Judgment No. HB 29/10
Case No. HCA 78/04
CRB 636/01

**DUMISANI NDLOVU**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA & NDOU JJ
BULAWAYO 17 MAY AND 27 MAY 2010

*Ms C Nunu* for the appellant
*T Hove* for the respondent

Criminal Appeal

**NDOU J:** On 16 April 2004, the appellant was convicted by a Bulawayo Regional Magistrate of rape and impersonating a police officer in contravention of section 64 of the Police Act [Chapter 11:10]. On the charge of rape, he was sentenced to eight (8) years of which two (2) years were suspended on the customary conditions of good future behaviour. On the charge of impersonating a police officer he was cautioned and discharged. He has appealed against the conviction and sentence in the rape charge.

After hearing Ms *Nunu*, for the appellant, we dismissed the appeal in its entirety without hearing Mr *Hove*, for the respondent. We indicated that our reasons for doing so will follow. These are they.

It is common cause that on the evening of 27 September 2000 the appellant met the complainant and her boyfriend Tanaka Ncube on a path at Centenary Park, Bulawayo. The appellant alleged that the two had been making love before his arrival at the scene and blew a whistle pretending that he was alerting other policemen. The two were reprimanded for doing so in the public. They denied that they were making love but said they were merely chatting. Save for the blowing of the whistle, these facts are beyond dispute. The appellant denied that he purported to be a policeman at the time he rebuked them. The trial court accepted the complainant's version of events of what transpired thereafter. The complainant testified that after the appellant rebuked them, he ordered them to go separate ways. They obliged believing that the appellant was a policeman. The appellant later followed her after she had separated from her boyfriend. When the appellant caught up with her he walked by her side. The appellant then stated that since her boyfriend had absconded, he was going to arrest her. He ordered her to follow him to the other side of the park. She complied as she was under the impression that he was a police officer. The appellant threatened her with eighty (80) days

incarceration. He then said if he was to free her, he had to have sexual intercourse with her first. Against her will he dragged her by the arm to a shrub in the park. He ordered her to take off her trousers, which she did. She said he pulled out a condom from his bag but she is not sure whether or not he used it during the sexual act. He raped her one. Thereafter, he ordered her to dress up properly and leave. He ordered her not to look back as he walked away from the scene. She complied and left the scene. It is her testimony that she managed to observe the appellant and his facial features during this ordeal. As she left, she walked to the city centre and ended up near Bulawayo Health Studio. She met her cousin Martin Sibanda who enquired why she was crying. She told him that she had been raped at the Centenary Park. Martin hired a taxi and they went to the scene and proceeded to the side of the park where there is a police post and reported the matter. About a week later, when she was in the company of Martin in a commuter taxi, she spotted the appellant and informed Martin. A report was made to the policeman at the taxi rank and the appellant was arrested. The issue of identity does not arise in this matter as the appellant does not dispute that he met the complainant and her boyfriend in the Centenary Park on the day in question. He does not dispute that he rebuked them for allegedly indulging in a sexual act in the park. The complainant testified that the person who rebuked them went on to rape her. She, therefore, cannot be mistaken on the appellant's identity. Once the issue of identity was resolved, the court *a quo* had to determine why the complainant would falsely incriminate the appellant. The complainant did not know the appellant before the fateful date. The court *a quo* found the complainant to be a credible witness. This is a finding on credibility of the witness based on her demeanor and facts of this case. There are many authorities of the Supreme Court and persuasive authorities from other jurisdictions on the proper approach of an appellate court to the consideration of a decision based on fact – *Hughes* v *Graniteside Holdings (Pvt) Ltd* SC-13-84 and *S* v *Isolano* 1985 (1) ZLR 62 (SC) at 63C-G. In the case of *S* v *Isolano*, *supra*, the court referred with approval the following remarks by LORD MacMILLAN in *Watt (or Thomas)* v *Thomas* [1947] 1 ALL ER 582 (HL) at 590B-D –

> "The appellate court had before it only the printed record of evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case, but it is only part of the evidence. What is lacking is evidence of the demeanor of the witnesses, their condour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion, but it is not available to the appellant court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who enjoyed advantages not available to the appellant court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the

> powers of court of appeal on question of fact. The judgment of the trial judge on the facts may be demonstrated on the pointed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone completely wrong."

*In casu*, the trial magistrate believed the complainant and Martin Sibanda. The magistrate made an adverse finding on the credibility of the appellant. I have carefully considered the issues raised by Ms *Nunu*, for the appellant. I do not find any misdirection in the trial magistrate's finding of credibility. I am persuaded that the trial magistrate was correct in rejecting the defence evidence and in accepting the prosecution evidence. There is no doubt in my mind that on the evidence before her the trial magistrate arrived at the right decision as far as conviction is concerned. Ms *Nunu*, failed to make any meaningful submissions on the question of sentence. This is understandably so because the sentence erred on the side of leniency. The appeal against sentence is equally devoid of any merit.

Accordingly, we dismissed the appeal against both conviction and sentence as alluded to above.

Kamocha J ……………………………………… I agree

*Calderwood*, *Bryce Hendrie & partners*, appellant's legal practitioners
*Attorney-General*, respondent's legal practitioners