not, called upon to be very circumspect. They are enjoined to carefully analyse the evidence of state witnesses, that of the complainant in particular, and, in the process, be able to discount the possibility of false incrimination of accused persons who appear before them. They should, in short, be satisfied that the state established the guilty of the accused beyond reasonable doubt. Where, as *in casu*, doubt remains in the mind of the judicial officer, that doubt must be resolved in favour of the accused person whom the judicial officer must acquit.

We are satisfied, on the basis of the foregoing that:

(a) the court *a quo's* analysis of the evidence which had been placed before it was erroneous.

(b) the analysis in question led the trial court to arrive at an erroneous decision which was not supported by the evidence which had been placed before it.

(c) the delay in reporting the alleged rape to the police tends to support the view that the state witnesses were rehearsing their respective pieces of evidence in an effort to perfect their story and make it hold.

(d) The dangers of false incrimination of the appellant by the complainant and her husband was more real than it was fanciful;

The appellant's appeal succeeds on the strength of all the matters which we considered in this case. The appellant is, in the premise, found not guilty and is discharged.

CHIWESHE JP : agrees:……

Mushangwe & Company, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners