

THE STATE  
versus  
STEPHEN ZAKAYO

HIGH COURT OF ZIMBABWE  
HUNGWE and MAVANGIRA JJ  
HARARE, 20 MARCH 2012

### **Criminal Appeal**

*A. Nyikadzino*, for the appellant  
*S. Fero*, for the respondent

MAVANGIRA J: The appellant was convicted on a charge of rape by the Regional Magistrate sitting at Harare. The allegation against him was that on 23 January 2008 at No. 24 Coronation Avenue, Greendale, Harare, he unlawfully had sexual intercourse with the complainant without her consent. Upon conviction he was sentenced to 17 years imprisonment of which 4 years was conditionally suspended. He now appeals against both conviction and sentence.

The Appellant raised four grounds of appeal. The first is that the learned trial magistrate erred in convicting the appellant on the uncorroborated suspect evidence of the complainant. The second is that the trial magistrate erred in convicting the appellant in the face of clear and uncontroverted evidence from witnesses who were close to both the complainant and the appellant that the two were in love. The third is that the trial magistrate erred in that he failed to seriously take into account that the rape was reported not by the complainant but by one of her sisters and that the report was not timeously made thus casting doubt on the credibility of the complainant. The fourth is that the magistrate erred in believing the State's witnesses' evidence as opposed to that of the defence witnesses. With regard to the appeal against sentence the ground of appeal raised is that the sentence imposed is manifestly excessive in the circumstances, especially taking into account that the appellant is a first offender and that apart from his immediate family he is also looking after the complainant and her minor child. However during the hearing of the appeal Mr *Nyikadzino* withdrew the appeal against sentence.

The appellant does not deny having sexual intercourse with the complainant. He however claims that it was consensual between him and the complainant. To the contrary the complainant's evidence was that she knew the appellant as a prophet or healer who used to assist her in respect of an ailment that she suffered from. In her words, she would "lose power, fall down and become unconscious". She said that those who would be around would later tell her that she would also "make utterances as someone who has lost her mind". Her sister, with whom she resided and who worked at the same premises as the appellant referred her to the appellant for help. On 23 January 2008 the appellant called her to his house to collect "holy water".

When she arrived, the appellant instructed her to enter into his single room residence. She sat on a chair. The appellant who followed her inside closed the door behind him. He then told her that he wanted to have sexual intercourse with her as the Holy Spirit had told him that he was to take her as a wife. The complainant said that she refused to be his wife since he was married and she had only approached him for assistance in connection with her illness. The appellant insisted that he would have sexual intercourse with her and then see what she would do about it. He then felled her to the floor, removed her pair of trousers and her pants and raped her. She tried to fight him off but he overpowered her. She tried to shout but the appellant closed her mouth or gagged her. Although the appellant used to stay with many people, on that day she did not see anyone else around. After raping her, the appellant gave the "holy water" and warned her not to tell anyone lest she dies or the severity of her illness would increase. The complainant refused to accept the holy water and went back home. The complainant was thus emphatic that the intercourse was not consensual.

The complainant also explained that she became afraid after the appellant threatened her with aggravation of her illness or death as she had been ill for many years and she feared falling ill again. She thus kept quiet and made no report about the rape. Under cross examination she confirmed that she believed that the appellant had powers to cause one to die and or to become more ill. From a reading of her evidence this belief was particularly confirmed after appellant's visit to her rural home albeit the said visit was made after the rape. It appears that after the visit the family believed that the appellant was responsible or had caused the misfortune that apparently befell the complainant's mother.

It is common cause that the complainant conceived as a result of the rape and later gave birth to a child.

The complainant's evidence is attacked on the basis, amongst others that there was no evidence of screams or soiled garments to corroborate her story that the intercourse was not consensual. It has been submitted in the appellant's heads of argument that in the absence of such evidence the trial magistrate wrongly convicted the appellant.

I am not aware of any authority and none has been cited, to the effect that in the absence of evidence of screams or soiled garments, there can be no conviction for rape. The trial magistrate had the long established advantage that all triers of fact have. He had the advantage of seeing and hearing the witnesses and assessing their demeanour and credibility. He believed the complainant who said that she tried to scream but the appellant gagged her. No valid basis has been laid to justify interference in this respect by this court, sitting as an appeal court.

The complainant's evidence or reliability thereof is also attacked on the basis that the report was not made by the complainant herself but by her sister and that the report was in any event not timeously made. No convincing reason has been placed before us as to why the learned trial magistrate's assessment on this aspect ought also to be found to be erroneous. The relationship between the appellant and the complainant was that of faith healer and patient. She believed that he possessed the power to assist or help her and for a period of two months before the commission of the offence she was going to him for such assistance. She genuinely believed his threats that he could cause her death or aggravate her illness. The nature of the illness that caused her to seek the appellant's help, and this has been described earlier, is also pertinent, coupled with the fact that she had suffered from the ailment for many years. Contrary to Mr *Nyikadzino's* submission, her level of education has nothing to do with a belief of this nature. It cannot, in my view, be said that because she was educated up to "O" level, she could not have entertained such beliefs. One cannot help but also note that her own family including her parents appear to be steeped in this kind of belief as well. It was her sister who referred her to the appellant. When her parents became aware of her pregnancy and the circumstances in which it was conceived, their immediate concern was not about the making of a report to the authorities. Their immediate concern was for their daughter's safety, preferring that there be no confrontation with the appellant. The complainant's sister, Wynet, also told the court that their parents feared the appellant as he was a prophet. A perusal of the record also shows that the appellant himself claimed to have healing power. It is common cause that he gave himself out to be a person endowed with healing powers.

It is important for the court not to take an arm chair approach in the determination of a matter before it. In *casu* it appears that that would be the effect of acceding to the submissions by both the appellant's and the respondent's legal practitioners in their written submissions. Whilst Mr *Nyikadzino* persisted in his defence of the appeal in his oral submissions, Mrs *Fero* for the respondent withdrew her earlier written concession that the conviction cannot be supported by the evidence on the record. She reckoned that on a holistic approach to the matter, regard being particularly had to the healer-patient relationship between the appellant and the respondent, it was clear from the evidence on the record that the complainant had not consented to the act.

The trial magistrate's assessment of the matter is supported by the evidence on the record. The reasons for the late report as well as the fact that it was not made by the complainant herself are clearly stated and are cogent. Therefore the trial court did not err.

Regarding the attack that the magistrate erred in convicting in the face of clear and uncontroverted evidence that the two were in a love relationship; firstly even if there was such a relationship between them, which relationship the complainant denied and which the trial court also found did not exist, that in itself would not be evidence of consensual intercourse. Secondly the learned trial magistrate adequately and clearly gave reasons for dismissing such a claim at pages (ix) to (xi) of his judgement and it is not intended to repeat the same herein. Suffice to reiterate that the importance of the nature of the relationship between the appellant and the complainant, that of healer and patient as well as the belief by the complainant in the appellant's powers over her life and health cannot be overemphasised.

The fourth ground of attack, being that the trial magistrate erred in disbelieving the defence witnesses' evidence yet believing that of the State witnesses has already been dealt with in a statement made earlier in this judgement. The advantage of the trial court which sees and hears witnesses and is thus in a better position than the appeal court to assess demeanour, credibility and reliability of evidence is an issue beyond debate. Necessarily, an appeal court is loathe, and in fact is justified only in clearly stipulated circumstances, to interfere with such assessment by the trial court. A perusal of the evidence on record does not reveal any error in the magistrate's assessment of the evidence and thus his final determination of the matter.

For these reasons the appeal against conviction is without merit. As stated earlier, the appeal against sentence was withdrawn by the appellant's legal practitioners during the hearing of the appeal.

In the result the appeal against conviction is hereby dismissed.

HUNGWE J: agrees

*Nyikadzino, Kworera & Associates*, appellant's legal practitioners  
*Attorney General's Office*, respondent's legal practitioners