TAPIWA TITIYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAFUSIRE & CHIKOWERO JJ
HARARE: 23 November 2020

Date of written judgment: 20 February 2021

Criminal appeal

E. Mavuto, for the appellant
T. Mapfuwa, for the respondent

MAFUSIRE J:

[1] This is an appeal from the Regional Magistrate's court. It is against both conviction and sentence. The appellant was charged with 2 counts of rape as defined in 65(1) of the Criminal Law (Codification and Reform) Act (*Chapter 9:23*) ("***the Code***"). He was also charged with 1 count of attempted rape as defined in s 189, as read with s 65 of the Code. He pleaded not guilty. But after a full trial, the Regional Court convicted him on all counts. Treating all the counts as one for the purposes of sentence, the appellant was sentenced to 10 years imprisonment, with 3 suspended for 5 years on the usual condition of good behaviour.

[2] In his grounds of appeal, the appellant alleges that the court *a quo* misdirected itself because the evidence did not prove guilt, more particularly in that:

- there was no evidence that the appellant was the one who had had sexual intercourse with the complainant;
- the complaint (of rape) was not made timeously and therefore did not meet the requirement of the law for credibility;
- there was no evidence of the attempted rape.

[3] The other grounds of appeal allege that the court *a quo* misdirected itself on points of law, more particularly:

- for convicting on the basis of suspect witnesses' evidence which showed that there had been bad blood between the appellant and the complainant and her parents;

- **for convicting for contravening s 65 of the Code when the evidence showed a contravention of s 70 of the Code** (*our emphasis*)

[4] We have purposefully highlighted the ground adverting to s 70 of the Code. During argument, counsel for the appellant literally abandoned all other grounds and concentrated on this one. Section 70 of the Code makes it a criminal offence for any person to have extra marital intercourse with a young person under the age of 16 years. It is largely on account of counsel's argument on the point, and his reliance on the *obiter* in *S v Mapfumo & Ors* 1983 (1) ZLR 250 (S) that we reserved judgment.

[5] On sentence, the ground of appeal is that the sentence was manifestly unjust and that it induces a sense of shock.

[6] Some facts are common cause. At the time of the offence the complainant was 13 years of age. The appellant was 20. The 2 stayed together in Kuwadzana, Harare, under one roof with 12 or so other people. These other people included the complainant's mother and father; the complainant's grandmother and grandfather, and the complainant's 2 younger brothers aged 8 and 5. The house belonged to the complainant's grandparents. There were some tenants at the property. One of them, Vaida Muroiwa ("***Mai Yolanda***") was called to give evidence. The complainant and her 2 young brothers slept in one bedroom. Her grandparents and parents slept in their own separate bedrooms. So did the tenants and the appellant. The appellant was some kind of a distant relative in that one of the complainant's uncles, a younger brother to her father, then deceased, had been married to the appellant's sister. Therefore, the appellant was some kind of uncle to the complainant. They related to each other as such. Everyone else treated them as such. The appellant was a plumber and general hand in a company owned and operated by the complainant's father.

[7] In the court *a quo*, the State's case was this. The appellant raped the complainant in March and May of 2019. Late in the evening or at night, after coming back from work, the appellant would sneak into the complainant's bedroom which she shared with her 2 young brothers. He would pull her out of bed and lay her on the floor, mount her and forcibly have sexual intercourse with her without her consent. The complainant did not

reveal the abuse to anyone. Her reason for keeping quite was that if ever she did, her family would be chased away from the household by the grandmother. She perceived hostility by her grandmother towards her mother. She considered that the grandmother openly discriminated against the complainant's family.

[8] The alleged rape came to light on a day in September 2019. On that day, the complainant's parents were out of town on business. The appellant came back from work as usual. He entered the complainant's bedroom as usual. He lifted the complainant from the bed and laid her on the floor as usual. However, as he was about to mount her as usual, one of her brothers suddenly asked in his sleep as to what was going on. The complainant immediately got up and rushed to Mai Yolanda's room. She begged to sleep in Mai Yolanda's room saying the appellant was trying to have sexual intercourse with her. She also then revealed to Mai Yolanda the other instances of rape in the past. At that time the appellant had sneaked out and had gone to some nearby tuck shop, ostensibly to get some provisions. When he came back, Mai Yolanda asked him about the attempted rape allegations. He denied it. But Mai Yolanda informed the complainant's grandparents.

[9] When the complainant's parents came back that night, a family gathering was held. The complainant was questioned about the rape allegations. She narrated what had allegedly happened. The appellant continued to deny it. Eventually the complainant was taken to hospital for a medical examination. The hospital required a police report. The matter was reported to the police. A medical report was procured. Among other things, it showed that the complainant's hymen was attenuated or stretched or torn or notched. The evidence of penetration was said to be definite.

[10] The defence case was this. The appellant never had sexual intercourse with the complainant. The rape allegations were a fabrication. They were an attempt by the complainant's mother to fix the appellant because of the bad blood that existed between them. The complainant's mother hated the appellant for being the brother of a woman whom the complainant's father was having an affair with. Given the proximity of the rooms the many occupants at the house used as bedrooms, there was no way the appellant could have raped the complainant and avoided detection. Furthermore, there was no way the complainant could have been raped over such a lengthy period and failed or neglected

to make a report. At any rate, the rape report was neither made within a reasonable time to the first person the complainant was reasonably expected to report to, or made voluntarily. As such, her evidence should be discarded for lack of credibility.

[11] The State led evidence from the complainant, her mother and Mai Yolanda. They all stuck to, and elaborated on the outline above. The complainant and her mother particularly were subjected to lengthy cross-examination. The defence led evidence from the appellant. He maintained his innocence. An attempt to lead, in support of the defence, the evidence of one of the relatives who had attended one of the family gatherings where the rape issue had been discussed was abandoned after the court had questioned the relevance or admissibility of such evidence. At the close of the case, the appellant was convicted and sentenced as above.

[12] Although the appellant was convicted only of 2 counts of rape and one of attempt, the evidence led for the State suggested that the complainant had been raped by the appellant on multiple occasions over an extended period of time. Before us, counsel argues that the evidence in the court *a quo* revealed only a contravention of s 70 of the Code, not rape. He argues that there seemed to have developed some kind of romantic or sexual relationship between the appellant and the complainant. He said that explained how the complainant would enter the appellant's bedroom without protest. She could not have been doing that if truly she had been raped before. Counsel relies on a portion of the judgment of the court *a quo* that reads:

> "I noted that there was now a certain acquaintance which now existed between the accused and the complainant, a sexual acquittance in which the complainant knew that the accused would come into her room and have sexual intercourse with her. But during the act she would not cry for help even in the presence of her parents."

[13] Counsel argues that on the authority of *Mapfumo's* case, *supra*, it was a misdirection on the part of the court *a quo* to have ignored that evidence which suggested consensual intercourse even if the appellant might have flatly denied sexual intercourse altogether. As such, the appeal court is now at large to interfere with both the verdict and the penalty of the court *a quo*.

[14] *Mapfumo* was a case of murder. The central issue was the defence of compulsion. The appellants in that case had maintained throughout the trial, and on appeal, that they had been compelled by the guerrillas roaming the area to kill the deceased or else the

guerrillas would kill them. They argued that they had committed the offence out of fear for their own lives. In the course of its judgment, the Supreme Court said, at p 252E:

> "It is, of course, clear that a Court is not required to consider a defence unless there is some evidence to support it: but once there is some material, whether adduced by the defence or emerging from the prosecution case, suggesting that a defence may be available the Court must consider it."

[15] Appellant's counsel's stance is bizarre. In a charge of rape, the two possible defences: that the sexual intercourse did not happen at all, or that it was consensual, are mutually exclusive. They cannot be pleaded in the alternative. An accused person cannot plead the one, and having failed, decide to take up the other later on. It is the same with an appeal. You cannot plead the one defence at trial, having failed, rely on the other on appeal. It is weird.

[16] During argument, we repeatedly asked counsel if it was now his instructions from his client, the appellant, that in fact the sexual intercourse with the complainant did happen. He was equivocal. It turned out that it was just an opportunistic argument. *Mapfumo's* case does not support such a stance. The case is starkly different. From the start to the end the appellants in that case maintained that they had been compelled to kill the deceased. That forced both the trial court and the appeal court to examine the defence of compulsion. In contrast, the appellant in this case did not plead consensual intercourse before the trial court, let alone place any material before it to show consensual intercourse. Counsel says that such material was placed before the court by the State and that therefore the court was obliged to consider it. But that was not the case. The material placed by the State before the court was all to show forced intercourse, not consensual sex. It was only an observation made by the court, in the course of making a finding, but was not the finding itself, that there seemed to have developed some kind of sexual acquittance between the appellant and the complainant which explained why the complainant would come into the appellant's room and not shout for help even when her parents had been around.

[17] But the court did not end there. It did not make that finding. On the contrary, it discounted it. It said:

> "In this regard I took guidance from the case [of] *S-v-Mushumhiri*, 2014 (2) Z.L.R.(*sic*) The court held that:
>
> > '*A judicial officer must not take an armchair approach when dealing with the issue of why a complainant did not cry for help or raise alarm.*'

> One can fail to cry because of one reason or another or to raise alarm because of one reason or another. The court noted that various reasons may lead one not to report especially where the parties are related.
>
> I noted the complainant whilst she gave her evidence that she showed that the accused would call her 'D'. That is what the complainant said in her evidence. This to me shows some sort of relationship that would have been created between the two that goes beyond relations they had. **I am not ready, however, to say that the complainant because of this acquittance consented to the sexual intercourse because if she did, she would not have made a complaint on the 15th and also the accused has denied sexual intercourse in clear circumstances in my view that the sexual intercourse occurred.**" (*emphasis by ourselves*)

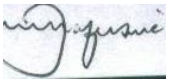
[18] None of the other grounds of appeal and of the rest of the arguments by counsel can succeed. The appellant's evidence on the intrinsic aspect of sexual intercourse without her consent was consistent and straightforward. It was the attempted rape in September 2019 that led to the previous episodes of rape coming to light. The appellant was somewhat fortunate in that the State preferred only 2 counts of rape. The complainant was consistent that the abuse had happened multiple times. Her mother confirmed that when the complainant had eventually opened up to her, she had referred to multiple incidents of intercourse with the appellant. The complainant's reason for not disclosing the abuse must be understood in the context of her age. She was just 13 years old. She feared disclosure would cost her family the only available shelter there ever was. In her young and impressionable mind, her grandmother did not like her mother. They would surely be expelled from the home. That is plausible enough.

[19] The conspiracy theory is a favourite amongst most defence lawyers in a charge of rape. It is said a complainant makes false rape allegations in an effort to fix the accused for some grudge being nursed by the complainant and/or her handlers against the accused. In most cases, such a theory is just all smoke. No sooner is it raised and pleaded than it just fizzles out and dissipates in the face of real evidence on the ground. That has been the case in this matter. That the complainant cried rape to fix the appellant for her mother's sake was a long shot. It was not even the appellant that was said to be the source or cause of the complainant's mother's ire. It was his sister. She was not even staying at the house anymore. Lawyers should be circumspect in some of the things that they try to peddle before the courts. This defence was spurious. From the evidence led, it was false beyond any reasonable doubt.

[20] Not much energy or effort has been expended on the appeal against sentence. Nothing has been shown how the court *a quo* might have misdirected itself in the exercise of its discretion in assessing the appropriate sentence. The sentence, 10 years imprisonment with 3 suspended, is not at all out of range.

[21] In the premises, we find that the appeal against both conviction and sentence is without merit. The appeal is hereby dismissed. The Registrar is hereby directed to issue a warrant of committal against the appellant.

20 February 2021



Hon Chikowero J: I agree _____

Maposa & Ndomene, legal practitioners for the appellant
National Prosecuting Authority, legal practitioners for the respondent