

MEMBER JENAMI

versus

THE STATE

HIGH COURT OF ZIMBABWE

**MUZOFA & BACHI-MZAWAZI JJ**

CHINHOYI, 29 May to 19 June 2023

**Criminal Appeal**

*U. Saizi*, for the Appellant

*T.H Maromo*, for the State

**Criminal Appeal**

**BACHI-MZAWAZI J:**

**Introduction**

The appellant was sentenced to 8 years imprisonment with 4 suspended on attached conditions after being convicted of aggravated indecent assault on a minor girl child, in contravention of the main charge, s66(1) (c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] following a contested trial. The alternative charge, of indecent assault as defined in s67(1)(a)(i) of the Act was withdrawn by the State before plea with the concurrence of the trial court which acknowledged unnecessary splitting of charges.

He has approached this court appealing against both the conviction and sentence.

**Brief facts**

The brief facts are that, the appellant whilst home alone, sometime in August 2021, during school holidays, invited the complainant, a young girl who was watching television from outside his house's window, as was the norm, to come and watch from a sofa inside the house.

It is alleged that when the complainant was about to leave for her homestead after watching the evening television episode, the appellant closed the doors and then dragged her into his bedroom where he partially undressed her and himself. He then proceeded to place his male organ and rubbed it on the complainant's female organ whilst lying on top of her and closing her mouth. It is said that complainant felt pain.

It is further stated that, the appellant used his fingers on the complainant's female organ. However, conflicting evidence was placed on record on whether the fingers were inserted inside her or outside her said private parts. Nevertheless, it is stated that the complainant felt pain once again during the encounter with the appellant's fingers. There are also allegations that the complainant was crying throughout the incident and at one point was threatened with knife. However, there is contrasting evidence as to when she commenced crying and the issue of the knife.

The sexual molestation report was made several months later to the complainant's father and stepmother. The reasons for the late report were said to be a combination of the threats from the appellant, fear of assaults from the complainant's biological mother and an exam paper question conscientising pupils on the need to report sexual molestation.

### **Summarized Grounds of Appeal**

The appellant's grounds of appeal are summarily that, the court erred both in fact and law by;

- a. Making a finding that penetration was proved when the medical report stated that there was no penetration.
- a. In concluding that the complainant was a credible witness in the face of a multitude of contradictions and discrepancies in all her testimony.
- c. In ruling admissible, the reasons behind the delay in the complainant's report.
- d. In finding the complainant credible in the face of numerous contradicting evidence and inconsistencies in her whole testimony.
- e. In rejecting both his defenses of false incrimination and alibi and placing the burden of proof on the appellant to prove his defenses.

### **Appellant's defense**

The appellant denied the offence in toto or any interaction whatsoever with the complainant. He stated that it was the Covid 19 pandemic period and he was home with his wife and children at all material times. All members of his family were immobile due to the travelling restrictions that were in place during that period. In any event, he stated, it would not have been impossible to sexually abuse the complainant as his house was just by the road side facing a gym and a vegetable market frequented by people. It is his further, defense that during that whole timeframe he stayed with another tenant, called Mai Leon, occupying a room which used the back entrance and it was not possible to use that door nor to sexually molest complainant without

drawing her attention. He thus, stated that the offence was fabricated and a figment of the complainant's imagination meant to falsely incriminate.

Two of appellant's children testified in support of his alibi defense, as he puts it. They confirmed that the whole family never moved an inch from home and were always together because of the epidemic induced travelling restrictions.

### **State evidence**

From the State evidence, the complainant testified that, on the day in question the appellant was home alone. She gave several versions as to where the members of his family had gone including his daughter, Paida, her friend and age mate. At one stage she mentioned that the family had gone to church and then told the court that they had left for their rural home.

She admitted that there was a gym and a vegetable market close to the house but said the people were long gone at the time of the alleged commission of the offence. However, when referring to the closing of the doors and being thrown on the sofa she gave the impression that indeed there were people around capable of seeing the happenings inside through the open doors, their closure.

It is her evidence that, the appellant invited her in, upon seeing her watching TV from outside the house as she and others usually did. She acknowledged that it was not her first time to be invited inside by the appellant and to be there when he was alone. She said she was thrown onto the sofa where she had been seated when she rose to go after the episode she was watching had finished. This is when accused then grabbed her, dragged her to the bedroom, whilst holding her mouth and threatening her with a knife. There is also a discrepancy as to when the complainant's mouth was muzzled.

After that, she claims, he threw her onto the bed, undressed her and himself and rubbed his male hood on her female organ. He then stopped when she felt pain and proceeded to insert his fingers inside her vagina and moved it up and downwards, causing her to feel pain once again.

Contrary to her evidence on the rubbing of the penis on the upper outside of her female organ which was consistent and straight forward. She prevaricated on whether the finger used was one or more and as to whether it was inserted inside her female private part or not. So fraught with inconsistencies, was complainant's finger sexual abuse evidence that the trial court, the prosecutor and the defense counsel had to go into a secluded room for her to demonstrate and physically point where and how the finger or fingers came into contact with her womanhood. This as recorded on the transcript on page 54-55 of the record.

During the course of the trial the complainant gave different testimonies in regard to when she started crying, when and where the knife had been taken from, what the appellant was wearing and undressed.

The witness gave three different reasons for the late report. To begin with she mentioned the fear of threats from the appellant. Then disclosed the fear of assaults from the mother who had admonished her from watching night television shows. She said apart from that she just had the general fear of being assaulted by the mother. Lastly, she stated that the report was prompted by an exam paper which she had written conscientizing on the need to report sexual assaults.

The rape report is said to have been firstly made to the complainant's father and then repeated in the presence of the step mother. The father was not called to testify but the step mother did. Apart from regurgitating what the complainant said in respect to how she ended up at the complainant's house and what she claimed he did to her and how it was done this witness gave some critical evidence behind the motive of the report.

She told the court that, when the complainant had been informed that it was about time for her to go to her mother's house, as was the routine. She was home with her step mother until 9pm of the alleged report but did not tell her. She then went into the bedroom after he returned and disclosed sexual abuse. The witness stated that the father called her (the wife) to come and hear first hand the allegations and she took heed of the call but asked the father to leave the room.

It was this witness's evidence that, initially the complainant alleged abuses of assaults and ill treatment by the step -father. She then changed goal posts implicating the appellant after the stepmother, who then suspected sexual assaults by the step father, contacted the complainant's mother baring the allegations. The mother denied the said state of affairs. As already noted, the complainant then introduced the sexual molestation aspect pointing to the appellant as the perpetrator resulting in the report. In her evidence to the second state witness the complainant mentioned the presence of another girl, Valerie who was also enticed with sweets and was about to be indecently assaulted on the same day had her mother not called her. This evidence was never said to the court or the police by the complainant.

Apparently, the complainant's parents are estranged and live apart with different partners. It can be deduced from the record that the father lived a more comfortable life than the mother. This is evidenced by the fact on record that, the mother could not even afford a television set and had to spend most of her time at work, in order to make ends meet. Hence, the propensity of the complainant to poach Television viewing from the neighbor's house. The mother was also staying with three more adults.

From the look of it, as the evidence reveal they had a mutual arrangement on child visitation or access rights. The facts disclosed that, during the course of the school term the

complainant would be with the father at his residence and during school holidays with the mother at her own different place.

### **Issues**

Turning on the issues, they are:

- a. Whether or not the trial court erred in its finding of fact or law on both the conviction and sentence?
- b. Whether or not the error or misdirection justifies upsetting her findings.

### **The trial court's findings and analysis**

As reflected in the grounds of appeal above, the court found the complainant's evidence credible. Even though it acknowledged the extent of the inconsistencies, the court justified them to be as a result of "rape trauma". A term she coined and introduced. It was not mentioned in evidence no extracted from an expert. The court believed that this was because it had observed the complainant crying in court, during the ordeal and during the medical examination.

However, it is our view that children of that age cry because of diverse factors which cannot be solely attributed to an established trauma. For instance, it could have been the resultant effect of her parent's break-up, the broken home syndrome, the act of not belonging, being bundled from one parent to the other, being caught and lost in between two parents who have found new lives and loves. Children cry, under pressure of cross examination and the exigencies of the court room, to attract sympathy, to be believed, when they are happy, overwhelmed, to manipulate and get their way, the list is endless.

So, there is no way one can make a valid conclusion on the reasons why children cry without substantial evidence. This was extraneous evidence on the part of the court and a misdirection. See, *Barros and Anor v Chimponda* 1999(1) ZLR 58 SC.

We are also of the view that the magnitude of the discrepancies in the witnesses' evidence did not warrant a finding on credibility. Although, issues of credibility are predominantly the trial court's forte as pronounced in several case authorities, the question is was the trial court's finding on credibility reasonable in the circumstances? See, *Godfrey Nzira-v-The State* SC 23/06, *State-v-Ngara* 1997 (1) ZLR 918 C, *Beckford-v-Beckford* 2009 (1) ZLR, *State-v-Mlambo* 1994 (2) ZLR 410 S, *State-v-Mbada* SC 184/90, *State-v-Soko* SC 115/92.

This general rule on the aspect of credibility being the domain of the trial court was qualified in *MB Ziko (Pvt) Ltd & Cestaron Invstms (Pvt) Ltd & Anor* 2008(2) ZLR1(S) where, it was held that an appellate court may still disagree with the finding of the trial court if on examination of the evidence and considering all the circumstances of the case, (such as inferences from unquestioned facts and probabilities), it concludes that the trial court 's findings

on the credibility of witnesses cannot be supported. The advantage of assessing of demeanor that the trial court cannot be overemphasized, though crucial but the question of whether the evidence given is reliable and probative of the facts in issue must depend on all the circumstances of the case. See, Prof. Geoff Feltoe, *Magistrates' Handbook* page 288.

That being the case, turning to the other grounds of appeal in no chronological order, starting from the ground of appeal, on the admissibility of a report which had not been made timeously. The case of *S v Banana* 2000(1) ZLR607(S) will help to shade light on the requirements for the admissibility of a complaints of rape. It noted as follows;

- a. It must have been made voluntarily and not as a result of questions of a leading inducing or intimidating nature. See, *R v Petros* 1967RLR 35 G-H,
- b. 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.

The trial court made a finding that the report was made timeously, voluntarily and to the expected closest person. Whilst the court acknowledged that there was a delay of about five months, it justified the report as timeous because of the combined effects of the threats from the appellant, the assaults and neglect from the mother who from the court's version would leave the complainant alone and sometimes not return home and the fact that the complainant's memory was jolted by the exam paper in December. Of note, nowhere in the record of proceedings was reference made to the mother's negligence of the complainant or of spending nights out nor of actual assaults. Again, the court brought in and supported itself from information outside the scope of the record, which we could not help to note and condemn as a misdirection.

In order to attain the interests of justice, and the doctrine of impartiality, judiciary officers are restricted to making decisions based on the facts and evidence placed before them against the backdrop of the law.

On the issue of the closest person, we are of the view that the mother apart from the unsubstantiated allegations of ill-treatment and neglect, was the closest and expected person a report could have been made. Further, the mother stayed with three mentioned relatives, but the complainant did not divulge the incident immediately soon afterwards in the same month of August, but waited for December. We are not told that there was no cordial or hostile relationship between the complainant and those who stayed with the mother.

A closer look at the exam question paper aspect, reveals that no evidence was placed on record as to when the exam was written and the report then made. This would have helped in ascertaining on whether indeed the exam paper prompted the report to the father by jolting the complainant's memory. There was need to call the father to clarify this point amongst others. There was need for evidence to be placed on record not only to verify when the exam paper was

written but also whether indeed that question was in the exam paper, before that evidence could be safely relied on by the court aquo.

What exercised our minds was also the fact that do examiners and education system examine students on what they had not taught or included in the syllabus? If it had been taught as part of the curriculum then surely the point that the complainant's memory was jogged by the exam paper on such issues will have been effectively and informedly concluded.

These gaps or lacunas, expose the investigation in criminal cases. Rape cases are very serious cases with devastating effects. Permanent psychological and physical scars for the victim and lengthy goal terms for the perpetrator are common facts. Hence, the need to exhaust all loop holes in investigations especially in criminal law jurisdictions like ours, where there is absence of forensic and other technologically aided investigations. More so, when the law recognizes the inherent infallibility of humans in matters of honesty, recollections, exaggerations, misrepresentations amongst other human frailties, See *Mutter & Anor S-66-89, S v Musasa HH52/23, Sv Mupfumira HH64/15, Sv Sibanda 1994 (1) ZLR SC, The Magistrates hand Book* by Prof Geoff, Feltoe. Reid Rowland, *Criminal Procedure in Zimbabwe*, Legal resources foundation. In *S v Banana*, above, though the Cautionary rule was castigated and abandoned, the court emphasized that for such single witness evidence in sexual offences to be admitted it should be flawless and credible as another human's life and liberty depends or hangs on it.

In the face of these three varied reasons on the delay in making the report, we find that, the court's finding on this ground was also unsafe.

Having stated, that the other ground of appeal which touch on the appellant's defences of alibi and false incrimination both share one common denominator of who bears the burden of proof in criminal matters in general and in an alibi defence in particular.

It follows that, in a Criminal trial, where the presumption of innocence operates in favour of an accused person, until proven guilty, the burden of proving such guilt lies on the State or prosecution. The state is obligated to prove every essential element of the offence against an accused person. The oft quoted passage in the *locus classicus* case of *R v Difford 1937 AD* is instructive.

It states, "... no onus rests on the accused to convince the court of the truth of any explanations he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but beyond reasonable doubt false, if there is any reasonable possibility of his explanation being true, he is entitled to his acquittal"

In, *S v Mapfumo and Others 1983 (1) ZLR 250 (SC)* it was held that,

“There is no onus on an accused person to establish his defence. Once there is some evidence suggesting a defence the court must consider this defence.”

In this regard, the court of first instance made a finding that it was not established that the appellant informed the police about his alibi, hence, the police did not investigate on that aspect.

In common parlance an alibi is a claim or piece of evidence that one was elsewhere when the act, or offence was committed. It connotes both the distancing of the person from the scene of the crime at the alleged material time and a person who can vouch that they were with the suspect elsewhere at that given time. It thus speaks, to time, place and the company in which the alleged offender was in. It can also be innate objects such as receipts from service providers, CTV cameras or independent witnesses bailing the person out and indicating that at the time he was at a different place altogether. This was highlighted in the South African case of *R-v-Biya 1952 (4) SA 514* which laid as follows;

“If there is evidence of an accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that his alibi evidence is true it means that there is the same possibility that he has not committed the crime.”

In the present case, the appellant’s defence is not that he was at a different location on the day in question, but that he was home in the company of his family. Two members of his family attested to this. In our view his alibi is not an alibi in the strict sense as, he is not denying the time and place. For as long as the defence witnesses were consistent and credible then their evidence ought to be believed. The trial court did not question the credibility of the evidence of these witnesses but disregarded it on the basis that they had an interest to serve. Further it disregarded his alibi defense stating that it had not been introduced to the police to allow them to investigate that aspect.

On the issue, on false incrimination. Given the multiplicity of inconsistencies, in the complainant’s evidence, the medical and expert report indicating absence of medical penetration, the motive surrounding the report as adduced from the second State witness, the uncontroverted evidence from the defenses witnesses the probability of the false incrimination of the appellant by the complainant cannot be ruled out. As such, once an accused proffer a probable defense then he has no duty to prove others and the burden of proof is shifted to the State to rebut that explanation.



Whilst the court was accurate in respect to the stage when an alibi defence is introduced, as laid out in several authorities, see, *Munyaradzi Kereke v Francis Maramwidze & Anor*, SC86/21, we are of the view that this was not an appropriate instance of an alibi defence as will be explored later.

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"There is no onus on an accused person to establish his defence. Once there is some evidence suggesting a defence the court must consider this defence."

Lastly, the court made a finding that the accused committed the offence and that penetration was effected. She noted as follows;

"It is the court's considered view that medical penetration was proved in this case when accused inserted his fingers into complainant's vagina, and she felt pain and she began to cry. The process of inserting and removing was repeated causing more pain...*In casu*, he penetrated complainant's vagina using his finger without her consent. Accordingly, guilty as charged."

It is important to note that, a medical examination was done on the complainant after the report was made it disclosed that there was no evidence of penetration or any healed or fresh scars nor any evidence of the tampering of the complainant's private sexual parts.

Case law in abundance points to the fact that there is legal penetration the moment the male organ come into proximity with the female organ though there may be no medical penetration or contact or breaking of the hymen.

In some cases, even if there is no insertion of the male organ but the slightest degree of contact with the female organ wherein the victim alleges that she felt pain then legal penetration is considered to have been proved. See, *S v K* 1972 (2) SA898 and *Le Roux v S* (A&R 25/2018[2021] ZAECGHC 57(13 May 2021). *Simbarashe Gibson v the State* SC16/14.

In the case of *Torongo* SC206/96 at p6 of the judgment it was held that,

“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.”

*Sv Mhanje* 2000(2) ZLR20(H) it was noted that, for rape to take place it is not necessary that there should be full penetration. The slightest degree of penetration will suffice”.

The legal definition of penetration according to *Black’s Law Dictionary*, is

“The insertion of the male part into the female parts to however slight an extent, by which insertion the offense is complete without proof of emission”.

In some other instances the courts have considered the fact that the victim felt pain as an indication of legal penetration be it in rape cases under s65 of the Criminal law code or sections 66 and 67.

This was highlighted in, *Ncube v S* HB 55/15, where the Supreme court confirmed the conviction on the basis that the victim felt pain although there was no medical evidence of penetration.

So, in this case was the finding of the court on penetration taken with all the evidence on record point to the guilt of the appellant?

It is not disputed that the complainant gave several conflicting testimonies with regards to where the appellant’s fingers had been placed. She was consistent and unmistakable on the issue of the penis rubbing the outer apex of her vagina but with the fingers or finger the changed goal posts each time she was questioned on that aspect. This was acknowledged by the trial court in her reasons for judgment when summarizing the complainant’s evidence.

On page 8 of the record of proceedings, 2<sup>nd</sup> sentence of the first paragraph, she noted,

“Accused stopped rubbing his penis but began to insert his fingers (plural) into complainant’s vagina on the upper part without pushing the fingers inside’.

The witnesses at one stage, mentioned that the finger was placed in twice moving up and downward. In court she said it was the forefinger. From the evidence of the step mother, she mentioned two fingers.

These inconsistencies led the court to adjourn on a fact-finding mission with the rest of the legal team and the complainant to a secluded room to establish on where exactly the finger or fingers had been placed on her body as the issue of the penis was a done deal.

On pages 54 and 55 of the record, the complainant under cross examination testified that he would place his finger on the upper part of the vagina.

It is on page 55 of the record where it is reflected that the whole ensemble of the legal team proceeded to a separation room with the complainant to see where she was pointing in respect to the fingers. The record reflects that they all agreed that, “the complainant was pointing close to the vagina the upper but not really inside’ this was after seeing the physical demonstration by the complainant herself. This is what the transcript denotes.

For some reason, the court aquo, on page 19 of the record, in her assessment of the evidence of penetration, the trial court went on to state that the complainant inserted his fingers inside her but was not pushing them hard but she felt pain all the same. Where did this come from as the legal team had in unison on page 55 agreed that the area where the fingers touched was not inside but outside. This was for the purpose of eliminating once and for all the contrasting versions that had been given by the complainant on the aspect of fingers. The conviction of penetration based on the fingers was thus unsustainable.

We are alive to the fact that the appellant could still have been convicted on the issue of his penis coming within inches of or contacting the vagina but given the inconsistencies in the key witness’s evidence, the defence witnesses corroborative evidence, the expert opinion from the medical report the circumstances surrounding the delay in making the report and the motive behind the report the dangers of false incrimination was not eliminated. The benefit of the doubt should have gone to the appellant.

## **Disposition**

In rendition, rape is a serious offence. It is evident that this case is one of those where investigations were not exhaustive. Rape cases are traumatic to both the victim who is scarred for life and the suspect who faces a considerable length of time in imprisonment. There is need for all the stakeholders to thoroughly investigate and present cogent and tangible evidence. We cannot advocate for sterner penalties when we do not work towards foolproof methods of ensuring that the guilty pay and the innocent are freed. Once there is doubt the benefit of the doubt must go to a person who faces a considerable life or a lifetime behind bars. Whilst courts do not condone any acts of sexual violations on children particularly the girl child the more the need for tangible and consistent evidence. There must be justice both to the victim and the offender.

The court is cognisant of the debates revolving around legal and medical penetration, as well as penis and finger penetration. However, in a jurisdiction where there is no scientific evidence in rape or sexual offences reliance is placed on the only independent expert evidence in the form of a medical affidavit. It is unfortunate that it does not assist with the identity of the perpetrator but it is of vital importance as to sexual violation on the victim's body. Though, as per the Banana's case which removed or negated the cautionary rule of evidence in sexual offences, the single witness evidence if credible is sufficient as a stand -alone to sustain a conviction. The lack of forensic evidence makes the medical affidavit an essential evidentiary tool in the meantime,

In that regard the finding that the state had proved its case beyond a reasonable doubt was a misdirection on the part of the court aquo. From the totality of evidence on record, the appellant gave a probable defence. See, *Kombayi v State* HH27/04, *Kapende v S*, HH157/02 and *S v Dube* 1977(1) ZLR 221.

The appeal succeeds on both conviction and sentence. The trial court's decision is set aside. The conviction is quashed. The sentence is set aside and substituted with the following;

Accordingly, the accused is found not guilty and acquitted.

**Honourable Justice Muzofa, J agrees**

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