Judgment No. HB 52/2003
Case No. HCA 180/2000

GILBERT ZULU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 31 MARCH AND 8 MAY 2003

G Nyoni for the appellant
Mrs M Cheda for the respondent

Criminal Appeal

NDOU J: The appellant was convicted by a Bulawayo Provincial Magistrate for indecent assault it being alleged that he fondled the complainant's breasts and touched her legs (or lifted her skirt). He was sentenced to 24 months imprisonment with 6 months suspended on condition of good behaviour. The appellant is aggrieved and dissatisfied with the conviction and sentence. This appeal is an expression of such dissatisfaction. The salient facts of this matter are that the appellant's and the complainant's families shared a house in Makokoba suburb, Bulawayo. The complainant was aged ten (10) years at the time of the incident. It is common cause that on 12 December the appellant's and the complainant's family members were away. It is common cause that the appellant called the complainant and sent her to go and buy him beer at a nearby shebeen. It is common cause that when the complainant returned the appellant further sent her to go and get an opener from her parent's room. She obliged. When she returned with the opener and handed it over to appellant the appellant's and complainant's versions start to differ. On the one hand the appellant testified that the complainant brought an opener which depicted a man and woman intimately involved in some act. He asked the

complainant about the ownership of this opener. She indicated to him that it belonged to her father. He warned her against the use of the opener, as it was "obscene". He denied fondling complainant's breasts or lifting up her skirt or touching her legs. He was surprised to hear about these allegations of indecent assault from the complainant's father. On the other hand, the complainant gave the following account i.e. after she returned with the opener –

> "Accused asked me what grade I was doing at school and I told him I was in grade 5. He asked me how old I was and I told him 10 years. Accused then pulled me on to the sofa he was sitting on and started fondling my breasts. He then asked me whether I was able to misbehave and I told him I could not. He said "does it fit" and he asked that I opened (sic) my legs. I did not know that accused was referring to when he said, "does it fit?" Accused then gave me $20 and said I was to put it in my bag."

I agree with *Mr Nyoni,* for the appellant, that the prosecution was poorly conducted. The complainant was not asked whether she in fact "opened her legs" or lifted up her skirt. Besides the fondling of breasts the testimony does not show any further assault of an indecent nature. As these facts had been alleged in the state outline the prosecutor should have canvassed the issue further when the complainant testified especially when the complainant was aged ten years. In his judgment the learned trial magistrate found "the accused then *pulled her* to the sofa he was seated and fondled her breasts and *opened her legs* after asking her to behave" (emphasis is mine). The highlighted parts of the judgment are based on the allegations in the state outline. In her testimony, the complainant never mentioned that. The learned trial magistrate misdirected himself in this regard. *Mr Nyoni* did not attribute this failure to lead such evidence to the credibility of the complainant. This is a case of poor presentation of evidence by the prosecutor which is not of complainant's making and

thus the assessment of her demeanour is not affected thereby. It is trite that the complainant'scredibility is not to be assessed on apparent conflicts between her *viva voce* evidence and a statement or summary of the case prepared by someone else – see *S* v *Chigova* 1992 (2) ZLR 206 (5) at 213D. In any event the inconsistency referred to cannot be said to be so blatant as to be irreconcilable, that being so, too much weight cannot be placed on them – see *John Weeks and Another* v *State* SC-118-93 at page 7 of the cyclostyled judgment.

It is trite that the assessment of the credibility of a witness is the province of the trial court. See *S* v *Mlambo* 1994 (2) ZLR 410 (5). At page 413 of the said judgement GUBBAY CJ stated –

> "The assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by an appellant court unless satisfied that it defies reason and common sense."

In *Alice Soko* v *State* SC 118-92 at page 8 of his cyclostyled judgment EBRAHIM JA stated as follows:

> "A court of appeal will not interfere with a trial court's assessment on credibility tightly. There has to be something grossly irregular in the proceedings to warrant such interference. This is because the trial court by having the witness before it is better able to make an assessment on demeanour and all other factors relevant in assessing credibility. The Appeal Court, on the other hand, is confined to the record."

In *Joseph Mbanda* v *State* SC-184-90 at page 7 of his cyclostyled judgment GUBBAY CJ stated as follows:

> "An appellant court must never overlook that the trial court's living through a drama of a case is in a unique position to evaluate the evidence in its proper perspective. To justify the conclusion that the assessment made by a trial court of the credibility of the witnesses is wrong, an appellant court must be persuaded that the finding defies reason and common sense. Questions of credibility are par excellence the province of the trial court."

The above cases set out admirably the approach that this court sitting as a

court of appeal, should adopt. The crux of the matter *in casu* is the finding of credibility of the complainant by the trial court. My careful reading of the record of proceedings *in casu*, does not lead me to a conclusion that there were gross irregularities in the manner in which the trial was conducted. But, that is not necessarily the end of the matter. As rightly pointed out in the *Soko* case *(supra)* at pages 8-9 –

> "The matter does not, however, end that easily. The legal system is based on the principle of the presumption of innocence. Before an accused person is convicted, the state must prove beyond reasonable doubt that it was indeed the accused who committed the offence in question."

With this in mind I examined the totality of the state evidence carefully. Although it is trite that the cautionary rule in sexual offences is no longer warranted, the sexual acts still need to be considered carefully – see *S* v *Banana* 2000(1) ZLR 607 (5). At page 614E-G of the judgment GUBBAY CJ stated –

> "It is my opinion that the time has now come for our courts to move away from the application of the two-pronged test in sexual cases and proceed in conformity with the approach advocated in South Africa. In so holding, I have not overlooked the well researched judgment of GILLESPIE J in *S* v *Magaya* 1997 (2) ZLR 139 (H). But having regard to the abrogation of the obligatory nature of the rule in such countries as Canada, the United Kingdom, New Zealand and Australia, as well as by the State of California (see Chaskalson, *et al*, *Constitutional Law of South Africa* at 14-62; Hatchard, 1993 *Journal of African Law* 97 at 98; (1983) 4 *Canadian Journal of Family Law* 173), I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. *Yet I would emphasise that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully*." (The emphasis is mine)

In casu, the issue of the identity of the assailant does not arise. The issue is whether the appellant fondled the complainant's breasts. There is no room for doubting the complainant's evidence in this regard. Her explanation of what the appellant did constitutes an assault of an indecent nature. The trial magistrate's assessment in this regard cannot be faulted. The finding of the trial court in the

circumstances does not defy reason and common sense. The conviction is unassailable and the appeal against conviction has to be dismissed.

The basis of the appeal against sentence is that it is manifestly excessive so as to induce a sense of shock. In assessing the appropriateness of a sentence an appeal court should be guided by what GUBBAY CJ stated in *Ramushu and ors* v *State* SC-25-93 at page 5 of his cyclostyled judgment –

> "But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate" – see also *Msindo and Ors* v *State* HH-25-02.

So far as sentence is concerned, the appellant is a first offender. In *Manyemba* v *S* AD 82-79 the accused was found guilty of indecently assaulting a young girl aged sixteen and a half years. He was sentenced to a fine of $75 or in default of payment 25 days imprisonment plus an additional custodial sentence of three months suspended on condition of good behaviour. The appellant in that case indecently assaulted the young complainant *by placing an arm about her waist, seizing her wrist and placing a hand upon her breasts.* (emphasis is mine) At page 6 of the cyclostyled judgment DAVIES JA stated –

> "… but it seems to me that although the nature of the assault did not indicate serious indecency, it nevertheless merited at least the punishment imposed by the magistrate … Quite obviously there is a need for a deterrent sentence in this regard. Obviously imprisonment as such was not called for and, of course, an effective period of imprisonment was not imposed upon the appellant."

In *Ndhlovu* v *State* AD 88-79 the accused was convicted of indecent assault committed in the course of searching her. The complainant was a juvenile. He

searched her because he believed, apparently genuinely, that she might have been responsible for stealing a sum of money from his house. On appeal, a sentence of 18 months imprisonment (with 8 months suspended on condition of good behaviour) was set aside and substituted with one of $50 or, in default of payment, one month imprisonment. In that case the indecent act comprised of touching her breasts and interfering with her clothing in the course of the search. In *State* v *Phiri* GB 27/77 the accused was proved to have felled an 11 year old girl. He lain on top of her and touched her breasts. He was sentenced to 18 months imprisonment, of which nine months was suspended on condition of good behaviour. The child was frightened by accused's actions. On review, the sentence was reduced to nine months suspended on condition of good behaviour. *Mr Nyoni*, contends that the appellant's moral blameworthiness was not judiciously assessed. *Mrs Cheda*, for the respondent concedes that sentence imposed is manifestly excessive. She, however, contends that a reduction of the custodial sentence from 24 months to 12 months imprisonment with part thereof suspended will meet the justice of the case. As both parties agree that there was an improper exercise of sentence discretion this court is at large as far as sentence is concerned. *Mr Nyoni* contends that a non custodial sentence is called for. He submits that the option of a fine or community service should, at least, be considered. I agree that our superior courts have over the years emphasised that imprisonment should be imposed as a last resort on first offenders - *S* v *Kashiri* HH-174-94 and *S* v *Gumbo* 1995 (1) ZLR 163. This reflects a paradigm shift. First, over the years our courts have emphasised that a sentence of imprisonment is a severe and rigorous form of punishment, which should be imposed only as a last resort and where no other form of punishment will do. Second, there have been concerted efforts to

shift from the more traditional methods dealing with crime and the offender towards a more restorative form of justice that takes into account the interests of both society and the victim. This is a holistic approach to sentencing in that it punishes the offender, causes the offender to pay reparation and integrates the offender into the society – *Ndlovu* v *S* 1994 (1) ZLR 290 and *S* v *Sithole* HH-50-95.

In this case the aggravating factor is that the complainant was aged ten years at the time. If the matter had been properly prosecuted and it was proven that in addition to fondling the breasts, the appellant lifted her skirt and touched her legs I would have no hesitation in imposing a custodial sentence. Another factor is that the appellant was in *loco parentis*. Generally, the courts deal severely with fiendish perpetrators of horrible crimes on children. It is one of the functions of the criminal law to give expression to the collective feeling of revulsion toward certain acts such as indecent assault of children. But an enlightened society will recognise the futility of severely punishing unavoidable retrogression in human dignity. But it is vain to preach to any society that it must suppress its feelings. The law, if wisely administered, should dramatise its punishment. It is a fact that all men live more or less in their imagination, and any imaginative realisation that one will be hissed off the social stage to suffer pain is bound to act as a strong deterrent. In this connection, it is well to repeat the frequently made but still just, observation that not only the severity but the certainty of punishment is a factor in the case – see *Reason and Law* by Morris R Cohen at pages 59 and 60. If civilisation, however, means rationality in the elimination of needless cruelity, then our methods of punishment must certainly undergo profound changes even though they cannot cease to be punishments. Is mere touching of breasts a serious act of indecency?

Does it warrant imprisonment?

I believe factors such as the age of the complainant, acts or statements accompanying the touching of the breasts, the reaction of the complainant, the frequency of the touches etc should be taken into account in determining the seriousness of the conduct. In this case after touching the complainant's breasts the appellant gave her $20, presumably to silence her or to buy in her approval. This is a bad thing for an adult to do. Appellant was teaching, or least encouraging this 10 year old some form of prostitution. This conduct would introduce children to prostitution i.e. men can satiete their lust with your body in exchange of money. This is a perception that children can have of this conduct. In this case it was also bad for him to send her to shebeens to buy him beer.

In light of the above, I feel that a fine coupled with a suspended custodial sentence will meet the justice of the case. I accordingly, confirm the conviction and set aside the sentence imposed by the court *a quo* and substitute in its place the following:

> "A fine of $10 000 or default of payment 5 months imprisonment. In addition 12 months imprisonment wholly suspended for 5 years on condition the accused in that period does not commit an offence of indecent assault or of a sexual nature and for which he is convicted and sentenced to a fine in excess of $500."

Cheda J ……. I agree

James, Moyo-Majwabu & Nyoni appellant's legal practitioners
Criminal Division of the Attorney-General's Office respondent's legal practitioners