BERNARD CHITIMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSAKWA JJ
HARARE, 12 January 2016 & 3 February 2016

**Criminal Appeal**

*T Nyamucherera, for the appellant*
Ms *F Kachidza, for the respondent*

HUNGWE J: Experience on this bench shows that, more often than not, there are chances of a rape victim falling victim to this sordid crime again sometime later in her life. This appears to have been the sorry experience which the complainant in this case, a young child, has had to endure.

The appellant, a teacher and the complainant's class teacher, was convicted of rape as defined in s 65 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] and sentenced to 18 years imprisonment of which five years imprisonment were suspended for five years on condition of good behaviour. He appeals against both conviction and sentence. Although several grounds of appeal were raised in the notice and grounds of appeal by the appellant it was clear both from his heads of argument and from the submissions at the hearing of the appeal that the appellant's main contention was that the court *a quo* erred in disregarding the medical report. According to the appellant, the medical report proved that there had been no recent sexual penetration of the complainant since this would have been made evident by the presence of fresh tears, stretches of the hymen and vaginal discharges.

In order to properly appreciate the contextual basis of this argument, it is appropriate to set out the factual findings made by the court *a quo* at the end of the trial. These are the following.

The complainant was aged 11 years at the time of the offence. She was in Grade 6 at the school where the appellant was a school teacher. On the day on which the allegations of

rape arose, she was called by the appellant to his residence at the morning break time to collect some sports uniforms. Upon arrival, the appellant invited her into his house. When she went in, he asked her into his bedroom. When she entered into the bed-room, he laid her on his bed and then removed her pants. When she tried to cry out, he took a piece of cloth and covered her mouth such that her cries for help were muffled away. He then removed his pair of trousers and sexually penetrated her. After completing his purpose, he wiped her and said something to the effect that he wanted her to be his "aunt" advising her to come back again tomorrow for another sex session. The appellant was a self-actor at the time of his trial and conducted cross-examination of the complainant on his own. It emerged during such cross-examination that the complainant had been sexually abused previously. The appellant was aware of the facts surrounding that incident and that it had been reported late through an organisation called Girl Child Network which is headed by his wife. It also emerged during cross-examination that the complainant had taken the uniforms from the appellant's residence to the class-rooms but had gone back to his house as she had forgotten her pencil case after the sexual assault.

Her mother, the first person to who she reported the incident, confirmed to the court that the complainant had asked her to read what she had written on a piece of paper. She told the court that the complainant had written that she was ashamed to tell her that her class teacher had made her his "wife". As a result, she wrote that she did not want to go to school the following day since her class teacher had promised her another session similar to the one she was writing about. This led to the matter being reported to the authorities and the arrest and prosecution of the appellant.

The court *a quo* found the two witnesses credible. The court discounted the political conspiracy theory which the appellant raised in the defence case. In a well-reasoned judgment the magistrate gave cogent reasons why she believed the complainant and her mother and disbelieved the appellant. The magistrate correctly set out the contents of the medical report and acknowledged that the complainant had been forthright in admitting her previous abuse experience which was consistent with the doctor's findings. The court noted that the appellant did not dispute that he had called the complainant to his residence at the time stated by the complainant. The learned magistrate stated:

> "In cross-examination of the complainant by the accused he dwelt much on why she did not report at the school because being a member of the Girl Child Network she was well informed and could have known how to react. He failed and did not challenge her on the natural facts of

> rape which complaint clearly explained the act of sexual intercourse…….Complainant even told the court that accused had said to her that he wanted her to be his 'mainini' and should return the next day to which he did not dispute."

In his submission at the hearing, the appellant's counsel argued quite vehemently that because of the fact that the complainant was a young girl and the appellant an adult, therefore the complainant must have felt some pain during the act of rape. The fact that she said she felt nothing, she must be disbelieved and on that basis the appellant was entitled to his acquittal. I must express my surprise with this line of argument on appeal. Matters of credibility are better handled by the trial court for obvious reasons. In an appeal hearing the court does not enjoy the benefit of seeing both the complainant as well as the accused and making an impression about such things as where the probabilities in the matter would lie on such issues as sexual intimacy between the parties. An appeal court simply cannot determine credibility on the basis of such issues.

In *Chimbwanda* v *Chimbwanda* SC 28-02 ZIYAMBI JA remarked:

> "It is trite in our law that an appellate court will not interfere with findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage point of having seen and heard them. See *Hughes* v *Graniteside Holdings (Pvt) Ltd* SC-13-84. The exception to this rule is where there has been a misdirection or a mistake of fact or where the basis the court a quo reached its decision was wrong."

*In casu,* there is no suggestion that the finding that the witnesses were credible was based on a wrong contextual basis. If anything the court *a quo's* finding of fact is eminently unassailable. It is the submission that there was no sexual intercourse which I find misplaced in light of the evidence. The complainant was only 11 years old. She could not, in the circumstances of the case, have been part of a political plot against her class teacher.

In the result I find no merit in the appeal against conviction.

As for the appeal against sentence, the court took into account all the relevant factors which it was obliged to consider in assessing sentence. It took into account that the appellant was complainant's class teacher who stood in *loco parentis* towards the complainant. It imposed a sentence lawfully within the statutory range in cases of this nature. Rape is a vile crime. It is an assault on the integrity and dignity of the victim. The consequences, for the victim, are far reaching. The legislature has deemed it fit to provide for life imprisonment in fitting cases. In the circumstances of this case I am unable to agree that the sentence of 18 years induces a sense of shock on account of its severity. In any event, being a school teacher, and the victim's class teacher, the appellant knew very well the risk attendant to his conduct.

He shamelessly committed this crime against a child society expected him to take care of. He has no-one to blame when the courts, in their indignation, impose the sentence he received on this occasion. He deserves his just desserts. In the result the appeal against sentence fails.

In light of the above the appeal against both conviction and sentence be and is dismissed in its entirety.

Musakwa J agrees……

*Lawman Chimuriwo Attorneys*, appellant's legal practitioners
*National Prosecuting Authority,* respondent's legal practitioners