

SAUL MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO & MABHIKWA JJ
BULAWAYO 5 OCTOBER 2020 & 18 MARCH 2021

Criminal Appeal

M. R. Petkar for the applicant
K. Jaravaza for the respondent

MOYO J: The appellant in this matter was convicted of rape as defined in section 65 of the Criminal law Codification and Reform Act (Chapter 9:23). The allegations were that appellant had anal intercourse with the complainant Sabina Dube sometime in June 2017. Appellant was sentenced to 12 years imprisonment with 3 years imprisonment suspended on the usual conditions.

Dissatisfied with both conviction and sentence the appellant approached this court.

The gravamen of appellant's case is that the state did not prove his guilt beyond a reasonable doubt. 2 judges of appeal heard the matter and reserved judgment that is myself and my sister judge Hon KABASA J. We however failed to agree on a common position regarding the decision of the court on the appeal. We then invoked section 4 (2) of High Court Act which provides the following:-

“Whenever there is a difference of opinion on an appeal or application or any other matter being heard by an even number of judges of the High Court sitting together and the opinions are equally divided. The decision of the High Court shall be suspended until the opinion of a third judge of the High Court has been obtained and thereupon the decision of the majority of such judges shall be the decision of the High Court.”

A further opinion was consequently sought from Hon. MABHIKWA J and his view and my view tallied thereby becoming the majority decision which

then becomes the decision of the High Court in this matter in terms of the afore-quoted section.

The state made a concession that the conviction is not safe and ought to be set aside together with the sentence.

The State case

The complainant Sabina Dube was the 1st witness to testify for the state. She told the court that she left her home to ask for a pen at accused's place. She wanted to ask for a pen from accused's daughter one Prudence. On arrival she knocked on the door and asked if Prudence was in and the accused asked her to get into the sitting room. He then pulled her into the bedroom, removed her panties and threw her onto the bed. He then started to rape her and when he turned her around, Prudence arrived. She said that accused made her face downwards and removed his trousers. She said he made her lie face down, removed his trousers and started to insert his thing into her anus. She got off the bed. Prudence asked what had been happening and she told her that her (Prudence's) father was raping her (complainant). She said she felt pain. She said Prudence opened when accused was about to turn her upwards. She said she tried to scream but accused closed her mouth. She then got off the bed after Prudence had come and she dressed up in her panties and went outside. She said Prudence entered while accused was in the act and she also told Prudence. Prudence then asked complainant to accompany her and told complainant not to tell her mother that accused had raped her. She then accompanied Prudence to Habek where there was no one and she then went home. She went home into her bedroom and she sat down. She later told Faith who is her friend on 27 September 2017 (page 14 of the court record). She said she could no longer recall when the offence had occurred. She then told the court that she reported to Faith because Faith suggested that they tell each other secrets and Faith also promised to tell her, her own secrets so she told Faith about the rape. Under cross-examination she said she could not scream because accused closed her mouth. She also said she felt some pain in her anus for some days. She said she did not tell her mother because Prudence told her not to report. She also said she told Faith and not her mother because she was afraid of being assaulted or insulted by her mother. Under cross-examination she told the court that accused misled her saying Prudence was in the house when she was not.

She said it was on a Friday and she could not remember but she said it was in the afternoon. She then said when accused was about to turn her, Prudence emerged from outside, the door was open.

The 2nd state witness was Thabo Sibanda the teacher. She told the court that the complainant and other girls came to report to her that complainant had been abused by Prudence's father a neighbour. The teacher said she then spoke to the complainant on her own (page 21 of the court record) and asked her why she did not tell them that she had been raped, the complainant narrated that she had been raped by Prudence's father the previous week. The teacher spoke to complainant in September just after the opening of schools, the 2nd week of the term. The teacher then further stated that:

“She narrated how one morning she got up and went to Prudence's place of residence. Prudence happens to be her friend. So when she went to her place of residence her intention was to borrow a pen. She then says when she got there she knocked, the door was opened and she enquired from Prudence's father whether or not Prudence was present. She says Prudence's father opened the door and told her that Prudence had already left. He then closed the door, threw her on the bed and first made her to lie facing upwards. She said at that stage Prudence's father was naked. She said he lied her facing downwards and tried to penetrate her through the back. I do not know what actually happened because she did not narrate to me but he then turned her facing upwards. Having turned her intending to make her face upwards trying to penetrate her, Prudence then opened the door.” (Emphasise mine)

She said complainant told her that Prudence's father told her that Prudence had already left for school since it was a school day. Under cross-examination she told the court that complainant told her the incident had occurred about a week ago. (Emphasis mine) She then referred complainant to a teacher who is also a counsellor, one Mrs Mpofu.

Next to testify was Sikhanyisiwe Mpofu she is also a teacher and a counsellor at complainant's school and she spoke to complainant about these allegations after complainant had been referred to her by another teacher one Thabo Sibanda. She told the court that complainant told her that it was in the morning as she was preparing to go to school and she did not have a pen, so she thought of going to her friend one Prudence to borrow a pen and she got there and knocked, the father opened and she enquired if Prudence was there and the father confirmed that Prudence was home and complainant could get in. She then got into the house and the accused closed the door and grabbed her and threw her on the bed. She said she tried to scream and the accused tried to penetrate her from behind. He then tried to turn her face upwards. At that time Prudence entered accused then let go of her and he then begged Prudence not to tell her mother from there complainant got out of the house and she went to

school. She then enquired as to why complainant had not told her mother complainant then said her mother had gone somewhere. She then said after further enquiry by the witness, complainant then said that she was afraid of her mother that she was going to beat her for having gone to Prudence's house in the first place. This witness asked the complainant why she was now discussing the rape and she said the thing was bothering her that is why she came to the conclusion of disclosing it. This witness said it appeared as if the incident occurred sometime back because when she I talked to her it was now in September after schools had opened but according to her it had occurred sometime back. (underlined parts for emphasis)

Under cross-examination she said it appeared the incident had occurred sometime back maybe in June or July. She said it seems to have occurred before the August school holidays. She then said complainant did not state exactly when it had happened but it had happened sometime back, not during the month of September. She then said complainant told her it occurred in the morning and that after the incident she then went to school. (underlined portions for emphasis)

Next to testify was Faith Mutero. She told the court that complainant told her she had an issue that she wanted the witness to know but that the witness should not tell anyone about it. She said she went to Prudence's home to look for a pen it was in the morning. She knocked on the door and accused opened, while in the room accused dragged her into his bedroom, removed her panties and threw her onto the bed and raped her, sodomised her.

Under cross-examination this witness said she had asked the complainant if she had been raped in the morning and that her response was that she did not give her proper time but that it was "ntambama" (I do not know why the interpreter left this term in vernacular in the court record instead of interpreting it into English).

This witness also told the court (at page 32) when asked:-

Q Did she say how long it had happened?

A - After a few days of rape (underlined portions for emphasis)

Next to testify was Tadiwanashe Gozho. She said complainant told her that on a certain day she went to look for Prudence and found her absent, present at the house was Prudence's father. The father misled her that Prudence was home. He then invited her into the house. Prudence's father then took her into the bedroom and raped her. Complainant said she then got out of the room

and went to her home. Asked if complainant had told her when she was raped, she said about 2 weeks back. She told the court that complainant had said it happened in the afternoon and that she had proceeded to tell Prudence to go and play.

(underlined portions for emphasis)

Dr Alison Rambanapasi who was next to testify on the medical affidavit. He confirmed that the medical report was inconclusive and that the condition referred to as a reflex anal dilatation can also arise if the patient is constipated and due to other conditions and that that is the reason why Dr Gora concluded that these findings on penetration are inconclusive but possible.

The defence case

The accused disputed the allegations and said complainant came to his place of residence in June 2017 looking for his daughter Prudence, as she stood there, there was another knock. She then got out. She spoke to the person who had knocked and they then left. He denied any physical contact with complainant. He said complainant came to his house late in the afternoon and that she was not wearing a school uniform. He said he had a misunderstanding with his wife and she moved out with the children and they stayed about 4 houses away.

At page 48 of the court record, the prosecution put a question to the accused that the doctor in the medical report confirmed that the complainant had been abused through the anus. When defence counsel objected, and said such a question cannot be put to the witness as clearly, the doctor's report said inconclusive, the learned magistrate, despite accepting that indeed the medical report was inconclusive, queried at page 49 of the record of proceedings why such a question could not be put to the accused.

The defence counsel responded by saying but the doctor did not conclude that and the learned magistrate nonetheless ordered the accused person to answer the clearly misleading question despite the fact that defence counsel was objecting and rightly so. One wonders why the court would allow a clearly misleading question to be put to an accused despite protest by the defence.

Next to testify from the defence was Prudence Moyo. She told the court that she stayed with her mother because her parents had a misunderstanding. She passed through her father's residence and she found complainant standing inside the passage, she then asked complainant to accompany her and they went there. She denied finding complainant in the bedroom and she said she found

her in the passage. She said she did not get into the house. She did not ask complainant what she was looking for because she thought complainant had been looking for her. She said complainant wore a blue track bottom and a pink jersey. She said at the material time she was coming from school. She denied getting into the house and standing by the bedroom door. She denied any knowledge of the rape and her begging complainant not to tell her mother.

Problems with the state case

There are material discrepancies that the trial magistrate ignored and did not seek to analyse and resolve in his judgment.

Complainant in her evidence says accused misled her saying Prudence was in the house;

- She said after that she left with Prudence to Habek
- She said Prudence told her not to report the incident
- She said she reported to Faith because Faith enticed her that they tell each other secrets
- She also said she did not report because she was afraid of her mother
- She said she could not recall when the offence was allegedly committed
- She said it was on a Friday afternoon

Thabo Sibanda

- Says complainant went to accused house in the morning as opposed to complainant's version that it was in the afternoon
- She says complainant told her that the father said Prudence had already left as opposed to what complainant said that the accused pretended Prudence was in the house
- She said complainant told her the incident had occurred about a week ago

Sikhanyisiwe Mpofu

- Complainant told her that it was in the morning
- Complainant told her that accused confirmed that Prudence was at home as opposed to the earlier witness's account that accused had pretended Prudence was at home.
- This witness also tells the court that accused begged Prudence not to tell her mother, an account that is missing from the accounts of the 2 other state witnesses.

While complainant says she left and accompanied Prudence to Habek this witness tells us that complainant in fact left and went to school

- This witness was also told by complainant that she did not tell her mother because her mother had gone somewhere and upon further enquiry she said she was afraid to tell her mother.
- This witness does not tell us what complainant told us that she did not report because Prudence had told her not to
- This witness also stated that complainant said she decided to open up because she was bored by this thing that is why she came to the resolution of divulging it but complainant herself told the court that she was enticed by Faith to tell her a secret.
- This witness also said that complainant gave her the impression that it had happened some time ago as opposed to what complainant told Thabo Sibanda that the incident had occurred about a week ago.
- She was also told that the incident occurred in the morning and that thereafter complainant went to school. This contradicts complainant's own version on that point.

Faith Mutero

- In fact this witness contradicts herself as to the time told to her by the complainant as to the time the incident occurred. In her evidence in chief she said complainant had said that it was in the morning and later under cross-examination she said complainant could not give a proper time but that it was "ntambama" (meaning late afternoon). Faith also said complainant said it was after a few days of occurrence of this incident (page 32) of the transcribed record of proceedings.

Tadiwanashe Zhou

- Said complainant said accused misled her that Prudence was at home
- This witness says complainant said she then left accused's house after the incident and went home (Already there are 3 versions on this point, that she went to school, that she accompanied Prudence and that she went home).
- This witness also says complainant said the incident occurred about 2 weeks ago and that it was in the afternoon

All these are material contradictions that affect the admissibility of a complaint in terms of our law. The sexual complaint is tainted by inducement, by a late report and the various versions as to the time it occurred, what complainant did thereafter and why she did not report. All these are material discrepancies going to the root of the admissibility rules of evidence. There must be consistency on the information given about a sexual complaint so that

its credibility and truthfulness is enhanced and not open to doubt. With all these material inconsistencies, the complaint is not safe to accept and convict the accused person. The complaint simply falls short of the required threshold on admissibility and the learned magistrate should have dismissed it as inadmissible *vis-a-vis* the requirements.

1. The principles governing the admissibility of a sexual complaint. In the case of *S v Banana* 2001 ZLR 607 (S) at 616A – C the approach by the courts to a sexual complaint was stated as follows:

“Evidence that a complainant in an alleged sexual offence made a complaint soon after the occurrence and the terms of that complaint are admissible to show the consistency of the complainant’s evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant fabricated the allegations”.

The learned Chief Justice as he then was went on to state the following:

“The requirements for admissibility of a complaint are:-

1. It must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature.
2. It must have been made without undue delay and at the earliest opportunity in all the circumstances to the first person to whom the complainant could reasonably be expected to make it.”

In the case of *S v Zaranyika* 1997 (1) ZLR 539 (H) GILLESPIE J stated thus:

“Both the promptitude and spontaneous or voluntary nature of the complaint are important elements in rendering such a complaint admissible. Where any threat or any inducement by question of a leading or suggestive nature precedes and procures the making of the complaint its voluntary nature is destroyed and the evidence of the complainant becomes inadmissible”.

In this case, complainant told the court herself that she told Faith about the rape after Faith had said they should tell each other secrets and that Faith would also tell her, her own secrets in return. In other words, there was an inducement from Faith and an expectation that Faith also tells her, her secrets which then led complainant to make the complaint. The law as quoted above is very clear that any form of inducement to make a sexual complaint renders it

inadmissible. That is the law. The learned magistrate stated this issue in his judgment and in fact just makes a sweeping statement in his findings that the complaint was made freely and voluntarily to Faith a finding that is not supported by the complainant herself as to why she opened up to Faith. This was a misdirection on the part of the learned magistrate.

Secondly, the complaint was not made promptly the allegations seemingly arise sometime in June 2017 and the complainant only told Faith on 27 September 2017, about 4 months later, more so after an inducement by Faith on the girls telling each other their secrets.

Thirdly, there is no consistency on the report made as shown by the various statements, on one hand complainant says it was in the morning on the other hand she says it was in the afternoon.

The time of occurrence of the alleged rape is also brought into question. Thabo Sibanda says it was some time ago but definitely not in September. Mrs Mpofu says about 2 weeks ago and Tadiwanashe Gozho says about a week ago. This is critical because it gives consistency to the complainant's story and therefore the complaint itself. Where a sexual complaint is marred with inconsistencies as to material aspects like the time, the sexual assault allegedly occurred, its validity is vitiated for it has to be consistent and credible for it to be admissible. Against, in his judgment the learned magistrate says the defence wanted to capitalise on the issue of time which the court says is corroborated by the defence witnesses as to when complainant went there. In essence the court accepts that the defence witnesses are telling the truth that it was sometime in June 2017 therefore, the court was then duty bound to determine the delay of 4 months in making the complaint. It did not. In paragraph 2 at page 77, the court finds that the delay was not inordinate as it was almost 2 months after the alleged rape, one wonders where the court derives this fact from yet on the other hand he says he accepts the evidence of the defence witnesses who say complainant did visit the accused's place. I presume the acceptance of the evidence by the defence witnesses on that point also includes their version that it was in June for the court cannot accept that they said complainant did come but not accept that they said it was in June 2017. Even if the trial court thought the delay was about 2 months, there is no justification in finding that the delay was inconsequential. Two months is too long a delay to make a sexual complaint as it does not conform to the rules of admissibility that dictate that the complaint must be made promptly and without undue delay. A delay of 2 months with no explanation is obviously not in terms of the rules of evidence.

On another note, the version by the complainant differs per the state witnesses accounts, some she told that she then went home and sat in her bedroom some she told them she went with prudence to Habek. She also stated to some that Prudence told her not to tell her mother and to others that she was herself afraid of her mother's backlash. These are contradictions on material aspects of a sexual complaint because the time of the alleged assault is of essence, the reason why complainant did not report is of essence and the reason why she later reported is of essence. The court *a quo* just brushed such pertinent issues aside in its judgment and did not assess the validity of the complaint *vis-a-vis* these material contradictions. It is also common cause that the medical evidence was inconclusive and therefore did not take the state case further.

The court *a quo*'s assessment of the defence case is not per the required standard that a defence ought to succeed unless if it is not reasonably possibly true in the circumstances. The accused person told the court the truth because he did not dispute that complainant did come to his place of residence and the evidence was supported by the defence witness Prudence Moyo. Whilst the learned magistrate says accused built his case as he went, clearly his piece of evidence that complainant was truant and naughty was corroborated by Prudence Moyo under cross-examination and therefore the court had no right to dismiss that piece of evidence. In any event, the accused stated that when responding to a question and that could not have been material to his defence for him to mention it in his defence outline. That the child was naughty and truant would certainly have no relevance on whether she was raped or not. It could thus not be held that accused left out a material point to his defence. Even if he had left it out, Prudence Moyo confirmed that that was so, so the learned magistrate could not attack what accused had corroborated by his defence witness. Defence witnesses should not be dismissed for the simple reason that they are defence witnesses. Their input is equally essential in the matter at issue as are state witnesses and unless there is a clear and concrete reason to reject their testimony, a judicial officer does not have a right to just dislike, disbelieve and dismiss their testimony without evaluating it. The learned magistrate made a sweeping finding that there were no contradictions in the state witnesses' testimony and yet clearly they were there as shown in the court record. The learned magistrate also avoided assessing the defence and whether the defence witnesses were credible or not. He was duty bound to analyse the defence and eliminate it as being unreasonable, improbable and in fact untrue. Prudence Moyo gave her evidence well and disputed complainant's story, the learned magistrate whilst accepting the defence witnesses' accounts *vis-a-vis* complainant's arrival at their place of residence in terms of time, surprisingly chose to avoid the rest of the issues they raised and the rest of the allegations

they made. Given the problems with the state case which we have already shown herein the learned magistrate should have juxtaposed the state case with the defence case. From the findings made by the court, the trial magistrate just chose to believe the state case as against the defence without any justification for doing so. He took the approach that state witnesses must be telling the truth and defence witnesses disbelieved without any lawful cause. He took the approach discouraged in the case of *S v Makanyanga* 1996 (2) ZLR 23 wherein the learned judge stated thus:

“Proof beyond a reasonable doubt demands more than that the complainant be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it is true.”

In this case, Prudence Moyo was not discredited in any way and yet she refuted the allegations by the complainant, however, the trial magistrate does not even allude to her testimony at all. In fact he just cherry picks what he wants to use to convict the accused like the fact that defence witnesses accepted that complainant did visit accused’s house. If he believes the defence witnesses to the extent that they are telling the truth when they say complainant did visit accused’s house, why then does he throw away the rest of their testimony? No justification is given by the learned magistrate for just picking what he wants from the defence case.

We hold the view that as shown herein the trial court misdirected itself in convicting the accused person and the concession made by the state was therefore properly taken. The state having conceded and the concession being found to have been properly taken, a judgment would naturally not have been required but in this instance it was necessitated by the split views of the bench.

It is for these reasons that the appeal succeeds.

I accordingly order as follows:

1. The appeal succeeds.
2. Both conviction and sentence are set aside.
3. The verdict by the court *a quo* is set aside and substituted with the following:

“The accused person is found not guilty and is acquitted.”

Mabhikwa J I agree

M. R. Petkar Law Firm, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners