

SURE KEPHAS TAZIRA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 28 OCTOBER 2002 & 1 APRIL 2004

L Nkomo for appellant
Mrs I M Nyoni for the respondent

Criminal Appeal

NDOU J: The appellant was charged with four counts of sodomy at Gweru Provincial Magistrates' Court. After hearing evidence the trial magistrate found him guilty on all four charges. The appellant was sentenced to a total of 6 years imprisonment, with 2 years suspended for 5 years on condition of good behaviour. The appellant appeals against the conviction only.

The two complainants, Davison Tigere and Emmanuel Ruwizhi were not known to each other prior to the commission of these offences. They knew each other through the appellant.

Emmanuel Ruwizhi's evidence was that on 3 September 1996, he agreed that he would remain at the appellant's house as the appellant would start work at 0300 hours. He went to the appellant's house at 1800 hours and found him drinking opaque beer with Montello wine. As they were drinking beer the appellant asked him to spit beer from his mouth into the appellant's mouth and he refused. After 12pm they went to bed. When he got up his pant and school short had been torn in between the legs and when he touched his back he noticed some semen. He made a report to Francis Shumba around 1100 hours on 4 September 1996.

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On 24 September 1996 he went to Top Ten Bar with the appellant and when they were drunk they went to the appellant's house. The appellant told him to sleep at his (appellant's) house and promised to secure employment for him at Zim Alloys. In the blankets the appellant embraced him. When he woke up at 0500 hours he found that he no longer had his swimming trunk and shorts on. When he threatened to report to his parents, the appellant offered him \$4,00 to buy whatever he wanted. Later he met Davison Tigere at the shops who revealed that the appellant had sodomised him. He told Davison that the appellant had done the same to him. They then decided to go and confront the appellant.

Davison Tigere's evidence was that on 17 October 1996 the appellant asked him to spend a night at his, appellant's house since the appellant was doing night duty and was afraid of house breakings. Around 1900 hours he went to the appellant's house with the appellant who told him that he had bought a drink. He went to the toilet and when he came back the drink had been poured into a cup. When the appellant went outside he poured the drink into the sink and replaced it with another that was in the bottle. The appellant invited him to go to sleep and when he said he was not feeling sleepy, the appellant went to bed.

The appellant returned around 2200 hours and switched off the television and invited him to go to sleep. When he went to sleep the appellant insisted that he removes his trousers. At around 0200 hours to 0300 hours he woke up and saw the appellant attempting to turn him to face downwards. When he woke up in the morning he dressed himself and as he walked home he felt sticky things on his buttocks and it felt like mucus. The sticky stuff smelt like semen. He said he was not able to defecate easily as he was feeling pain.

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On 25 October 1996 the appellant again asked him to go to his, appellant's house. When he wanted to sleep the appellant removed his trousers and attempted to sodomise him. When he asked the appellant what he was doing, the appellant retorted that he thought it was their secret. They argued until he got out of the room and went to their house and that was around 0400 hours. After school he went to the shops and met a young man that he had seen in the company of the appellant and told him that the appellant had sodomised him and the young man (the previous witness) said he had the same problem with the accused. They decided to go and confront the appellant.

Simbarashe Gwarandira testified that when he got to the appellant's house, Davison told him that the appellant had sodomised him as well as Emmanuel. He said the argument between the appellant and Davison was heated with the latter threatening to cause the arrest of the appellant. Simbarashe also testified that Emmanuel told him that he had also been sodomised and was still suffering from stomach pains. The appellant testified that he was surprised to see the complainants at his house on 25 October 1996 as they discussed the issue of speakers. This is what triggered these allegations. He denied ever sharing blankets or bed with the complainants. In his detailed judgment the trial magistrate believed the two complainants and found corroboration in the evidence of Simbarashe. The trial magistrate made an adverse finding on the credibility of the appellant. It is trite that the assessment of the credibility of witnesses is the province of the trial court and this appellate court can only disregard such a finding if we are satisfied that it defies reason and common sense or there is something grossly irregular in the proceedings to warrant interference – *Mbanda v S* SC-184-90; *Soko v S* SC-118-92; *S v Mlambo*

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1994 (2) ZLR 410 (S) at 413; *R v Dhlumayo & Ano* 1948 (2) SA (A) at 705-6; *Van swegen v De Clercq* 1960 (4) SA 875 (A) at 881 and *Blysaag (Edms) Bpk en andere v Theron* 1978 (2) SA 624 (A) at 626H-627G. What is apparent from all these cases is that in view of the advantages enjoyed by the trial court in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial, an appeal court is in general reluctant to disturb the findings of a trial court on questions of fact.

In *casu*, the trial court carefully examined the nature and circumstances of sexual acts. This is necessary even though it is trite that the cautionary rule in sexual offences is no longer warranted – *S v Banana* 2000 (1) ZLR 607 (SC) at 614F-G; *S v D & Anor* 1992 (1) SA 513 (Nm); *S v Jackson* 1998 (1) SACR 470 (SCA) at 476e-f and *R v Makanjuola*; *R v Easton* [1995] 3 ALL ER 730 (A) at 733c-d. The testimony of the two complainants, although in my view not strikingly similar, has sufficient probative value to outweigh its prejudicial effect. The guilt of the appellant was proved beyond a reasonable doubt. The appellant was correctly found guilty of four counts of sodomy.

Accordingly, his appeal against the convictions is hereby dismissed.

Cheda J I agree

Dzimba, Jaravaza & Associates (c/o Webb, Low and Barry) appellant's legal practitioners
Criminal Division, Attorney-General's Office respondent's legal practitioners