

LUCKSON PETROS

versus

STATE

HIGH COURT OF ZIMBABWE

MUZOFA & BACHI MZAWAZI JJ

Chinhoyi, 29 May & 8 June 2023

Criminal Appeal

J. Mangeyi, for the Appellant

T.H. Maromo, for the Respondent

BACHI MZAWAZI J: The appellant was convicted on a charge of rape in terms of s65(1)(a) after a contested trial. He was sentenced to fifteen years imprisonment, three suspended with attached conditions and twelve years effective imprisonment.

He is appealing against both conviction and sentence. The grounds of appeal on conviction are basically that the court misdirected itself by making a finding that the complainant's evidence was credible and discrediting that of the appellant as the onus of proof beyond a reasonable doubt rests on the State.

The basic facts are that the complainant aged 30, a mother of three, and appellant were not strangers as they resided in the same home area in Chikuti. It is alleged that on the 19th of April 2021, at one stage the two travelled together from the shopping area. It is the complainant's version that along the way the appellant proposed love to her. She turned him down and consequently he grabbed her, pulled her into a nearby bush, undressed complainant and himself and raped her. She attested that the appellant was startled by passersby voices and he fled. The complainant then went back to the road crying and informed the passersby one of them who testified as a witness in the lower court. It is stated that the rape was

reported to the police the following day but the appellant was only arrested on the 26th of September 2022. It is said he had been evasive but it is not clear in what manner.

In his defence, the appellant claimed that he was in a love relationship with the complainant. The charge was trumped up as he had terminated the relationship over undisclosed facts about the complainant's motherhood status. This is said not to have gone down well with the complainant who then fabricated these charges. He did not deny walking with the complainant from the shops but disputed that it was on the day of the alleged rape.

The only state witness called knew both appellant and the complainant. He confirmed that on some date when he was coming from somewhere he saw complainant emerging from the bush into the road crying. He enquired from her why she was crying. She informed this witness that she was about to be raped by one Lucky. The evidence of this key witness is on page 31 of the court record of proceedings. Under cross examination the same witness repeated that she was informed of an attempted rape not rape. He told the court that he never saw the assailant as it was in the evening and was dark.

On page 24 of the record the complainant testified that she was walking together in rapport with the appellant whom she already knew when he proposed love to her after travelling for some time. She turned him down. This is when he attacked her, tore her three quarter short and raped her without her consent.

The medical report is of no probative value. Though taken four days later, the reason of the delay was not explained. Nothing much could be shown given that this was a mother of two children or more. Although the court relied on the endorsement of the word 'stress' of the complainant noted by the Doctor who observed her four days later it is not evidence of the exact cause of the stress.

Ordinarily issues of credibility are the domain of the trial court as observed in several authorities. In instances where a finding on credibility defies common logic that prerogative that the trial court enjoys can be interfered with. See *S v Mambo* 1994(2) ZLR 410, *S v Mbada* SC 184/90 and *S v Soko* SC118/92.

The case of *Michael Gwanzura v The State* SC66/91 at page 7 is authority that, in issues of credibility, the evidence of the witness or accused should not be taken in piecemeal or isolation should be holistically evaluated.

In casu, the appellant was charged and convicted of rape. The complainant cried rape, reported rape and testified rape. In contradistinction the first person to accost her, the only state witness was indisputably told of a rape attempt although she was visibly shaken. The witness did not see nor was he shown the alleged torn three-quarter trousers nor was it produced in court as evidence. This was the glaring evidence before the lower court. No tangible explanation was given by the complainant of why she would mistake an attempted rape with the actual rape.

The court noted the contradictions but came up with an explanation which in our view is impermissible extraneous evidence, on page 10 of the record. He justified the contradictions by stating that the state witness may not have been attentive as initially he wanted to flee when he was startled by the complainant. See, *Barros and Anor v Chimponda* 1999(1) ZLR 58 SC, wherein it was noted that extraneous evidence is a basis upon which the discretion of the trial court may be interfered with.

Rape offences are of serious concern both to the victim and the offender with adverse everlasting imprints on both. This is the reason why in most developed countries there is the implementation of advanced forensic or technological investigating methods to eliminate the innocent and nail the guilt without question. In countries where reliance is placed mainly on oral evidence of the victim in most cases as the only eye witness there is great need for thorough and exhaustive investigations as well as a high magnitude of consistency in such evidence.

For the above reasons, we are of the view that the court erred in relying on the contradicting evidence of the complainant when it did acknowledge the inconsistency. We are thus of the opinion that in that regard there was no basis for it to conclude that the state had proved its case beyond a reasonable doubt.

We accordingly, uphold the grounds of appeal in the interest of justice though unrefined. Both the sentence and conviction of the court a quo are set aside and substituted with that of “Not guilty and acquitted”.

Honourable Mrs. Justice Bachi-Mzawazi

Honourable Mrs. Justice Muzofa – I Agree