ALBERT MUDYAMBANJE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MUSHORE JJ
HARARE, 11 July 2016 & 26 January 2017

Criminal Appeal

K Kativu, for the appellant
I Muchini, for the State

CHATUKUTA J: The appellant was convicted, after contest, of two counts of contravening s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 15 years for each count. Six years of the total of 30 years imprisonment were suspended on condition of future good behaviour.

During trial, the state called three witnesses, the complainant, the nurse who examined the complainant after the rape came to light and the complainant's step-mother. The appellant testified in his defence. He called five witnesses, his wife (complainant's mother), his son/daughter (complainant's half-sibling), a neighbor, a brother-in-law (complainant's maternal uncle) and his mother-in-law (complainant's grandmother) and a friend's wife. The trial magistrate found the following facts to have been proven:

The appellant was the complainant's step-father. He started staying with the complainant in 2007. The complainant came to stay with her mother after she had been abused by a previous step-mother.

Between 1 January 2013 and 16 January 2013, the complainant's mother went to attend a church meeting. She left the complainant under the care of the appellant during which time the appellant took advantage of the mother's absence and raped the complainant (who was just over 13 years old) on two separate occasions. The complainant was raped on her mother's bed. The

complainant reported the rape to the mother when the latter enquired why her blanket was blood stained. The mother assaulted the complainant for attempting to ruin her marriage to the appellant and failing to appreciate that the appellant was taking care of her and her other siblings.

The complainant later ran away from home after the mother had assaulted her. She ultimately ended at her father's home in Harare. She started staying with the father and step-mother. The step-mother observed that the complainant was withdrawn and could not interact with other children. She questioned the complainant on a number of occasions as to why she was always withdrawn. The complainant eventually opened up and confided in the step-mother that she had been raped by the appellant. Thus the report was made to the step mother almost a year after the rape. The complainant explained to her step-mother that she did not report the rape earlier because the appellant had threatened her with death at the hands of a traditional healer, who was appellant's neighbour.

Dissatisfied with the court's findings and sentence, the appellant launched this appeal. The grounds of appeal against conviction were that the trial magistrate erred when he:

(a) made a finding that the complainant was a credible witness, when in fact there was never an occasion when the appellant and the complainant were ever left alone;
(b) admitted the rape complaint despite the fact that it was made a year after the alleged rape; and
(c) discounted the appellant's defence which was reasonable and genuine and corroborated by the defence witnesses.

The respondent filed a notice in terms of s 35 of the High Court Act [*Chapter 9:07*] conceding to the appeal citing more or less the same grounds as stated by the appellant. The concession was however withdrawn after an engagement with the court.

The trial magistrate found the state witnesses to be credible. It is trite that a court of appeal does not generally interfere with the findings of a trial court on the credibility of a witness unless the findings are not supported by the facts adduced in evidence. (See *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62E-H to 63 D and *Bertha Hollington & Dicko Kaila* v *The State* 2002 (2) ZLR 163 at 165F-167 H.)

It is a requirement at law that in a rape matter, the rape report should be made timeously, voluntarily and to the first person to whom the complainant is reasonably expected to report to. (See *S* v *Nyirenda* 2003 (1) ZLR 64. However, in determining whether or not these requirements

have been satisfied, a trial magistrate should not take an armchair approach. The complainant's testimony should be assessed on the basis that there is no standard reaction to rape, each case has to be considered on its own merits.

The appellant contended that the rape report should not have been admissible because it was not made to the first available person and was made to the step mother a year after the rape. The error that the appellant made during the trial and on appeal was to consider the report made to the step-mother in Harare as the first report made by the complainant and hence his contention that there was an inordinate delay in reporting the rape. The court *a quo* seemed to have fallen into the same error. There is no basis to hold that the rape report was not made timeously and to the first available person. The complainant testified that she reported the rape to her mother upon the latter's return from the church meeting. The mother was the first person she would have been expected to have made the report to. Instead of being sympathetic and reporting the rape to the police, the mother was uncaring and in fact rebuked and chastised the complainant for attempting to destroy her marriage to the appellant. The fact that the mother did nothing after the complainant confided in her about the rape, and in fact rebuked the complainant for crying should not be held against the complainant. The complainant was expected to make the report timeously and to the first available person and that is exactly what she did.

The complainant's evidence about her mother's reaction to the report, that she was more interested in preserving her marriage than the welfare of her daughter, is supported by the mother's conduct in two respects. Firstly, the complainant testified that she ran away from home on 8 March 2013 to stay, with an aunt initially, and later with her father, to escape the abuse from the mother and the appellant. Despite the complainant's youthfulness, the mother did not follow after her daughter to check if she was safe. She confirmed in evidence that the next contact with the complainant was when the trial commenced in 2014. When the complainant was staying with the aunt, she was content with sending other people, some of them children younger than the complainant, to go and check on her. The situation in which the complainant found herself was aptly captured by the trial magistrate on pp 14-15 of the record of proceedings where he stated:

> "Whilst I appreciate that for a rape complaint to be accepted as evidence it ought to have been made within a reasonable time and should be made freely and voluntarily. In the present case it was made almost a year down the line. I do appreciate the delay but the court should not turn a deaf ear to the circumstance in which the complainant was. She was staying with the perpetrator

> and her heartless, unloving and careless mother who was more worried about her marriage to the accused at the expense of her child's welfare. She later managed to run away from her mother after she was assaulted for a petty issued and when she tried to return home her mother chased her away without any clothes. To show that she is heartless, she never made a follow up of her to date."

I find no fault with the trial magistrate's assessment of the complainant's dilemma and her mother's conduct.

Secondly, the mother testified against her own daughter during the trial in support of her husband, the appellant. It further appears that she supported that her own mother, brother, son and friend equally testify against her daughter.

The complainant could not have been expected, after the trauma that she was subjected to by her own mother, to have made a report to any other person soon after the report to the mother. A mother is there to provide protection and solace. Where none is forthcoming it is understandable for one, and particularly a 13 year old to clamp up. It is the step-mother who noticed that the complainant was traumatized and hardly interacted with other children as is expected of a child of her age. It appears the sympathetic ear by the step mother paid and the complainant opened up.

On the question whether or not the report was made voluntarily, the complainant testified that she made a report to her mother when the latter had queried the blood stains on her blankets. It is then that the complainant reported what had transpired in the absence of the mother. There is no indication that there were any leading questions. Therefore that report was voluntary.

Assuming that the report to the step mother would be considered as the first report (which I believe it is not) the fact that that the step mother asked the complainant on a number of occasions cannot be considered as leading. It is clear that the questioning was an expression of concern by the step mother. The step mother was in fact more concerned than the complainant's own mother.

The appellant had submitted in his defence that the complainant had falsely incriminated him because she hated him. The appellant did not consider the reason(s) why complainant hated the appellant as it is quite clear from the record at pp 43 and 44 of the record of proceedings that the complainant hated the appellant for ill-treating her and for the rape. In fact, abuses to the complainant (other than the rape) had gone on for a long time (6 years) and the complainant had

not during that period, alleged that she was sexually abused. Of all the abuse she suffered at the hands of the appellant, it is only the complaint of rape that is the subject of this appeal. The complainant first met her step-mother in April 2013. She was asked on four separate occasions why she looked troubled and she still did not disclose the rape to the step-mother. If she had been bent on incriminating the appellant she would have reported to the step-mother the first time she was asked. The appellant therefore failed to sustain his allegations that the complainant had falsely implicated him because of her hatred.

The appellant contended that the court *a quo* disregarded the evidence of the defence witnesses which he alleges supported his defence and rendered it probable that he was never left alone with the complainant. The mother- in-law was found not to be credible. She clearly did not recall the occasions that her daughter went to church and whether she left children with her. The evidence of the neighbor and wife's friend also had no probative value as the witnesses could not recall what transpired between 1 and 16 January 2013.

The appellant's, son aged 10 years old, did not fare any better. The trial was held in 2014, over a year after the rape. Initially the son testified that he would recall what transpired on the day or during the period that the complainant was raped. He testified in his evidence- in-chief that he was staying with his mother when the complainant alleged that she was raped. His mother would always leave him, his two other siblings and the complainant at their maternal grandmother's home. He supported the appellant's evidence that there was no occasion that the complainant stayed behind with their father. It was incredible that he would recall the exact date when the complainant was raped and the events of that day, unless he had been coached on what to say. Unlike the complainant who had been raped, surely he did not have cause to recall such minute details. He however latter contradicted himself under cross examination. Under cross and re-examination, he made an about turn and testified that he in fact was staying with the grandmother at the relevant time. The complainant and his other two siblings would join him at the grandmother's place whenever his mother went to church. The appellant's brother-in- law (the complainant's maternal uncle) confirmed that the witness was staying with him and grandmother during the period in issue.

The trial magistrate cannot therefore be faulted for discounting the evidence of the defence witnesses and particularly the appellant's evidence that at no time was he ever left alone with the complainant. The contradictions in the evidence of the defence witnesses and the failure

to recall what transpired on the day of the rape left one with the inescapable conclusion that their evidence was tailored to support the appellant's defence. The explanation proffered by the appellant cannot therefore be said to be reasonable under the circumstances.

The appeal against conviction must therefore fail.

Turning to the appeal against sentence, the appellant contended that the sentence was excessive and induced a sense of shock. It was further contended that the trial magistrate failed to give due regard to the compelling mitigating factors.

It is trite that an appeal court will sparingly interfere with the lower court's sentencing discretion. (See *S* v *de Jager & Anor* 1965 (2) SA 616 (AD).

In assessing sentence, the trial magistrate regarded the fact that the appellant was a first offender, aged 57 years of age as mitigating. He also considered that the appellant was a family man with heavy responsibilities but of no means. On the other hand he considered that the appellant was facing two counts of a very serious offence. He further considered that the offence was premeditated with the appellant having waited for his wife to go to church and then rape the complainant. The rape was committed in a callous manner as the appellant tied the complainant's legs to overcome resistance and gagged her. The appellant raped the complainant twice. After the rape he threatened the complainant with death at the hands of a neighbour who was a traditional healer. The appellant had a duty to protect the complainant.

The trial magistrate observed:

> "It should be noted that the offence of rape is a heinous one which does not only involve the physical abuse of a non-consenting victim but it brutalizes such victim physically and psychologically. As a stepfather he (the accused) had a legal duty to protect the complainant from abusers but unfortunately he turned out to be the rapist himself. He deflowers the complainant thus leading her away from the path of virtue and was putting her at the risk of contracting incurable diseases. I wonder what the world is coming to. He would sleep with both the mother and the daughter."

I cannot put the indignation caused by such a crime any better. The complainant had just turned 13 and was still a child. The psychological effect of the rape was evidenced by the fact that she had to flee from her mother and the appellant and take refuge at her aunt's place. She was withdrawn as noted by her step-mother.

The court *a quo* balanced the mitigating factors against the aggravating factors, arriving at an appropriate sentence of 15 years for each count. The court suspended six years of the

sentence in recognition of the mitigating factors. It, my view, correctly applied the general sentencing principles. The appeal against sentence cannot also succeed.

It is accordingly ordered that:

The appeal against both conviction and sentence be and is hereby dismissed.

MUSHORE J agrees ……

Rubaya & Chatambudza, the appellant's legal practitioners
National Prosecuting Authority, the respondent's legal practitioners