ELVIS MADZEMWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 15 September 2015 & 10 May 2017

Criminal Appeal

C Nyika, for the appeal
T Mapfuwa, for the respondent

HUNGWE J: The accused was convicted of raping a 12-year old girl after a contested trial. He was sentenced to 16 years imprisonment of which 4 years was suspended for five years on condition of good behaviour. He appeals against both conviction and sentence.

The respondent filed a notice in terms of s 35 of the High court Act, [*Chapter 7:06*]. In the notice the respondent indicated that it did not support the conviction.

Upon a perusal of the record of proceedings and the reasons given by the trial court for the conviction, we were not persuaded by the reasons given in the notice by the respondent. Whilst the Notice and Grounds of Appeal specifically challenge the propriety of both the conviction and sentence, the respondent gives the clear impression that the appeal is against sentence only. (See paragraph 4 of the respondent's notice). This in our view speaks to the casual approach by the respondent's officer assigned to handle this appeal. When contrasted with the sloppy manner in which the Notice of appeal itself was drawn, it is surprising that the respondent was not moved to adopt a more circumspect approach to the appeal. Whilst the notice of appeal clearly indicates that it is intended to challenge the propriety of both conviction and sentence, the first three grounds attack the sentence imposed on the appellant. Only two paragraphs were directed against conviction. The two grounds read as follows:

> "4. The learned magistrate in court a quo misdirected himself in finding the accused guilty as charged despite acknowledging that the complainant that the complainant was not trustworthy and worthy of her word.

5. The learned magistrate in the court a quo in not looking at all the circumstances surrounding the case which point to the fact that chances for appellant having abused the complainant in the presence of so many people was far-fetched."

The fourth grounds is not in compliance with the rules. It is as good as stating that the conviction is wrong in law because the court acknowledged that the complainant was untrustworthy. If the ground of appeal is that the magistrate erred in law this should be stated and the particular mistake in law, which the magistrate is alleged to have made, should be set out.

Rule 22 (1) of the Appellate Division (Magistrate's Court) (Criminal Appeal) Rules, 1979 (S.I. 504 of 1979) reads:

> "The appellant shall, within fourteen days of the passing of sentence, or, where a request has been made in terms of sub-rule (1) of rule 3 of Order IV of the Magistrates Courts (Criminal) Rules, 1966, within seven days of the receipt of the judgment or statement referred to in that rule, whichever is the later, note his appeal by lodging with the clerk of the court a notice in duplicate setting out clearly and specifically the grounds of the appeal……..."

In *S* v *McNab* 1986 (2) ZLR 280 it was held that a ground which read:

> "The Learned Trial Magistrate erred in fact and in law in holding that the State had proved the appellant was so drunk as to be incapable of having proper control of his motor vehicle."

did not set out "clearly and specifically the grounds of appeal."

In order for a ground to comply with the rules of this court, that which the appellant is attacking in the judgment of the convicting court must be set out in the manner laid out by the Rule.

A reading of the judgment given after hearing the evidence in the court a quo does not support the averment made in this ground. If the criticism is therefore based on the allegation of an adverse finding on credibility then this ground is not well-taken and should fail. Quite to the contrary, the learned magistrate painstakingly and diligently analysed the evidence given by the complainant, a 12-year old at the time of the commission of the offence. He incisively dissects the dilemma faced by a child rape victim who has to battle conflicting and confusing emotions of betrayed trust as well as misdirected self-blame and anger over the abuse. Research also highlights the significant imbalance of power, language, skills, and familiarity with the court process between child witnesses and the legal professionals involved. The assumption underpinning the adversarial process is that

"persistent questioning" and challenging a witness's account of events during cross-examination will expose the unreliability of witness evidence.[1]

It is to be recalled that the appellant was conducting an affair with complainant's mother. The delay in reporting and the difficulty in revealing the rape to her mother ought to be understood in this light.

There is no rule of law that in order to sustain a conviction, the evidence of a child complainant must be corroborated, although obviously the presence or absence of corroboration is relevant for an assessment of the reliability and credibility of the complainant's evidence. In assessing the credibility and reliability of the complainant's evidence a careful examination of other pieces of evidence will put the matter to rest. The appellant took the complainant to his residence at night. He confirms this. Second, when the children wished to sleep, he did not seek to separate the girl child from his bedroom into his mother's. (His mother was present and could have taken the complainant in). The appellant therefore had the opportunity to commit the offence in the manner described by the complainant. Thirdly, when complainant's mother came by and asked if her children were inside, he confirmed this fact but lied that they were asleep. This lie, in my view, confirms his consciousness of guilt since releasing the complainant then would have given the victim an opportunity to reveal the abuse or the motherly instinct would have alerted her that something grave had occurred. Fourthly, the following day or soon after, the mother and Norah noticed the depressed condition of the complainant which prompted Norah to quiz complainant about what happened at the appellant's place. Finally, there were physical signs found on medical examination, which are indicative of sexual interference. Such signs would not be corroborative unless it can be shown that they occurred at a time or place which involved the accused. The evidence adduced at trial clearly implicates the appellant who had both the time and opportunity to have interfered with the complainant. In light of the above, I find nothing untoward in the assessment of the complainant's credibility by the learned trial magistrate.

[1] CA Carter, BL Bottoms and M Levine, "Linguistic, social and emotional influences on the accuracy of children's reports" (1996) 20 Law and Human Behavior 335–358; E Davies, E Henderson and F Seymour, "In the interests of justice? The cross-examination of child complainants of sexual abuse in criminal proceedings" (1997) 4 Psychiatry, Psychology and Law 217–229; E Henderson, "Persuading and controlling: the theory of cross-examination in relation to children", in H Westcott et al, op cit n 4, pp 279–293.

The fifth ground of appeal again falls foul of r 22(1) cited above. However for what it is worth I consider that it does not merit serious consideration by this court. I mention this because it implies that at the time of the crime, the appellant's residence was teeming with people. To the contrary, besides appellant's mother and complainant's younger brother, there was no-one else at this residence. This ground is therefore dismissed.

As for the appeal against sentence, no authority was cited for the submission that the sentence of 16 years of which 4 years is suspended on condition of good behaviour is so harsh as to induce a sense of shock. There could not have been any because that sentence is in line with the current sentencing trend in cases involving rape committed on children. The general principle applied by appeal court is that save where the sentence is vitiated by an irregularity or misdirection, sentence is pre-eminently in the discretion of the trial court and that an appellate court should be careful not to erode that discretion. Where, as here, the sentence is attacked on the ground that it is excessive, it can only be altered if it is viewed as disturbingly inappropriate. See *S* v *Ramushu & Ors* S-25-93; *S* v *Dullabh* 1994 (2) ZLR 129 (H).

In the present matter, the court *a quo* expressly took into account all the mitigating factors which it was obliged to consider and appropriately weighed them against the aggravating ones. There was no submission that the court *a quo* acted on a wrong principle when assessing sentence or that it wrongly took into account factors which it was not entitled to take into consideration. In the absence of a misdirection or an irregularity, this court finds no basis of interfering with the sentence imposed by the lower court. It is trite that sentencing is within the discretion of the trial court. As long as that discretion is exercised judiciously, an appellate court will be hard put to interfere. In the result the appeal against sentence must fail.

Consequently, the appeal is dismissed in its entirety.

CHIWESHE JP agrees……

National Prosecuting Authority, legal practitioners for the State
Nyika Kanengoni & Partners, legal practitioners for the appellant