WILSON MUKARONDA ZUNIDZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 15 September & 7 October 2015

Criminal Appeal

Mrs *J T Magaya*, for the appellant
E Mavuto, for the respondent

HUNGWE J: This is an appeal from the Regional Magistrate's Court, Bindura. The appellant was convicted of rape as defined in s 65 of the Criminal Law (Codification & Reform) Act, *[Chapter 9:23]*. He was sentenced to 20 years imprisonment. He appeals against both conviction and sentence. The appellant raises six grounds of appeal against conviction and a further four grounds against sentence.

The first ground of appeal is that "the court *a quo* misdirected itself in failing to give a conscious consideration of the likely risk of false incrimination and ensure that false incrimination is excluded before exposing its complete confidence in the complainant."

The second ground put forward on appellant's behalf is that the court "erred in failing to discern that the version given by the complainant was fabricated by a spiteful young child and her custodian with a hidden malice for revenge after complainant had been assaulted by appellant's wife on the day in question." The third ground recites that "the learned magistrate erred and misdirected himself in holding that the bruises on complainant's labia were caused by the accused yet the tendered medical report did not rule out any previous genital sexual experience (*sic*) nor state whether the lesions were fresh or healed." The fourth ground states that the "the learned magistrate fell into error by being moved by a subjective and unduly sympathetic acceptance of the testimony of this eleven year old girl who was healthy and walked properly with a normal emotional state and who did not show any signs of distress

and shock a day after the alleged rape upon examination thereby failed to discern that that version could not establish beyond reasonable doubt the guilt of the accused." In the fifth ground it is said that "the court *a quo* erred in failing to give due regard to the need for special caution in scrutinizing and weighing the evidence of a young complainant in a sexual case especially where the accused was unrepresented." Finally, it is said that "the court a quo misdirected itself in failing to call for the evidence of the examining medical officer to support his findings of legal penetration in a matter where the appellant insisted that he did not rape the complainant and the medical report indicating that no penetration was noted."

The trial court convicted the appellant after a contested trial. The state alleged that the rape occurred under the following circumstances. On the day in question the complainant was coming from school in the afternoon. Her way passed through the appellant's homestead. When she got there the appellant lured her into his kitchen hut with buns and mangoes. Once inside, the appellant grabbed her, removed her pants, laid her on a bench and raped her once. After this act, the complainant dressed herself up but soon thereafter, the appellant's wife entered the hut. After asking the complainant what she wanted, the appellant's wife slapped the complainant twice. Complainant left this homestead. She reported the rape that same day to her aunt who, in turn, alerted the complainant's parents. The next day, 12 February 2014, a report of rape was made to the police leading to the appellant's arrest. In the medical examination report compiled on the same day, the nurse noted that there were bruises on the complainant's private parts. He also noted that there was no penetration noted.

In his judgment the trial magistrate remarked that the complainant gave an impressive account of the events leading to the allegations of rape against the appellant in a manner that hamstrung the appellant from meaningfully challenging her during cross-examination. Indeed, a reading of her evidence on the record justifies this conclusion. The aunt, Sarah Mbauya, who is the first responsible person to whom the complainant made a report of rape, gave evidence which in essence, corroborated to detail the nature of the report that complainant gave to her. In the end, the trial court rejected as false the bare denial given by the appellant in his defence.

In our view, the dangers of false incrimination were remote in this matter. First, the appellant himself does not say he was falsely implicated in the offence. His defence is that he did not do anything to the complainant when she came round to his homestead. He states that complainant had knocked and entered and sat on the bench where she remained until his wife

came from church. He says his wife insulted the complainant and she left weeping. The appellant under cross-examination says that the complainant may have been influenced to lay these charges against him. He does not say who by or why that person would have done so. It is only when the matter was on appeal that he claims that the complainant's friend may have influenced her to lay the charges of rape as revenge for the assault on her by his wife. This, so the argument went, was done to fix both him and his wife for the assault upon her person when she found her inside the kitchen. But this argument begs the question; why in the first place did the wife assault the complainant anywhere? In our view, appellant's wife's reaction was actuated by a suspicion of some liaison of sorts between the two. She vented her frustration on the complainant. The appellant alleges malice and revenge as the motivation for the report. A fair assessment of the evidence does not in any way suggest that prior to this encounter there may have been a source of malice between the appellant and the complainant. In any event the older appellant was unable to controvert or cast doubt on the version of events as given to the trial court by the complainant. That, on its own, does not in any way render complainant's evidence suspect. She told her friend what the appellant had done to her and her fears regarding how she would report to her elders, hence the friend offered to accompany her to her aunt to make the report. In short, the first and second ground of appeal must, for those reasons fail.

The existence of bruises inside the complainant's private parts confirm her claim that she was ravished. Who did so? She says it is the appellant. The appellant confirms for good measure the fact that on the day she claims this incident occurred, the complainant and himself were at some point alone inside his kitchen. There is in our view sufficient corroboration of the complainant's claim that the appellant raped her. That corroborative evidence also confirms her version of events so as to discount any possibility of false incrimination. As such the need for special caution is obviated in the process. In our view, the overwhelming nature of the available evidence is such that there is no possibility of the appellant being falsely accused by the 11 year old girl. Thus it is unfair to label the findings of credibility by the trial court as "subjective and unduly sympathetic acceptance.." The record does not support this type of criticism. No-one adverted to the complainant's emotional state nor her gait soon after the incident. In our view, the finding of credibility is beyond reproach. The third and fourth grounds of appeal cannot be sustained on the evidence

on record. The need for caution appears to have been exercised from the reasoning of the court *a quo.*

In sexual assault cases there is already one well-known exception to the rule against hearsay which holds that evidence of a complaint is admissible to show the consistency and therefore support the credibility of the person who gives evidence of being sexually assaulted. (See *S* v *Banana* 2000 (1) ZLR 607 (S)). This general rule is of course subject to certain conditions, namely that the statement was reasonably contemporaneous with the event in question and was not induced by improper interviewing techniques. The complainant reported the rape promptly. The evidence was gathered quickly. The conviction is proper. The appeal against conviction must fail.

As for the appeal against sentence, we believe that in all matters where a first offender is sentenced to imprisonment, he ought to enjoy the benefit of a suspension of a portion of the sentence as a salutary recognition to his status as a first offender. Any offender is capable of reform. He must benefit from the usual and time-honoured practice of our courts to suspend a portion of a term of imprisonment in spite of how the court assesses the usefulness of this approach. A failure to observe this salutary practice may, in certain circumstances, such as here, constitute a misdirection entitling this court to interfere with sentence. Further, a court must always pay due regard to the language it uses in giving reasons for any decision. To use what might be termed "extravagant language" may lead to a conclusion that the court was swayed by considerations extra-judicial. I make mention of this because, in the present case, the learned trial magistrate remarked that this crime was committed for ritual purposes.

Nowhere is this suggestion made. He states that "the evidence in these courts is that all the cases that we deal with are influenced by rituals for how else can we explain a man of 57 years raping an 11 year old child?" As pointed out above there is no evidence that the appellant committed the crime in pursuance of a ritual. There is therefore, no justification for reference to rituals as having motivated this crime. It cannot be ruled out that the court may well have been subconsciously swayed, in its assessment of sentence, by this factor. It is true that where a fairly long effective sentence is determined to be appropriate, there may be no point in suspending a portion of such a sentence. However, while there is no rule which requires that in such cases no portion of such a sentence should be suspended, it is practice to suspend a portion of any such sentence where the offender is being sentenced for the first time.

Further, the statement that "if the accused cannot repent after serving a long term of imprisonment he cannot repent even after suspending a portion of it…" cannot, in my view, be justification for not suspending any portion of a term of 20 years imprisonment. Clearly, this approach to assessing sentence constitutes a misdirection.

The usual considerations, when assessing sentence, is the gravity of the crime, the personal circumstances of the offender and the interests of society. It has been held repeatedly that the sentence must suit both the crime as well as the interests of society. Needless to say, a court will give due weight to all the mitigating factors in the matter and weigh against those factors which constitute aggravating features in the matter.

We note that the appellant was 57 years old at the time. He was a first offender with the usual family responsibilities. On the other hand, his victim was only 11 years old and a neighbour. The psychological trauma she must have suffered is immeasurable. She must have been taken by surprise totally by the accused's sexual assault as she least expected this to happen. Having applied our mind to both the mitigatory factors as well as the aggravating ones we assess the sentence of 20 years imprisonment as befitting. However we are of the strong view that like any first offender, the appellant ought to enjoy the discount of a suspension of his custodial term. Therefore the sentence imposed in the court a quo will be altered to read as follows:

> "20 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition that the accused is not, during that period, convicted of any offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine."

CHIWESHE JP agrees …….

Magaya Mandizvidza, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners