

THE STATE
Versus
CASPER MANUWA

HIGH COURT OF ZIMBABWE
HUNGWE AND MAVANGIRA JJ
HARARE, 31 JANUARY AND 2 FEBRUARY 2012

Criminal Appeal

A Nyamupfukudza for the appellant
A Masamha for the respondent

MAVANGIRA J: The appellant was charged with rape as defined in s.65 of the Criminal Law (Codification and Reform) Act, [Cap 9:23]. He pleaded not guilty but was convicted after a trial. He was sentenced to 20 years imprisonment of which 6 years was suspended for 5 years on condition of future good conduct.

The allegation against the appellant was that he had on 8 May 2009 unlawfully had intercourse with the complainant, a female juvenile without her consent, knowing that she had not consented to it or realising that there was a real risk or possibility that she might not have consented to it.

The State led evidence from the complainant, her mother, her grandparents and the medical doctor who examined her. The sum effect of the State evidence is to the following effect: The complainant and her family were co-tenants with the appellant and his family at a house in Glen Norah A, Harare. The complainant was aged 11 at the time of the commission of the offence, having been born on 20 February 1997. It is noted that when she testified before the trial court a year later, she was 12 years old and was in Grade 7 of her primary school education.

On 8 May 2009 the complainant's mother went to attend a funeral at their rural home. She failed to return home on the same day as had been her intention. At about 6.00pm on that day the complainant was preparing supper for her seven year old twin brothers and herself. The appellant arrived and asked if her mother was around, the question having apparently

been prompted by the fact that the complainant was doing the cooking. The complainant answered that her mother was away after which his next question to her was whether she was the mother that day. The complainant said that she was.

The complainant left for church returning home around 8.00pm in the company of her two brothers who she then fed and put to bed. She washed up the dishes and swept the house. She locked the kitchen door and went into the bedroom and started praying. The appellant entered the bedroom. She stood up. The appellant said that he wanted to sleep with her. She did not answer. The appellant who was by the doorway started taking off his clothes. The complainant pushed the appellant who held her and gagged her mouth when she tried to scream. The appellant removed the complainant's pair of jeans. When the complainant tried to scream no one heard her. The appellant pushed onto the bed where he raped her and thereafter fell asleep while lying on top of the complainant. When she tried to shake him off he would hold her down. The complainant said that she felt pain and that she bled. The appellant only left the room about 4.00am.

The complainant's mother returned home on a Sunday. There was no electricity. On the Monday the complainant went to school. On her return from school her mother asked her what had transpired in her absence. The mother's questions were prompted by her observation on how the complainant was walking. The complainant did not divulge the rape to her mother. The complainant's mother examined her on the Tuesday morning after her bath. She observed a swelling. The complainant was referred to her grandmother who also examined her asked her if she had had sexual intercourse. The complainant said that she had not. The grandmother indicated that she would take the complainant to the doctor the following day. The complainant thereafter opened up to her grandfather, in the presence of the grandmother, and divulged that the appellant had raped her.

The complainant said that she had not divulged or reported the rape earlier or to her mother or grandmother because the appellant had threatened to kill her with a knife. She was later examined by a doctor who commented on his medical report regarding the complainant's emotional state that she was "very traumatised" and also that her labia majora were "very swollen". He also observed that her hymen was swollen shut and torn and bleeding. On her behaviour the doctor's comment was "severely traumatised. Raped all night starting just after say (sic) bedtime prayers."

The appellant's defence was an alibi, namely, that he was not at home at the material time having only arrived home in the early hours of 9 May 2009. He said that he had otherwise spent the whole night drinking with his friends. He denied raping the complainant. He called as defence witnesses his father and one Brian Madzivanyika who he said he was out drinking with.

The appellant raised four grounds of appeal against his conviction. The first is that the lower court erred in finding that the complainant was a credible witness as she did not mention the number of times that she was raped yet the State Outline indicated that she was raped throughout the night. Secondly, that the lower court erred by not taking into account the fact that a period of more than seven days had elapsed before the complainant was medically examined; yet her injuries were said to be fresh thereby giving rise to a possibility that the offence may have been committed by a person other than the appellant and on a day other than the alleged date. Thirdly, that the lower court erred by not taking due consideration of the fact that the medical report was inconsistent with the doctor's *viva voce* evidence. The fourth is that the lower court erred by not giving reasons as to why the appellant's defence should be dismissed.

As against sentence the ground raised by the appellant is that the lower court erred in not observing that no evidence was adduced as to the number of counts allegedly committed and thus did not properly reflect on the appropriate sentence.

In his oral submissions before this court Mr *Nyamupfukudza* submitted that the fact that the complainant was sexually abused is not and was never in dispute in view of the medical evidence. He further submitted that it was not for the appellant to prove his defence of an alibi. Rather, it was for the State to disprove it. In this regard it is noted that all that was said on behalf of the appellant, who was legally represented at his trial, in his defence outline is:

“On the day in question he went out with friends and was drinking until the early hours of the following day.”

Notably, no specific mention is made therein of the place or places where the drinking took place; nor of the names of his drinking companions; nor of the specific times when the appellant says that he was away from the shared residence. Notably also, besides repeatedly

stating that the appellant had not committed the offence, all that was put to the complainant specifically on this aspect of his defence by way of cross examination was:

“He did not commit the offence, but in fact he was out. The accused will say he was out with his friends at the time”;

to which the complainant answered:

“*The* accused was present.”

The case authorities are clear that where the accused raises the defence of alibi, it is not for him to prove it but for the State to disprove it. See *S v Mutandi* 1996 (1) ZLR 367 (HC); *S v Musakwa* 1995 (1) ZLR 1 (SC); *S v Masawi & Anor* 1996 (2) ZLR 472 (SC). In *S v Musakwa* McNALLY JA stated:

“What no-one seems to have realised is that the defence raised was that of an alibi. The appellant was saying that he had only just arrived when he was accused. So he was not there when the confidence trick was set in motion.

The appellant said so right from the beginning. So why did the police not check whether he was being truthful when he said he worked for “Heat and Systems” who make pressure pipes? Why did they not check his story that he left there at 4.30pm? Why did they not check how long it takes to walk from there to the spot where the offence was committed? Why did they not ask the complainant what time it was when the two young men approached her?

The court should have been alive to the importance of these matters. It was not simply a matter of the reliability of the young woman’s powers of recognition.”

In *casu*, the appellant did not, as already noted above, give specific details of his alleged alibi to allow for investigation thereof. He only purported to do so after he went on the witness stand when he said *inter alia*:

“I did not rape her. In a nutshell on that evening, I left work around 1800 hours. I boarded a bus and dropped at Specimen (Spaceman) Shopping Centre. I found my friends around 1900 hours at Dollar Power pub. We started drinking until the early hours of the following day. It was around 0100 hours when we went home. We were three of us, i.e. myself, Brian Madzivanyika and Charles. Brian lives near the shops. So we parted ways and I proceeded with Charles. When I got home everyone was asleep. I then knocked at my father’s window. Charles proceeded to his place. My father woke up to open the door for me. I got into the house. My father locked the door and i went into my room and slept.”

There is no evidence that the appellant gave this full story from the very beginning, i.e. from the time of his arrest. The police could not have been expected to check the

truthfulness of a story that was not furnished to them. At trial the appellant opted to give these details at an advanced stage in the proceedings. The trial court cannot therefore also be faulted for dismissing the defence of alibi in the circumstances and on the evidence adduced before it. This is so despite the calling of evidence intended and purporting to support or confirm the appellant's version. Significantly, whilst in his evidence under oath the appellant said that Brian lived near the shops and it was Charles in whose company he was when he got home, the appellant did not call Charles but rather called Brian.

Significant note is also taken of the complainant's mother's evidence to the effect that the appellant was arrested in the evening because he had changed his time of coming home. He used to come home around 6.00pm before going out for a drink but after the commission of the offence he would go to the bar for a drink first before coming home.

McNALLY JA further stated in *S v Musakwa (supra)*, at p3:

"I have spoken, often enough of the boxing ring approach to criminal trials. It is not good enough simply to throw the complainant and the accuse into the ring and decide the matter on credibility. ..."

and further down:

"The alibi defence is referred to in s.158 of the Criminal Procedure and Evidence Act and in Hoffmann and Zeffertt *South African Law of Evidence* 4 ed at p619. The onus is on the State to disprove the alibi: *R v Biya* 1952 (4) SA 514 (A); *S v Khumalo & Ors* 1991 (4) SA 310 (A) at 327 H

The State made no effort to disprove the alibi in this case. Mistakes in identification can happen. The police should know this. They should have checked."

I do not understand the law to accord an accused the option, when he relies on or claims that the defence of alibi is or should be available to him, to keep his cards close to his chest until the very end. For, how else would the State be afforded the opportunity to be able to discharge the onus on it if it is not furnished with the material details of such defence of alibi as the accused relies on, at the outset or at a stage that allows the police or the State to investigate its veracity. In *casu*, as already stated, the trial court was dealing with a legally represented accused. The appellant's legal practitioner before this court is the same counsel who represented him at the trial. In explaining the belated narration or furnishing of these details of the appellant's alibi, he said that that was so because he had not been furnished with the relevant instructions before that stage. This also tends to be supported by the fact that the

details of the appellant's alibi were not put to the complainant during her cross examination by the appellant's counsel.

In *S v Mutandi* 1996 (1) ZLR 367 (HC) GILLESPIE J, as he then was, said at p369 – 370, after reviewing some authorities regarding the treatment of the defence of alibi:

“As the extracts above show, the true enquiry is whether or not the accused is the person who accosted and cheated the complainant. That is to say the real issue is whether or not the complainant's evidence of identification of the accused was reliable. The extract from his judgment shows that the magistrate was obviously prepared to believe the complainant and indeed good reasons are given tending to show the genuineness of her belief and the truthfulness of her evidence. It is not enough however, to be able to find that the complainant honestly believes that she has correctly identified the accused. She might be honestly mistaken. This is the true danger which the magistrate, although he uttered the words of caution to himself, failed to appreciate or to consider.”

The learned judge proceeded further:

“As was said by HOLMES JA in *S v Mthetwa* 1972 (3) Sa 766 (A) at 768 A – C (and approved by DUMBUTSHENA CJ in *S v Dhliwayo & Another* 1985 (2) ZLR 101 (S) at 107 A –D:

‘Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; ...’

GILLESPIE J further continued:

“The present Chief Justice of this country, GUBBAY CJ, drew attention to the same need for caution when, in *S v Ndlovu & Others* 1985 (2) ZLR 261 (S) at 263G – 264E, he said:

‘Confidence and sincerity are not enough. The possibility of a mistake occurring in the identification, especially where the witness has not known the person previously, demands that the greatest circumspection be employed.’

In *casu*, the appellant was well known to the complainant as they had been resident at the same house for about three months prior to the commission of the offence. On the night in

question the complainant saw the appellant firstly at 6.00pm and later at around 8.00pm. On both occasions he spoke to her. Although it was evening and therefore dark outside the room in which she was when she saw the appellant was lit. The appellant was not at a distance far from where she was; he was at close range. The appellant spent the night in the complainant's room, leaving only at 4.00am. The appellant had learnt earlier that the complainant's mother was away. In addition, the complainant who hitherto always used to sleep in the same bedroom with his sister, on this day was in the same bedroom with her two seven year old brothers in their parents' bedroom. The appellant accepted that the complainant knew him and would thus not fail to identify him. He suggested that the allegations against him were fabricated by the complainant's mother as there was bad blood between him and her.

In the first place, this allegation was not put to the complainant's mother when she was in the witness box. In addition the complainant's mother fairly stated that she did not know who had raped the complainant and that it was only the complainant who could say who it was. Secondly, this was also said for the first time only in the appellant's evidence after the close of the State case.

On a consideration of such of the factors as are applicable in this case to test the reliability of the complainant's identification of the appellant, it appears that for the reasons discussed above, the evidence by and on behalf of the appellant is so highly improbable as to be unworthy of belief.

Regarding the attack that it is not clear as to who the complainant eventually opened up to between her grandparents, the trial magistrate's comment that in the circumstances of this case, that aspect is irrelevant and misplaced finds support on a perusal of the evidence on record. It is clear therefrom that it was only when the grandmother examined the complainant that the grandfather was not also present. After the examination both grandparents were present during their talk with the complainant and particularly when she opened up about the rape. There is no inconsistency to talk about on this part of the State's evidence; contrary to what the appellant's legal practitioner sought to urge the court to find.

The appellant's contention that there is also inconsistency in the State case by reason of the fact that no specimens were taken from him to try and connect him with any infection that the complainant may have contracted is not based on any evidence on record. There is no evidence that the complainant contracted any infection and therefore this contention, as

eventually and properly conceded by the appellant's legal practitioner, makes no sense on the facts of this case.

In *casu*, it is of significance that the offence came to light a couple of days after its commission. The complainant, 11 years old at the time of the offence, said that the appellant threatened her with a knife hence her failure and or reluctance to report the offence to her mother and initially to her grandparents as well. It is also significant to note that it came to light as a result of the complainant's mother's observation of the manner of the complainant's walk or gait after her return from the funeral. The medical examination confirmed the sexual abuse; the complainant had been raped.

The details of the medical report are disturbing. The doctor observed that the complainant was "very traumatised" or "severely traumatised" and that her labia majora were "very swollen". Furthermore, that her hymen was "swollen shut – torn and bleeding". She was also found to have sustained various injuries as chronicled by the doctor at p.48 of the record of proceedings, including tears on the hymen; one at 1200 hours, a small tear at 1000, a medium sized tear at 4.00 o'clock, a deeper tear than the one o'clock tear at 5.00; then at 6.00 a tear between the vagina and the anus, the tear continuing through the hymen into the vagina; another tear at 7 o'clock and a small one at one o'clock. The doctor's evidence or expert opinion was that all these injuries and tears were caused by the force of penetration or attempted penetration.

Although the doctor's report states that the complainant was raped all night, it is true, as submitted by the appellant's legal practitioner, that on the record, no evidence was adduced from the complainant as to how many times she was raped that night. That, however, is of no material consequence as the appellant was charged with only one count of rape. There is no effect therefore, on the conviction of the appellant. It may be that this may be a consideration relevant for purposes of the appeal against sentence but certainly not in relation to the charge and or conviction. The appellant's conviction is therefore supported by the evidence on record and there is no basis for quashing it. The concession by State counsel with regard to conviction does not find favour with this court as it is not supported by the evidence.

With regard to sentence, it is trite that sentencing discretion is generally the trial court's. The authorities are clear that an appeal court may only interfere in circumstances

where the lower court has misdirected itself or where the sentence appealed against is unduly harsh or so severe as to induce a sense of shock. In his comments to the notice and grounds of appeal, the trial magistrate said that he agreed that the appellant's sentence be reduced. He opined that another court may reduce the sentence by 2 or 3 years imprisonment. That in itself is not a ground entitling an appeal court to interfere. It is however noted that in *casu*, the HIV tests conducted on the complainant fortunately produced a negative result.

It is true that justice must always be tempered with mercy. Mr. *Masamha* for the State submitted that a sentence in the region of 12 to 13 years would meet the justice of the case and suffice. There is no doubt however on the facts of this case that a custodial sentence is called for. At the time of the trial the appellant was said to be 30 years old. He would thus have been 29 at the time of the commission of the offence. The complainant was only 11 years old. As the learned trial magistrate stated in his reasons for sentence the appellant was brutal to a defenceless minor towards whom he should have assumed a protective role. He cannot escape a lengthy term of imprisonment. Any other sentence would send the wrong message abroad.

In the result, for the above reasons the appeal against conviction fails and is hereby dismissed. The appeal against sentence succeeds. The appeal against sentence is allowed to the extent that the sentence of the lower court be and is hereby set aside and is substituted with the following:

“16 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition the accused is not during that period convicted of an offence involving sexual abuse on the person of another and for which he is sentenced to imprisonment without the option of a fine.”

HUNGWE J agrees.