

DISTRIBUTABLE: (83)

MUNYARADZI KEREKE
v
(1) FRANCIS MARAMWIDZE (2) THE PROSECUTOR GENERAL

SUPREME COURT OF ZIMBABWE
MAKONI JA
HARARE: 19 MAY 2021 & 8 JULY 2021

T. W. Nyamakura with *L. Madhuku*, for the applicant

C. Warara, for the first respondent

No appearance for the second respondent

CHAMBER APPLICATION

MAKONI JA: This is an opposed application for leave to appeal made in terms of s 44 of the High Court Act [*Chapter 7:06*] as read with r 20 (1) of the Supreme Court Rules, 2018.

The applicant was convicted of rape and sentenced to an effective 10 years imprisonment by the Harare Regional Court on 11 July 2016. His appeal against conviction and sentence was dismissed by the High Court on 29 May 2019. He sought leave to appeal to this Court, against the dismissal of his appeal, before the High court which leave was declined on 10 December 2020 hence the present application.

FACTUAL BACKGROUND

The applicant was arraigned before the magistrates' court charged with one count of indecent assault and one count of rape. The offences were allegedly perpetrated on two minor children who were his nieces. He was acquitted in respect of the first count of indecent assault.

The second count of rape is alleged to have occurred on 22 August 2010, at 11 Tavey Road, Vainona. The complainant and her sister (the complainant in count one) had visited their aunt Patience Muswapadare (Patience) who is a wife to the applicant. The complainant's evidence was that on the day in question, at around 3 am, Patience woke her up and asked her to tend to her (Patience's) baby. This was because Patience wanted to prepare some food for the applicant. After she lulled the baby to sleep she sat on a couch in the bedroom. The applicant, whom she had met in the lounge, came up to her on the couch. He fondled her breasts and vagina, produced his pistol and raped her. He only stopped after hearing some footsteps. The complainant managed to break free and went to her bedroom. She did not feel comfortable to report to Patience. She reported the ordeal to her sister the following day on 23 August 2010. The sister had spent the night at an all-night prayer. She forbade her from telling anyone because she was not comfortable sharing the experience with other people. Eventually, on 30 October 2010, the complainant voluntarily confided in her maternal uncle's wife, Sally Ndanatsei Maramwidze, about the rape. Thereafter other relatives were informed. On the same day the matter was reported to the police at Highlands Police Station. The complainant was medically examined at Parirenyatwa hospital on 1 November 2010. The report indicated that the hymen was broken.

Apart from the complainants, the state led evidence from Sally Ndanatsei Maramwidze (to whom the report of the rape was made), Francis Maxwell Maramwidze (maternal grandfather and legal guardian of the complainants to whom the allegations were later reported and who approached the police), Edwin Tafadzwa Chanakira (the doctor who examined the complainant and found that her hymen had been broken which was indicative of sexual penetration), Mirirai Chiremba (the Director of Financial Intelligence at the Reserve Bank of Zimbabwe to whom the applicant gave his pistol, magazine and cleaning kit on 22 August 2010 to return to RBZ Security Department and requested that an earlier date of return be entered), Grasham Muradzikwa (the Director of Security at the Reserve Bank of Zimbabwe who refused to take the applicant's firearm from Mirirai or backdate it to a particular date) and Monica Kativhu (the police officer at Borrowdale Police Station who recorded statements from the complainants).

The defence's case was led by the applicant who raised the defence of an *alibi*. He said that he was at his Mandara house with his brother Cletos Kereke at the time the alleged offence was committed. He had witnesses to support his testimony. He also denied influencing the backdating of the return of his firearm. He claimed that he had surrendered it on 14 June 2010, way before the allegations against him were levelled. The applicant claimed that the complainant's grandparents were trying to extort him for his refusal to pay the complainants' school fees. Gideon Gono and his counterparts wanted to silence him against revealing their fraudulent activities and also that there were political machinations against him by Webster Shamu and others.

The second defence witness Patience Muswapadare Taruvinga, wife to the applicant, testified that complainant's testimony was untruthful. The third witness, Alphios Njodzi Chinhano, pointed to friction between the applicant and Francis Mwaramwidze because of political ambition. Next to testify was Cletos Kereke, who corroborated the applicant's testimony that at the alleged time of the offence, he and the applicant were in Mandara. Taurai Bwanalisa and Norest Ngoro testified that they were security guards on duty at the Mandara house. They recorded the applicant's visit on 20 August 2010 but disputed the authenticity of the extract produced from the occurrence book in court. Anna Muswapadare, mother in law to the applicant and a stepmother to the complainants' father, attested that she shared the bedroom with the complainant during the material time and that she could not have been raped.

Dr Chiratidzo Lorraine Jeyacheya, a medical doctor and head of the Casualty and Emergency department was called at the court's instance and confirmed that Dr Chanakira was on duty at the time of the examination. The applicant had disputed that Dr Chanakira was on duty on the date the complainant was examined.

After an analysis of the evidence before it, the trial court convicted the applicant of rape. The court found that it had been proven beyond reasonable doubt that the applicant raped the complainant. The court reasoned that the complainant's report was voluntary, she gave a reasonable explanation as to why she did not report the case in time and that she was able to give a clear account of the circumstances of the alleged rape. It further found that her testimony was corroborated by Sally Ndanatsei Mwaramwidze and Francis Mwaramwidze. The court found insignificant the discrepancy in her narration in the applicant's use of a gun. It found that Chanakira who examined the complainant was indeed on duty on 1 November 2010. It also found that the

applicant still had the gun in his possession on 22 August 2010. The court concluded that the allegations were not as a result of fabrications by the Mwaramwidze family or political machinations. It found that the applicant had lied concerning his possession of the gun, backdating its return, coaching of the witnesses and an unconvincing explanation that he was with Cletos in Mandara.

In sentencing the applicant the court took into account the mitigating and aggravating circumstances and sentenced him to an effective 10 years imprisonment.

The applicant noted an appeal to the court *a quo* against his conviction and sentence which was dismissed in its entirety. The court found that the trial court properly assessed the evidence and correctly found that the applicant's guilt had been proven beyond reasonable doubt. It found that the trial court properly assessed complainant's evidence and found that her detailed account of the rape and her voluntary report which was corroborated by Dr Chanakira's medical report met the threshold of proof beyond reasonable doubt. It also discarded the applicant's defence of impossibility of the *actus reus* whereby he contended that raping the complainant on a couch was impossible, as invalid. The court *a quo* also found that the trial court properly disregarded the applicant's testimony regarding the return of his pistol as his version was only corroborated by a document which he had authored and forced Chiremba to co-sign. Further, that there was an anomaly in the defence witnesses' evidence as their statements, in affidavit form, were commissioned by one legal practitioner and were given on the same date. The possibility of coaching in these circumstances could not be ruled out.

As regards sentence, the court found that the trial court properly exercised its discretion in weighing aggravating and mitigating circumstances and that the sentence imposed was within the range imposed in similar cases. The court held that the decision of the Magistrates Court could not be faulted. It was the court's view that the applicant as an adult and relative of the minor child was expected to protect her and not abuse her.

Aggrieved by the High court's dismissal of his appeal, the applicant sought leave to appeal to this Court from the High Court. The court *a quo* found that the appeal did not have reasonable prospects of success. The factual disputes were thoroughly determined. It found that the trial court properly dismissed the applicant's defence of *alibi* after rejecting the defence witnesses' testimonies on the basis that they had been coached. The court reasoned that there was a remarkable coincidence in that their affidavits, in which they exonerated the applicant, were commissioned before the same legal practitioner under circumstances where they claimed to have gone to the legal practitioner separately and all were recorded on the same day. The court also held that the applicant's *alibi* was choreographed as the guards at his Mandara house could not corroborate the applicant's testimony as they disowned certified extracts of an occurrence book produced in court. Further, that the applicant would visit his Mandara house where none of his family were staying. He visited with his brother who then becomes a defence witness attesting to his *alibi*. It also found that the surrender of the pistol a few hours after the rape was not mere coincidence.

As regards the sentence, the court found that the sentence imposed was amply justified and the trial court properly exercised its discretion.

It is against this background that the present application has been made.

SUBMISSIONS BY THE APPLICANT

Mr *Nyamakura* submitted that the applicant has reasonable prospects of success on appeal as the court *a quo*, in dismissing his appeal, erred in failing to consider and place in their proper context material misdirections that saddle the decision of the trial magistrate. He raised four main areas of concern *viz* the impossibility of the *actus reus*, the inconsistencies in the complainant's evidence, the rejection of his defence of an *alibi* and the finding that defence witnesses were coached on what to say in court.

On the issue of the impossibility of the *actus reus* Mr *Nyamakura* submitted that it was physically impracticable that the applicant could have raped the complainant in the manner alleged. The panty which the complainant claimed could stretch was not produced. Her reaction is not one objectively expected under such circumstances. She claims to have been raped at 3 am after having been woken up by Patience to tend to her baby. Patience testified that on the night in question she was not at home as she was at Avenues Clinic where her baby was admitted. No proper reasons were given for rejecting her evidence. There was also evidence of Anna Muswapadare, who shared a bedroom with her to the effect that the complainant was in bed and asleep at the material time. The failure by the court *a quo* to consider, in its proper context, the impossibility of the facts presented by the prosecution is material. Instead the court characterised the applicant's arguments on impossibility as exhibiting male chauvinism and patriarchy.

Mr *Nyamakura* further argued that evidence led by the prosecution lacked consistency in material respects to warrant reasonable doubt. There was no consistency on the issue of the gun, the time the offence was committed and the reason why the complainant did not report the issue to the trusted adults at the first available opportunity. The court *a quo* erred and misdirected itself in failing to, in totality, find that the inconsistencies in the prosecution's version of events as well as the improbability of the same cast significant doubt on the truthfulness of the complainant's allegations.

Further, Counsel contended that the court failed to fully consider the applicant's defence of an *alibi*. The *onus* remained on the prosecution to establish that the explanation was not only improbable but that beyond any reasonable doubt it was false. The applicant asserted that he was not at his Vainona home at the time of the alleged rape. He called witnesses and the consistent thread in all their testimonies was that the applicant could not have committed the offence as he was not at the scene of the offence. Two of the witnesses were security guards who were no longer in the employ of the applicant at the time of the trial and had no motive to lie.

Mr *Nyamakura* further submitted that the trial court proceeded from the premise that the *alibi* witnesses who testified in respect to the applicants *alibi* were coached. It made such findings without direct evidence as to when, where and by whom they were coached. It relied on inferences without applying the test to justify drawing such an inferences. There was no evidence at all suggesting that the witnesses were coached. Coaching is a positive act and the prosecution did not lead evidence on the form, manner and timing of such coaching.

Mr *Nyamakura* attacked the court *a quo* for making a finding that the security guards had a motive to lie in order to protect their boss. The finding was made in 2016 when both guards were no longer employed by the applicant.

Mr *Nyamakura* further submitted that the court *a quo* erred in accepting Mirirai Chiremba's evidence that he was made to sign a memo, backdating the return of the gun, under duress by the applicant when there was no documentation confirming the return of the gun by the applicant on the date so alleged. He (Chiremba) failed to explain why he kept the gun in his office from August 2010 until the trial of the accused in 2016 in circumstance where the applicant had ceased to be his supervisor.

No submissions were made in respect of leave to appeal against sentence. I will take it that the applicant has abandoned the issue.

SUBMISSIONS BY THE FIRST RESPONDENT

Mr *Warara* submitted that the intended appeal does not have reasonable prospects of success on appeal.

Regarding the impossibility of the act of rape, Mr *Warara* submitted that the complainant gave a cogent explanation of how the rape was committed. Her evidence was not successfully challenged under cross examination. There was also medical evidence to prove penetration. Thus the averments relating to the absence of *actus reus* are misplaced.

He further argued that the trial court satisfactorily related to the alleged inconsistencies in the prosecution's case. He also submitted that the trial court properly dealt with the issue of credibility of witnesses and the threshold of proof beyond reasonable doubt in a balanced manner.

Mr *Warara* further submitted that the court dealt with the issue of the applicant's *alibi* and rejected it as the defence witnesses credibility failed during cross-examination. The record is replete with proof beyond a reasonable doubt that the applicant's *alibi* was not true. There was the evidence of the security guards who disowned the entry in the occurrence book. It recorded only the applicant's movements. There was the evidence of Chiremba who met with the applicant at Chisipite Shopping Centre on the morning of the rape. The applicant failed to explain why he handed over the gun on a Sunday.

THE LAW

The factors which must be considered in an application of this nature were discussed in the case of *Chikurunhe v Zimbabwe Financial Holdings* SC 10-08 at p 5 where the Court held that:

“The party seeking leave must show inter alia that he has prospects of success on appeal. In other words, leave is not granted simply because a party has sought such leave.”

Therefore, it is important to assess whether or not the appeal has good prospects of success.

APPLICATION OF THE LAW TO THE FACTS

The applicant's grounds of appeal are an attack on the factual findings of the trial court and its assessment of the credibility of witnesses. In confirming the applicant's conviction, the court *a quo* found these findings to be rational. The questions of whether or not the applicant was at the Mandara residence at the time of the offence, or whether the defence witnesses were coached and whether the applicant used the gun in the commission of the offence are enquiries of fact. It is trite that an appellate court is slow to interfere with the factual findings of a lower tribunal. The circumstances under which this Court will interfere with the findings *a quo* was clearly enunciated by this Court in *RBZ v Granger & Anor SC 47/09* as follows:

“There must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. A misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented.” (See also *Zvokusekwa v Bikita Rural District Council SC 34/15*)

In *Zimre Property Investments Ltd v Saintcor (Pvt) Ltd t/a vTrack & Anor SC 59-16* p 11 para 36 it was held that:

“The position is now settled that an appellate court will not interfere with the findings of fact made by a trial court unless the court comes to the conclusion that the findings are so irrational that no reasonable tribunal, faced with the same facts, would have arrived at such a conclusion. Where there has been no such misdirection, the appeal court will not interfere. This position was aptly captured by this court in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (s). At 670, Korsah JA remarked:

“The general rule of law as regards irrationality is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion...”

It is also an established principle that an appellate court is slow to interfere with the findings of credibility of the witnesses by a lower tribunal. This principle was well captured in the case of *Gumbura v The State* SC 78/14 at p 7 where the Court remarked as follows:

“As regards the credibility of witnesses, the general rule is that an appellate court should ordinarily be loath to disturb findings which depend on credibility. However, as was observed in *Santam BPK v Biddulph* (2004) 2 All SA 23 (SCA), a court of appeal will interfere where such findings are plainly wrong. Thus, the advantages which a trial court enjoys should not be overemphasised. Moreover, findings of credibility must be considered in the light of proven facts and probabilities.”

I want to zero in on how the trial court dealt with the evidence of the defence witnesses. The applicant raised the defence of an *alibi*. He led evidence from witnesses in support of his defence that he was not at his Vainona home on the date and time when the alleged rape was committed.

The trial court in dealing with the evidence of defence witnesses stated that the credibility of the witnesses in question was attacked by the prosecution mainly on the ground that they had been coached by the applicant on what to say. The other ground of attack on the credibility of Cletos Kereke, Anna Muswapadare and Patience Muswapadare was that their statements were all commissioned by the same legal practitioner on the same day.

It is common cause that the statements of Cletos Kereke, Patience Muswapadare, Anna Muswapadare, Vincent Muswapadare, were all sworn to on 10 August 2010 and were commissioned by a legal practitioner by the name *Takudzwa L. Takawira*. These four witnesses stated that they were called to a police station in Borrowdale on 10 November 2010 and the police interviewed them on this matter. As they were giving their answers the police were typing out and

after that the police then gave them the statements to go and have them commissioned by a commissioner of oath of their choice. They said that they did not meet each other at Borrowdale police station neither did they meet at *Takudzwa L. Takawira* Chambers. Each of them independently went into town to have his or her statement commissioned and by coincidence they all found themselves at *Takudzwa L. Takawira's* office at different times.

The trial magistrate found this amiss. There was no satisfactory explanation as to why the police would record their statements in affidavit form and refer them for commissioning elsewhere when they could have commissioned them as they did with the applicant's affidavit. He further found that it could not be coincidence that all the witnesses independently got into town and ended up at the offices of the same legal practitioners for commissioning of their affidavits. He concluded by stating:

“The above proves to me beyond any reasonable doubt that these witnesses were lying as regards how their statements were recorded and commissioned. There is no other reason for lying on these aspects other than that their statements were pre-recorded before these witnesses went to the police. Even accused's affidavit statement was pre-recorded this is clear from the declaration by the officer in charge who recorded the statement and I quote “I certify that the above statement was made freely and voluntarily by MUNYARADZI KEREKE who was in his sound and sober senses and tendered his prepared affidavit statement through his legal practitioner Tawanda Herbert Chitapi.”

The question is why these witnesses would pre-record their statements before they went to police and why they would lie about this fact to the court. There is only one reasonable conclusion that someone influenced them on what to write in the statements and they did not want the court to know about the fact, only reasonable conclusion is that accused is the one who influenced them. I draw the above inference because that is the only reasonable inference which can be drawn from the proved facts which I have stated above see *S v Marange and others 1991(1) ZLR 244 SC,R v Vhera 2003(1) ZLR 668*.

See also *Schwikkard at p 530* also *S v Vhera 2003(1) ZLR 668*

I therefore agree with the prosecution's submission that the witnesses mentioned above were influenced on what to say. The court should therefore never put any reliance on influenced witnesses. It is clear accused influenced them. This will also tend to support complainant's case that she is telling the truth see *S v Chigwada S-206-88, S v Katerere-s-55-91.*”

The court *a quo* found that the trial court's finding that the applicant was not at the Mandara residence on the day in question was unassailable. It found that the trial court after a careful and detailed analysis of the defence witnesses' evidence properly rejected the defence of the *alibi* as false. The defence witnesses' testimony was properly rejected on the basis of the anomaly that the statements were commissioned by one lawyer on the same date. That was proof of coaching.

The applicant's complaint is that the trial court rejected the *alibi* witnesses' evidence on the basis that they were coached when there was no direct evidence of that. It relied on inferences without applying the laid down test. That their evidence being in affidavit form and having been commissioned by the same legal practitioner is evidence of coaching is so shocking that no other court would arrive at the same decision, so it was contended.

The test for the proper use of circumstantial evidence was laid down in *R v Blom* 1939 AD 188 at 202-203 (quoted with approval in *Moyo v The State* SC 65/13) where it was stated:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

A court intending to rely on such evidence must ask itself a few questions. The first one is what the proved facts are. In *casu* if the trial court had asked itself the above question it might have arrived at a different conclusion. The prosecution did not lead evidence to controvert

the position stated by the defence witnesses regarding the recording of their statements. The issue arose during the cross-examination of the defence witnesses. The prosecution had not laid a basis for putting in issue what the defence witnesses said happened.

As was correctly submitted by Mr *Nyamakura* coaching is a positive act. Evidence has to be led as to the form, manner and timing of such coaching. In *casu* no such evidence was led. It appears the finding that the witnesses were coached was not based on demeanour but on probabilities. The Supreme Court, in such a situation, will be in the same position as the trial court regarding the drawing of the pertinent inferences. The point was made in *Minister of Safety and Security and Others v Craig & Others NO 2011 (1) SACR 469 (SCA)* at para 58 where the following was stated:

“Although courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness’ demeanour, but predominantly upon inferences and other facts, and upon probabilities. In such a case a court of appeal, with the benefit of the full record, may often be in a better position to draw inferences,”

In my view this is the situation that pertains in *casu*. The trial court rejected the evidence of the defence witnesses mainly on the basis of inferences and probabilities and not on the basis of their demeanour. The Supreme Court, with the benefit of the full record, may well be in a better position to draw the suitable inferences.

The test to be used in considering the plausibility of the defence of *alibi* was stated in *R v Hlongwane 1959 (3) SA 337 (AD)* in that case, HOLMES AJA had this to say at 340H: -

“The legal position with regard to an *alibi* is that there is no *onus* on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya 1952 (4) SA 514 (AD)*.

But it is important to point out that in applying this test, the *alibi* does not have to be considered in isolation.” (emphasis added)

Further on at 341 A-B the court held:-

“The correct approach is to consider the *alibi* in the light of the totality of the evidence in the case, and the Court’s impressions of the witnesses. In *Biya’s* case *supra* GREENBERG JA said at p 521:

‘... if on all the evidence there is a reasonable possibility that this *alibi* evidence is true it means that there is the same possibility that he has not committed the crime’.”

Applying that test to the facts of the present case the question is whether there is a reasonable possibility that the *alibi* evidence is true. This is an aspect where the applicant might have prospects of success. However whether or not the success of his argument on this specific aspect will have the effect of upsetting his conviction is a matter that I am inclined to leave for determination by the Supreme Court. I am loathe to pronounce on it as a single judge in chambers. For that reason **alone** I am inclined to grant the applicant the relief that he seeks so that the Supreme Court determines the impact, if any, of this particular aspect of his argument, on the propriety of his conviction.

Accordingly I make the following order:

1. The applicant is granted leave to appeal against the decision of the High Court under judgment HH 374/19, to the Supreme Court.
2. No order is made as to costs.

Lovemore Madhuku Attorneys, applicant's legal practitioners

Warara & Associates, respondents' legal practitioners