

TICHAFA MUHOMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAVANGIRA & HUNGWE JJ
HARARE, 13 & 21 MARCH 2012

J Dondo, for the appellant
Ms F Kachidza, for the respondent

Criminal Appeal

HUNGWE J: The appellant, who was 18 years at the time of the alleged offence, was found guilty of raping an old woman of 77 years. He appeals against both conviction and sentence. He raised four grounds of appeal. The first ground was that the learned trial magistrate misdirected herself by convicting the appellant in light of the fact that the appellant gave a version of events which was reasonably possibly true and was not demonstrated to be false by the evidence led during trial.

The second ground was that the learned trial magistrate appeared to have unduly placed too much reliance on the age of the complainant and the fact that she broke down during her testimony.

The third ground was that the learned trial magistrate ought not to have placed any reliance on the medical report in arriving at the decision to convict.

The fourth ground was that the learned trial magistrate ignored the fact that beside complainant's word, no other acceptable evidence was adduced to prove that the appellant raped the complainant.

Regarding the first ground, whether the explanation given by an accused person can reasonably possibly be true is a function of the subjective approach rendered to both witnesses for the State and for the defence in the light of all the relevant facts before the

trial court. Believing the testimony of the one witness over that of the other depends on several factors including the nature of the evidence being and led the availability of corroboration on material aspects of the essential elements making up the crime charged. The advantage enjoyed by triers of fact in this regard put them at a better position to determine whether a witness before them is worthy of belief taking into account the probabilities of the matter. Accepting the abandonment of the cautionary rule, the court must still carefully consider the nature and circumstances of an alleged sexual offence.

S v Banana 2000 (1) ZLR 607 (S).

In our view we do not find any basis to criticise the learned trial magistrate's reasoning accepting the complainant's version and rejecting that given by the appellant and his witnesses.

As for the second ground, the learned trial magistrate correctly weighed the factors that she ought to weigh in arriving at a proper assessment of the issues of credibility. Her treatment of the emotions associated with the type of offence that she was seized with is beyond reproach as these are not the only factors which influenced her decision to reject the appellant's version. She correctly points to the contradictions within the defence version of the alleged assault on the complainant and settles on a finding which rejects that version. In our view, there is nothing to be said against her assessment of the evidence.

The medical report gave sound corroboration to the complainant's testimony. The fact that she was subjected to cross-examination confirm that in spite of a spirited effort to cast aspersions on the quality of her evidence, the defence was unable to proffer any reasonable suspicion on the evidence she gave besides stating that it was not true. If indeed it was untrue how is it that a legal practitioner of experience was unable to show this using the time-tested weapon of cross-examination? It seems to us that such failure can only be explained by the fact that indeed the old lady was not trying to besmirch the appellant's name and good character but only relating what took place.

No meaningful submission was made regarding the sufficiency of evidence since both the appellant and respondent were ably represented at the trial. Had this been an issue appropriate attention would have been drawn to this fact in the court *a quo*.

In our view the appeal against conviction has no merit. We found the concessions by Ms Kachidza regarding conviction quite disconcerting. It is not a requirement that a rape victim should raise alarm in order to be believed. People react differently to similar situations. The reason why the old lady did not cry out may be found in the fact that she knew her assailant quite well. She was overpowered but she knew that the correct step to take is to make a police report on the assault. Ms Kachidza could not possibly hold that in each case where there was not a scream for help, a victim of rape was not worthy of belief. Such an approach is misplaced. In the end we were satisfied her concession was totally ill-advised and therefore dismissed it.

As for the appeal against sentence, we did not find the submission that the sentence induced a sense of shock in all the circumstances of this case. The appellant's youthfulness and that he was a first offender were factors which the trial court properly took into account in the assessment of the sentence which it eventually imposed. The fact that the sentence may be harsher than we would have imposed in similar circumstances is not a proper ground for interfering with the sentencing discretion of the court *a quo*. In any event we find that the hurtful words spoken by the youthful appellant to the complainant during her humiliation only added salt to aggravate the humiliation. Those young strong men who take advantage of the very young or very old do so because these two groups are indeed vulnerable to their vulgar and deplorable attacks. When they are properly found guilty of committing such heinous crimes on society's vulnerable, they should not expect mercy from the courts.

In the event the appeal against both conviction and sentence is dismissed.

MAVANGIRA J: agrees.....

Chinamasa Mudimu & Dondo, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners

