

HONEST DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 5 & 15 JUNE 2017

Criminal Appeal

Advocate L. Nkomo for appellant
K. Ndlovu for the state

MAKONESE J: The appellant was arraigned before the court of the Regional Magistrate sitting at Bulawayo on a charge of contravening section 65(1) of the Criminal Law (Codification & Reform) Act (Chapter 9:23) that is to say, rape. The appellant pleaded not guilty to the charge but was nonetheless convicted and sentenced to undergo 16 years imprisonment of which 3 years were suspended for 5 years on the usual conditions of good behaviour. Aggrieved by both his conviction and sentence, the appellant lodged an appeal against both conviction and sentence. The appellant through his legal counsel put up a spirited fight arguing that there was insufficient evidence to support the conviction. We dismissed the appeal after hearing argument and indicated that our detailed reasons would follow. These are the reasons.

It is settled law that the offence of rape is committed where a male person has vaginal or anal sexual intercourse with a female person without her consent or where the male person realises that there is a real risk or possibility that consent was not given. The first point taken on appeal is that the evidence of the complainant is riddled with inconsistencies. A perusal of the record reveals that the complainant Thandekile Dube told the court that the appellant came to their home at house number 512 Nketa 6, Bulawayo to see her uncle Alexander Mashavira. Her uncle left for work leaving her with Sifiso the house owner, her cousin Caroline Mahlangu and Brandon her six year old cousin. Shortly thereafter Sifiso and Caroline went to the shops while the complainant took a bath. All the while, the appellant was in the living room watching

television. After taking a bath she went to her bedroom. Appellant followed her and entered the bedroom only to find her lying on the bed. She testified that appellant mounted her and pinned her onto the bed, removed her $\frac{3}{4}$ pair of trousers, unzipped his own trousers and proceeded to rape her. There was a scuffle and the appellant and complainant tumbled down to the floor, at which point the appellant let go of complainant's throat. He had been throttling her. The complainant screamed and called Brandon, a juvenile to bring a knife. Appellant put on her clothes and grabbed the knife which Brandon had brought. She said she intended to stab the appellant as she was angry with him for having sexually abused her. Eventually the knife was taken away by the appellant who threw it under a sofa.

The complainant's version was not discredited in material respects by the appellant who was legally represented at the trial. There were no serious inconsistencies in her account. Complainant's account was corroborated in all material respects by the evidence of Brandon Mashavire and Senzelwe Dube. At the relevant time, Brandon was a grade zero pupil. His testimony was to the effect that he was called and requested by the complainant to bring a knife to the bedroom, where the appellant and complainant were fighting. Senzelwe Dube is appellant's young sister. She testified that on the day in question when she entered the living room where complainant and appellant were he found the two quarrelling. She enquired what had happened and the complainant stated that the witness (Senzelwe) should rebuke their dog as he was a useless dog. This witness stated that the complainant took a knife from under the sofa and attempted to stab the appellant.

It is common cause that in its judgment the court *a quo* made a specific finding that the complainant was a credible witness. There can be no basis for arriving at a different conclusion. The complainant gave a clear, concise account of the events of the day in question. Brandon handed a knife to the complainant because she felt so violated that she wanted to stab the appellant. Complainant's words to Senzelwe that Senzelwe should rebuke their dog and her remark that "look at what your brother have (*sic*) done to me" and the complainant's attempt to stab the appellant, which was not seriously disputed by the appellant, all demonstrate the

behaviour and conduct of a traumatised victim who had been angered by the appellant's conduct. The learned trial magistrate, in my view, properly found that the complainant was a credible witness worthy to be believed.

In the case of *S v Mlambo* 1994 (2) ZLR 410 (S) GUBBAY CJ (as he then was) had this to say about the assessment of evidence by a trial court at page 413C;

“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 appellate court unless satisfied that it defies reason and common sense.”

The same principle was adopted in the case of *Godfrey Nzira vs The State* SC-23-06 where the learned judge stated at page 2 of the cyclostyled judgment as follows:

“I must point out here that an appeal court is very unlikely to go against fictional findings of the trial court which had the opportunity to listen to and actually see the witnesses and observe their demeanour when giving evidence, unless it is shown that there is a clear misdirection on the part of the trial court.”

In *S v Ngara* 1997 (1) ZLR 91 (SC) at page 98, it was made clear that where the trial court makes a firm finding of credibility and is impressed with the demeanour of witnesses the appeal court will not readily be persuaded that the trial court erred in its assessment of the evidence if it has the same impression gained from a reading of the record.

See also the following cases; *Soko v The State* SC-118-92; *Sibanda v The State* SC-184-90 and *Nyirenda v The State* HB-86-03.

I will adopt the same approach in this case in finding that there is no basis for alleging that trial court's findings would defy reason and common sense. It has also been argued on behalf of the appellant that the medical report compiled by Doctor Abigail Lupepe was inconclusive with regard to the occurrence of rape and as such doubt is cast on the state case. Dr Lupepe indicated in her medical report that on examining the complainant she noted fresh bruises on the entrances to her vagina and two healed tears at the 4 and 8 o'clock positions and a

fresh bruise adjacent at the 4 o'clock position. Her conclusion was that penetration was probable and not definite. Such a finding by the medical report is indicative of the fact that penetration was possible. It does not exclude the possibility of penetration having been effected. To the contrary the conclusion by the doctor makes penetration likely when taken together with the rest of the evidence led by the complainant. In the case of *S v Torongo* SC-206-96, the court stated at page 7 of the cyclostyled judgment as follows:

“As far as the law is concerned placing the male organ at the orifice of the female organ, resulting in the slightest penetration constitutes rape.”

In the case of *S v Mhanje* 2000 (2) ZLR 4 it was held that:-

“that the medical perception of what constitutes penetration does not coincide with legal penetration. For rape to take place, it is not necessary that there should be full penetration. The slightest degree of penetration will suffice.”

See also, the case of *S v Sabawu* 1999 (2) ZLR 314 where it was stated thus:

“It is a trite proposition that for the purposes of the crime of rape, penetration is effected if the male organ is in the slightest degree within the female body. It is not necessary to prove that the hymen was ruptured. If authority were required for this settled position I would refer to S v Mhlanga 1987 (1) ZLR 70 (S)...”

The complainant testified that the appellant forced her to have sexual intercourse with him. The doctor's findings of a fresh tear at the 4 o'clock position point to the fact that penetration was indeed effected.

On whether sexual intercourse was consensual, applicant's version of events is that he had prior sexual contact with the complainant. He denies having sexual intercourse on the day in question. He states that the allegations are all intended to fix him as he had quarreled with complainant over an alleged boyfriend. Appellant's version of events cannot be possibly reasonably true. Brandon brought a knife and handed it to the complainant who was angry and wanted to stab the appellant. That knife was taken by appellant who shoved it under a sofa. Senzelwe, appellant's young sister found the appellant and the complainant fighting. Senzelwe

heard complainant referring to the appellant as a dog because of what he had just done. There is sufficient corroboration of the complainant's account. The complainant was consistent in her evidence. The complainant made a timeous report at Tshabalala Police Station that same evening. The complainant's conduct is consistent with one who did not consent to the sexual act. In the case of *S v Banana* 2000 (1) ZLR 607 (S) the court pointed out that the evidence of the complainant is receivable and admissible to vitiate consent where it is shown that the complainant made a timely report without any undue pressure and influence to the first person to whom such report could have been expected to be made. The complainant's evidence having been found to be credible by the court *a quo*, and a report having been made timeously there would be no reason to interfere with the regional magistrate's conviction. In the light of the evidence led and taking into account appellant's defence, it is my view that the conviction was proper.

As regards sentence, the issues of sentence are the province of the trial court and the appeal court will only interfere with the sentence imposed by the court *a quo* where such sentence is manifestly excessive so as to induce a sense of shock. See *S v Ramushu* SC-25-93; *S v Nhumwa* SC-40-88 and *Mkombo v The State* HB-14-10.

Inspite of the appellant arguing that the sentence was lengthy, there was no suggestion that the sentence was incompetent or out of line with similar decided cases. It ought to be observed that rape is a very serious offence which violates the dignity of the victim and results in physical and emotional trauma. It is trite that lengthy custodial sentences are imposed even for one single count of rape. This court finds no misdirection on the part of the trial magistrate in the approach to sentence.

In the result, the appeal against both conviction and sentence is hereby dismissed.

Moyo J I agree

Mathonsi Ncube Law Chambers, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners