KILLA MAURUKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE & TAGU JJ
HARARE, 25 February 2014 & 31 July 2015

Criminal appeal

B. Pesanai, for the appellant
Miss *R. Kachidza*, for respondent

BERE J: At the conclusion of the hearing the appellant was convicted of two counts of rape as defined by s 65 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], after which the appellant was sentenced to 18 years imprisonment 2 years of which were suspended on the usual conditions of future good behaviour.

The appeal before us was initially against both conviction and sentence as informed by the notice of appeal. However when the heads of argument were filed nothing was said about sentence. Consequently and as rightly observed by the State counsel we deemed that the appeal against sentence had been abandoned and our focus remained on the appeal against conviction only.

The attack on the court *a quo* is basically that the evidence led at trial was riddled with several inconsistences of the witnesses who testified and from which the appellant's counsel formulated the opinion that the appellant ought to have been acquitted. The defence has therefore pleaded with this court to uphold the appeal. This position was vehemently opposed by the State counsel, who whilst conceding the existence of such inconsistencies felt very strongly that the appeal had no merit at all and urged this court to dismiss it.

As is the norm what is being put in issue is the judgement arrived at by the learned Magistrate in the light of the evidence adduced by both the State and the defence. We have

thoroughly examined the judgement of the *court a quo* bearing in mind the criticism that has been made against it.

One of the main criticisms raised against the court *a quo* was to do with the manner in which the report was made in this case. The argument on the report was two-fold, firstly it was argued by the defence that it was not made at the earliest opportunity and secondly that it was made as a result of undue influence on the complainant. These arguments were premised on the decisions of *State* v *Nyirenda*[1], *R* v *P*[2], *R* v *Orsbarne*[3] and a host of other related cases.

In dealing with the concerns raised by the appellant's counsel the court *a quo* accepted that the complainant made an unsolicited or voluntary report to her mother who gave evidence confirming this aspect. It is accepted by the court that the complainant did not take the initiative in making a report of rape but only disclosed this after her mother had asked her why she was walking with straddled legs. I do not accept that the manner in which the report was made was compromised in any way by the enquiry made by the complainant's mother. There is nothing offensive in a rape case if a complainant discloses rape upon being questioned. It becomes a challenge if that report is forced out of the complainant or it is made as a result of undue pressure or undue persuasion to a complainant. This is certainly not what happened in the instant case. The court's view is that the complainant made a voluntary disclosure to her mother in response to her mother's natural enquiry as a responsible mother. I do not understand the appellant's counsel to be postulating a theory that having seen the suspicious manner of her daughter's walking the complainant's mother was supposed to keep quiet.

The attack on the alleged shortcomings of the State case did not end with the attack on the complainant's mother but was extended to the school head Sophie Chiwara. This witness told the court that having gathered about the complainant's abuse she approached her and told her that she had all the details concerning what transpired to the complainant. In response the complainant narrated to this witness the same story as the one she had disclosed to her mother. The similarity of her story to the school head and to her mother is

[1] HB 86/03
[2] 1967 (2) SA 497 (R)
[3] [1905] KB 551, [1905] ALL ER 54

unmistakable. It is not possible in my view that if she was allegedly singing her mother's song to fix the appellant she would have been able to sustain her consistency.

My view is that there was nothing wrong with the manner in which the school head dealt with the complainant. If anything she must be commended for her vigilance and her ability to let the complainant disclose this heinous assault on her. I am far from being convinced that the complainant's disclosure to the school head diluted her report of rape in any way.

The leaned Magistrate was further criticised for having made a factual finding that the complainant was raped in 2012 as opposed to 2011 which was in the State Summary. My view is that this attack on the Magistrate was clearly unwarranted. I come to this conclusion because of the following considerations. Firstly, it should be made very clear that throughout her testimony the complainant never personally testified on when exactly she was sexually molested. Her evidence in chief is silent on this aspect. It was only when it was suggested to her by the defence counsel in cross-examination that the second rape had taken place in August 2011 that the complainant agreed with counsel.

The complainant's mother cured the defect in the State Summary with regards to the time of the sexual abuse by candidly telling the court in her cross-examination, "I think there is a problem about years, this case happened in 2012 and not in 2011 as on the papers. I also asked the accused in 2012 and one Gladys informed me in September 2012."

Nothing in my view could be further from the truth as the complainant's mother's position accords well with the version given by her daughter Ennie Simango who said that it was in 2012 that she saw the complainant crying with the appellant standing naked beside her.

Secondly and more importantly the fact that the complainant was medically examined in 2012 reaffirms the position that she was raped in 2012 after the matter had found itself within the police radar. It is simply not possible that if the complainant had been raped in 2011, the police would have waited until September 2012 to have her medically examined.

Despite all the attack on the story told by the complainant my own observation is that there is an unmistakable consistency in that story. The complainant's story finds clear corrobation from her sister Ennie, the school head Sophie Chiwara and her mother Stella Sakala. It is inconvenciable in my view that if the complainant had been influenced to lie

against the appellant by her mother, she would have been able to maintain her consistency. If the complainant was bend on fixing the complainant as argued by the defence it is highly unlikely that she would have conceded that on the first sexual assault, the appellant failed to penetrate her. It would have been more attractive for her to have said that the appellant penetrated her on both occasions in order to ensure that he was punished. But alas! She did not have the courage to lie against the appellant.

If there was any need for corroboration in this case, then the medical report which confirmed sexual abuse on the part of complainant spelt a death knell to the appellant.

My overall view is that the judgement of the court *a quo* made the obvious and inevitable finding and it needs not be disturbed.

Consequently the appeal is dismissed in its entirety.

TAGU J agrees …….

IEG Musimbe, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners