

LAWRENCE ZINHUMWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA AND MUZENDA JJ
MUTARE, 24 July 2019 and 1 August 2019

Criminal Appeal

T. T Sigauke, for the appellant
Ms T. L Katsiru, for the respondent

MWAYERA J: Irked by the conviction and sentence imposed by the court *a quo* the appellant approached this court on appeal. The appellant was convicted of indecent assault as defined in s 67 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 18 months imprisonment of which 6 months imprisonment was suspended for 5 years on conditions the appellant does not within that period commit any offence involving sexual abuse for which he is sentenced to imprisonment without the option of a fine. It is contended by the state that sometime in August 2018 at house number 10109 Greenside Extension, Mutare the accused person Lawrence Zinhumwe with intent and knowing that Kirsty Zinhumwe had not consented made her touch his penis realising that there was a real risk or possibility that Kirsty Zinhumwe may not have consented to it. The state's case was that sometime in August 2018 the appellant asked Kirsty Zinhumwe his biological daughter aged 22 to touch and massage his penis which he alleged was painful. It was the state's case that the complainant massaged the penis shortly after an epileptic attack.

The appellant raised two grounds of appeal against conviction.

- “1. The court *a quo* erred when it failed to consider that due to the acrimonious relationship between the appellant and the complainant's mother it was possible that the report was only made to fix the appellant.
2. The court *a quo* erred when it relied on character evidence which was inadmissible and also its prejudice outweighed its probative value.

Against sentence

- “1. The court *a quo* did not give sufficient weight and value to the strong mitigatory factors, the appellant is an old family man who was convicted as a first offender.

2. The court *a quo* erred when it did not consider community service as a real option to a custodial sentence. Rather the court over emphasised the issue of deterrence and ended up passing a sentence not proportionate to the offence.”

The appellant’s defence was basically that the allegations were fabricated by his wife with whom he had an acrimonious relationship. He suggested that his wife, the mother of the complainant manipulated the complainant into laying false allegations. A close look at the record of proceedings reveals the evidence of both the complainant and accused’s wife. The complainant’s mother was not taken to task on the issue of infidelity being the cause of matrimonial problem between the couple causing the false allegations of indecent assault. The alleged infidelity and manipulation of complainant to give a false report was not placed before the court as an issue. To then seek to criticise the court *a quo* for not taking into account or not considering the acrimonious relationship between appellant and his wife as the source of allegations is expecting the court to base its decision on speculation moreso considering the appellant did not meaningfully place this assertion before the court either through the complainant’s mother or through the complainant herself. The complainant’s mother’s evidence was clear that upon observing the complainant’s bulging stomach she questioned the complainant who alleged witchcraft on the mother. This prompted the parties to go to chief Zimunya’s court. It was while there that complainant disclosed accused had requested her to caress or touch his male organ once after an epileptic attack. That the complainant was epileptic and that whenever she had an attack accused would attend to her in her bedroom and give medication is not in contention as both state witnesses and appellant attested to that in the court *a quo*. The appellant was also responsible for taking the complainant to prophets for help. The complainant fell pregnant and at the time of trial had given birth to a child was common cause although the author of pregnancy who fathered the child was not known. The complainant’s testimony was to the effect that on the day in question the appellant gave her medication after an epileptic attack and caused her to touch and caress his manhood which he said was painful. She without knowing what she was doing or in that state of confusion caressed the penis. The complainant’s evidence was not challenged by the appellant. This was despite the fact that the complainant and appellant enjoyed cordial relationship. Infact complainant looked up to the appellant for her wellbeing and welfare. The complainant had no reason to falsely incriminate the appellant. She infact denied having been raped and testified to one incident of being made to touch the appellant’s manhood. The court *a quo* considered the complainant as credible in material respects. To that extent the factual findings by the court *a quo* in respect of credibility

cannot be faulted. Moreso given appellant did not challenge complainant's version. I am alive to the fact that this is a case of a single witness's testimony and the court *a quo* could have done better by having detailed analysis showing elimination of dangers of false incrimination and also detailing that caution was applied. However lack of mention that the court was wary and cautious does not spell out lack of appreciation of the legal requirements where evidence assessed speaks volumes of how the court arrived at the conclusion.

In this case the court *a quo* exercised special care and diligence to the sexual offence by taking heed of complainant's evidence and that of the mother, the recipient of the report. There was no evidence that the complainant was manipulated to falsely incriminate the appellant her father. The pregnancy and inquiry led to allegations surfacing. The complainant had no reason to falsely incriminate her father with whom she is in good books in fact she denied having been raped when it was suggested to her. This shows she was not being manipulated and in fact even appellant himself did not challenge complainant's evidence on indecent assault. It is appreciated the appellant was not legally represented. The record reflects the court *a quo* explained proceedings to assist the appellant where appellant alleges allegations are as a result of matrimonial problems between himself and his wife and when she testified and complainant testified appellant did not pursue the issue with the witness. To then seek to blame the court *a quo* for appellant's omission would be expecting the court to prosecute the matter for and on behalf of appellant. That would be requesting the court to descend into the arena. I am mindful to the fact that the court has a duty to assist unrepresented accused but surely such assistance should not amount to descending into the arena so as to be the prosecutor, defence counsel and adjudicator. There is simply nothing from the appellant on the taking issue with complainant and the mother's evidence of indecent assault as having been fabricated for the court to urge on and clarify the issue. It is settled the appellate court can only interfere with the trial court's findings in circumstances where the findings of the court are not anchored on the record or amount to a misdirection. See *San'anza v State* HH 590/10 see also *S v Mpetsha and Others* 1983 (4) SA 262. It is only where the findings of the trial court are outrageous and irrational the appellate court he can justifiably interfere with the findings of the trial court.

In the present case the trial court made a factual finding based on credibility of witnesses. The complainant's account tallied with the mother's account of the report of indecent assault as recounted by the complainant not only to the mother but to Chief Zimunya. That the complainant, the appellant and the complainant's mother went to Chief Zimunya's court when complainant's stomach had bulged was not put in contention. Further that

complainant stated appellant caused her to touch his manhood was not challenged. The complainant was consistent that the appellant did not rape her but caused her to touch his manhood after an epileptic attack. The fact that she recounted what transpired during her mother's presence clothes the mother as a recipient of report. Such evidence is admissible and in this case it was corroborative of the complainant's version. The first ground of appeal does not bring out anything meaningful to dent the conviction. The complainant and her mother's evidence was not challenged. That the appellant and his wife were having a turbulent relationship on its own does not render complainant's assertion about how appellant approached her after an epileptic attack and caused her to touch his manhood. The trial court could not be expected to semice and speculate that the allegations were fabricated in the absence of a challenge to what was said to have happened. The first ground of appeal in the circumstances cannot be sustained.

Turning to the second ground that the court erred by relying on character evidence to convict equally crumbles for the obvious reason that the court's decision was not based or pinned on character evidence. The trial court did not rely on character evidence to convict but noted as common cause that the appellant has a history of incestuous relationship. This emanated from the appellant's own admission during cross examination by the prosecutor that he impregnated his niece (sister's daughter). The court commented on a common knowledge or undisputed fact given by the appellant himself. This was not the basis of conviction as reflected from the judgment. The appellant was not convicted of raping or impregnating the complainant but of indecently assaulting the complainant by causing her to touch his male member. The court made a finding on only one issue, whether the allegations were true or a fabrication. The court relied on the complainant's evidence and made a finding that complainant who was very close to the appellant, her father had no reason to falsely incriminate him. Similar fact evidence is inadmissible to the extent that it is prejudicial to the accused person. In this case the appellant is the one who informed the court of impregnating a niece and that evidence was not the basis of conviction. By commenting or noting a common cause aspect one cannot say the court relied on character evidence to convict. The court took complainant's evidence to be credible as there was no reason for her to fabricate allegations against the appellant her father whom she was close to.

The appellant only raised two grounds of appeal in a manner which given possible legal issues one could take as lack of diligence amounting to a disservice to client. Both grounds cannot be sustained and thus the conviction stands. Turning to sentence during the hearing Mr

Sigauke conceded that in the event of conviction being proper, then the indecent assault not being ordinary a custodial sentence would be appropriate. He suggested 12 months imprisonment of which 6 months imprisonment is suspended on the usual conditions of good behaviour. Sentencing is the domain of the sentencing court which has a wide sentencing discretion. Only in circumstances where the discretion is injudiciously and improperly exercised should the appellate court interfere with sentence imposed. In this case considering the nature of indecent assault, a natural father causing his own daughter to touch his manhood, the offence is deserving of an effective prison term. The sentence imposed even though it falls within community service grid considering the sentencing principles of matching the offence to the offender it would be improper to consider community service as a suitable sentence. Sexual violation of this nature within a prohibited degree of relationship is not only criminal but immoral and indeed an abomination. An effective prison term is appropriate. It is not a matter of what sentence the appeal court would have imposed but whether or not the sentencing discretion was properly exercised by the sentencing court. In this case the sentencing discretion was judiciously exercised. There is no justification in interfering with the sentence as such the appeal against sentence cannot be sustained.

Accordingly, the appeal against both sentence and conviction is dismissed.

Gonese & Ndlovu, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners