STEVEN JACKSON
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 9 & 16 October 2023

Criminal Appeal

Appellant in person
T Mapfuwa, for the respondent.

CHIKOWERO J:

1. This is an appeal against conviction on two counts of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code").
2. The appellant was acquitted of one count wherein he had been charged of raping the same complainant.
3. With both counts having been treated as one for the purposes of sentence, the appellant was sentenced to 20 years imprisonment of which 2 years were suspended for 5 years on the usual conditions of good behaviour. This sentence has also been appealed.
4. The appellant was a 30 year old HIV positive man. He was found to have raped his 9 year old step-daughter, in January and November 2017, in Epworth.
5. The complainant was medically examined on 28 November 2017. Having observed that the complainant had a healed hymenal tear, the medical doctor recorded in his report that penetration was definite. The medical report was produced as an exhibit at the trial.
6. Further, having reposed credibility in the complainant, the trial court concluded that it was the appellant who had raped the complainant.

7. The appellant attacks the trial court's reliance on the medical report, its assessment of the complainant as a credible witness and the conclusion that his defence was beyond reasonable doubt false.
8. In resisting the appeal, Mr *Mapfuwa* argues that the conviction was predicated on the credibility of the complainant. He cites *S* v *Mlambo* 1994 (2) ZLR 410 (S) where, GUBBAY CJ said at 413:

> "the assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by the appellate court unless satisfied that it defies reason and common sense."

See also *S* v *Soko* SC 118/92 and *S* v *Chingurume* 2014 (2) ZLR 260 (H)

9. The complainant gave detailed accounts of how the offences were committed. She capped her testimony by stating that the appellant not only threatened to kill her mother and herself, if she revealed the offence, but also gave her money to buy her silence. The appellant did not cross-examine the complainant on the use of money to ensure that the offences did not see the light of day. In view of the detailed testimony of the complainant, it would have led to a gross miscarriage of justice had the trial court not found that the complainant was a credible witness.
10. The complainant's evidence was fortified by how the offence itself came out into the open. Indeed, had it not been for the fact that the complainant's mother was puzzled by the whitish and smelly discharge from the complainant's vagina, the offence would not have been revealed in the circumstances that it was. That the complainant's mother poked her finger into the complainant's vagina (which was a lay person's physical examination of the female genitalia) was of no moment. That insertion of the finger was done well after the offences had been committed. We are satisfied that the trial court did not err in finding as a fact that the healed hymenal tear reflected in the medical report was a result of the appellant sexually ravishing the complainant.
11. We are not impressed by the appellant's argument that the complainant's mother tore her daughter's hymen to create the occasion for the raising of false rape allegations against him. The record reflects that there were good relations between the appellant and the complainant. The latter was not shown to have harboured any reason to allow herself to be used to raise untrue rape allegations against her own step-father, under whose roof she

was sheltered. Although the appellant appears to have had some misunderstandings with his wife (the complainant's mother) it was the complainant's unchallenged evidence that he prepared a meal for the whole family. The complainant said the November 2017 rape was committed on the day that he prepared this meal, as his wife was unwell.

12. We think it fair to remark that not all cases of rape are reported. Not all perpetrators of this offence are prosecuted. Similarly, there is no rule of thumb that a complaint of rape must invariably be made in every case where this offence is committed. In this matter, the 9 year old complainant only revealed to her mother that the appellant had committed the offences on the latter noticing a discharge and questioning the complainant. Considering the complainant's young age, her relationship to the perpetrator, the threats issued by the appellant and the use of money to muzzle the complainant, we are unable to accept the appellant's argument that the complaint was of no evidentiary value because it was not immediately made. It was fortuitous that the offences came out into the open. There also is no evidence on record that the complainant's mother forced her daughter to name the appellant as the perpetrator. As cautioned in *S* v *Nyirenda* 2003 (1) ZLR 64(H), in determining whether a complaint of rape has been made timeously, voluntarily and to the first person to whom the complainant is reasonably expected to report to a trial court should not take an armchair approach. The complainant's testimony should be assessed on the basis that there is no standard reaction to rape, with each case being considered on its merits. See also *S* v *Musumhiri* 2014(2) ZLR 223(H).
13. The appeal against the conviction does not turn on the other grounds raised by the appellant. It is unnecessary to set out and examine those grounds.
14. The appeal against the conviction is unmeritorious.
15. So too is the attack on the sentence. The aggravating factors far outweighed the mitigation. The appellant raped his own step-daughter. He stood in the position of a parent over the complainant. He was expected to protect her. Instead, he became the predator. He betrayed the complainant's trust, his wife's trust and that of society as a whole. He sexually preyed on the complainant. He did not do that once. He did so twice. This depicts his unrepentant attitude. He knew that he was HIV positive. He exposed the complainant to the risk of contracting that virus, which leads to the dreaded

disease, AIDS. The complainant was not put at risk of contracting the HIV virus once, but twice. That she was not infected could not be credited to the appellant. He did not care whether the complainant was infected or not. The appellant was 30 years old at the material time. The complainant was a mere 9 year old girl. There was a whooping 21 year age difference between them. The offences themselves are heinous. The penalty for a single count of rape ranges from any definite term of imprisonment to imprisonment for life. The factors of mitigation were chiefly that he was a first offender and had family responsibilities. To keep the sentence within acceptable limits, the court treated both counts as one for the purposes of sentence. Since the appellant was a first offender, the court suspended the not inconsequential portion of 2 years imprisonment on the usual conditions of good behaviour.

16. The headnote in *S* v *Mundowa* 1998(2) ZLR 392 (H) reads as follows:

> "An appeal court does not have a general discretion to ameliorate the sentences of the trial courts. It cannot interfere unless the discretion was not judiciously exercised, that is, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court would have imposed it."

The appellant told us that the sentence is manifestly excessive and harsh as to induce a sense of shock. In view of the factors of aggravation that we have alluded to, all of which were considered by the trial court, the sentence imposed is not so severe that no reasonable court would have imposed it. If anything, it seems to us that the trial court might have erred on the side of leniency.

17. The appeal be and is dismissed in its entirety.

CHIKOWEROJ:……..

ZHOU J:……..agrees

The National Prosecuting Authority, respondent's legal practitioners.