LEONARD CHIWAYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 6 & 10 March 2024

Criminal Appeal

LT Mapuranga with *O Marwa*, for the appellant
L Chitanda, for the respondent

CHIKOWERO J:

[1] The appellant appeals against his conviction by the Magistrates Court

[2] The appellant was convicted by the magistrates court at Harare of one count each of kidnapping and assault as defined in ss 93(1)(a) and 89(1)(a), respectively, of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("The Criminal Law Code").

[3] He was sentenced, on 27 February 2024, to 36 months imprisonment of which 12 months were suspended for 5 years on the usual conditions of good behaviour. This was on the kidnapping charge.

[4] On the charge of assault the appellant was sentenced to four months imprisonment the whole of which was suspended for five years on the conditions of good behavior.

[5] The trial court found that the appellant unlawfully detained the complainant, a male adult, from 6 March 2023 up to 9 March 2023 when the latter then escaped from such detention. The trial court found also that the appellant assaulted the complainant during that period. The offences were committed at the appellant's house in Goodhope, Harare.

[6] Although the appellant raised ten grounds of appeal against conviction the sole issue that falls for our determination, as regards the propriety of the conviction on the charge of kidnapping, is whether the trial court erred in finding that the complainant's presence at the appellant's house during the period in question was without the complainant's consent. It is that factual finding that is attacked on appeal.

[7] Similarly, the appellant urges us to interfere with factual finding made a *quo*, namely, that he assaulted the complainant.

FACTUAL BACKGROUND

[8] At the trial itself, most of the facts were common cause.

[9] The complainant was the chief executive officer of a private school located in Nyabira.

[10] His spouse, who testified as one of the defense witnesses, was the school's operations director.

[11] Laptops were stolen at the school. Prosper Chiwenga (who testified as the other defense witness) and one Takura (both male adults) admitted to have stolen the laptops pursuant to them falling victims to citizens' arrests. The laptops were recovered from their custody.

[12] They implicated the complainant, who worked at the school. Chiwenga's father was also employed by the school.

[13] The implication led the appellant to confront the complainant. The latter testified that he disputed involvement in the theft, challenged the former to make a police report at Nyabira Police Station and got into the complainant's vehicle on the understanding that they were proceeding to the police station. The appellant testified that the complainant got into the vehicle for the express purpose of appearing at the appellant's house in Goodhope to ask the appellant's spouse to forgive him for the theft.

[14] It was common cause that the complainant willingly boarded the appellant's vehicle. The point of departure was his reason for doing so.

[15] It was not in dispute that Chiwenga and Takura boarded the same vehicle because they wanted to ask the appellant's spouse, a mother figure, to forgive them for having stolen the laptops.

[16] That the complainant was at the appellants' house over the period mentioned elsewhere in this judgment, but that he left without notice around 7: 00pm on March 2023, were facts undisputed.

[17] As already indicated, what was in contention at the trial was whether the complainant was at that house without his consent. Also in issue was whether the appellant assaulted the complainant.

[18] The appellant testified that the complainant was assaulted by members of the public at the school in Nyabira.

[19] The complainant was found to have been a credible witness. His direct evidence, punctuated by his demeanour (he repeatedly broke down on the witness stand), impressed the trier of fact. The Court a quo found corroboration in the medical report which reflected the injuries suffered by the complainant. The medical examination was conducted on 11 March 2023.

[20] To the extent possible, the trial court also found that the complainant's friend's father and the taxi driver had also corroborated the evidence of the complainant.

[21] The former testified, and was believed, that he received a distress telephone call from the complainant. On beholding the terrified complainant and injuries on his person, the complainant's friend's father could not admit the complainant (whom he did not know previously) under his roof. This witness resided in Bluff Hill. Instead, as soon as the taxi driver brought the complainant from Goodhope, the complainant's friend's father took him to Malborough Police Station to make a police report. This was around 9:00pm on 9 March 2023.

[22] For his part, the taxi driver told the trial court that as he drove into Goodhope he saw a person who was by the roadside, running. This was around 8:00pm. As he had been furnished with the complainant's mobile number, it turned out that this was the complainant himself. He observed that the complainant was terrified. The witness was shocked to see the state that the complainant was in. He saw fresh wounds on complainant's body on the latter removing his shirt. This witness was also believed by the trial court. He was held to have testified on what he saw. He was believed in saying he did not know the complainant before their encounter on the road. His testimony relative to the injuries was found to have resonated with the contents of the medical report.

THE LAW IN AN APPEAL ATTACKING FACTUAL FINDINGS MADE BY THE TRIAL COURT.

[23] In S V Mashonganyika 2018 (1) ZLR 216 (H) Hungwe J (as he then was), in delivering the judgment of the appellate court, said at 217 G:

> "Where an appeal is based on an attack on the findings of fact by the trial court, which findings are a result of an assessment of the credibility of the complainant and other state witness, it is

> important to recall the time honoured practice and role of an appellate court. It is this. The assessment of matters relating to credibility is a matter for the trial court. An appeal court will not lightly interfere with such findings unless these are outrageously irrational and not consistent with the evidence led"

[24] In *S V Mashonganyika* (supra) the court, at 217H-218E, then outlined the applicable principles in an appeal such as the present. Those principles elaborate the test set out at 217G of that judgment.

[25] The trial court not only saw the complainant testifying but also observed him repeatedly breaking down on the witness stand. It took the view that the complainant was traumatized by the events that he testified to, namely how the kidnapping and assault unfolded. That court, having lived through the atmosphere of the trial itself, was better placed than us to assess the credibility of not only the complainant but all the other witnesses, the appellant included.

[26] We have already said that the court quo observed the complainant breaking down, not once but repeatedly. That court, having taken that demeanour into account together with all the other evidence placed before it, was satisfied that the complainant was not putting on a show at the trial. We see nothing on the record to suggest that the factual finding made, namely that the four day detention was without the complainant's consent, was outrageously irrational.

[27] It was common cause that although the complainant resided in Chitungwiza he left the appellant's residence not only unnoticed, but did so around 7:00pm. This accords with the trial court's finding that the four day detention was without the complainant's consent and that he seized an opportune moment to not only make a distress phone call but also to escape. If the complainant's stay at that residence was consensual, there would have been nothing precluding him from having bade farewell to his hosts, as well as to Chiwenga and Takura. There would have been nothing barring him from leaving in broad daylight.

[28] The taxi driver spoke to beholding the complainant not only running and terrified but also in a shocking state by reason of the fresh injuries on his person. This was in the evening and yet the taxi driver was able to see all this and recount it at the trial. He did not have to be a medical practitioner to see that the wounds were fresh. Mr Mapuranga's submissions to the contrary do not find favour with us.

[29] The complainant's friend's father gave testimony corroborating that of the taxi driver. He saw the injuries on the complainant. He saw that the complainant was frightened. He

straightaway rushed the complainant to the police station to lodge a report. Undoubtedly, that which the trial court found to have happened to the complainant at the appellant's house was without the complainant's consent. What would have been outrageously irrational and inconsistent with the evidence would have been a finding of fact, if such had been made, that the complainant consented to being at the appellant's house from 6-9 March 2023.

[30] The medical report reads in part:

> "Blunt chest trauma with multiple bruises on posterior chest wall
> : Left upper chest (2cm X 1cm)
> : Left lateral chest 2cm X 1cm), (1cm X 1cm)
> : Right lower chest (1cm X 10cm left flank region (3cm X 2cm)
> Left flank region (3cm X 2cm)
> Type of Trauma: sharp/**blunt**/ sharp and blunt
> Treatment given as follows: chest x-ray, skull x-ray,
> Anaigesia
> ATT
> Counsel
> Betadine pownting
> The approximate number of blows\ contacts likely to have been applied:
> One, two, three, four, five or more **(unknown**)
> Injuries sustained were: slight, (**moderate**), severe
> Possibility of permanent injury: likely (**unlikely)** indeterminate."

[31] The complainant testified that these injuries were inflicted on him by the appellant and his sons (who were on the run during the trial) at a time when the complainant was detained by the appellant. The accepted evidence was that an electric cable and hosepipe were the weapons used to perpetrate the assault, in addition to open hands. The appellant agreed that his written statement reflected that the complainant perpetrated the assault on the face, using open hands, whereas the evidence that he placed before the court was that an electric cable and hosepipe were used. His explanation was that he pointed out the omission to the recording police officer who however did nothing about it. Having seen that Marlborough Police Station did not act on his report, the complainant made a complaint to the Police General Headquarters, which then led to the prosecution of the appellant. All this evidence was not disputed. Given this background the fact that the prosecution did not lead evidence from the police officers to explain the variations between the complainant's evidence and his statement on what was used to perpetrate the assault does not make the trial court's assessment of the complainant as a credible witness unreliable.

The testimony of the three witnesses called by the prosecution a quo, supported as it was by the medical report, was cogent enough to justify the conviction of the appellant on both charges.

[32] The two defense witnesses were correctly disbelieved. Both were not independent witnesses. Chiwenga was a self –confessed thief who was clearly singing for his supper. He had an interest to serve in testifying in favour of the appellant. His father was employed at the private school at the material time. The trial court, which observed him as he testified, found his demeanour to have been poor. It recorded that he was evasive, defensive and unsettled. Indeed, he cried more than the bereaved. The appellant said his vehicle was not an open truck. Chiwenga testified otherwise, to give the false picture that the complainant, seated at the back of an open truck, should have shouted out that he had been kidnapped. The appellant's spouse was an interested party. She was out to save her husband. In any event, she was not present when the complainant got into the appellant's motor vehicle in Nyabira. The evidence of these two defence witnesses was considered. Sound reasons were tendered for finding that they were not credible witnesses. We have no basis for interfering with the trial court's findings in that regard.

[33] We have elsewhere in this judgment explained that the trial court accepted the evidence of the taxi driver and complainant's friend's father. Both testified on what they saw and did at the time that they interacted with the complainant. That evidence was not disputed. It was perfectly admissible. It tended to corroborate the complainant's evidence that he had been kidnapped and assaulted by the appellant. The two witnesses never said that they saw the offences being committed. But that does not mean that the trial court erred in relying on their evidence, for it was corroborative in so far as it was consistent with the complainant's evidence of the kidnap, assault and his escape under cover of darkness.

[34] It is true that the trial court remarked that it expected the appellant to call the painters who he said were present when the complainant not only boarded the appellant's vehicle in Nyabira but also when they arrived at the appellant's house in Goodhope. That, however, is far from placing an onus on the appellant to prove his innocence. The evidence on record sufficed to justify the conviction on both counts. The appellant's conviction was not predicated on his failure to call the painters as defense witnesses.

[35] It is true also that in convicting the appellant on the assault charge the trial court found that he had assaulted the complainant with an electric cord and a hose pipe all over the body

when the charge related to being struck twice with open hands on the face. It must not be forgotten, however, that in so convicting him the court a quo also found that the appellant had, in addition to perpetrating the assault with an electric cord and a hose pipe, also struck the complainant twice on the face with open hands. It is not an element of the offence of assault that an electric cord and hose pipe be used. The conviction is still safe not only because the evidence on record justifies it but when it is borne in mind that the appellant would still have been correctly convicted even if the trial court had limited its finding of fact to the use of open hands in committing the assault. At the end of the day, the appellant cannot profit from questionable investigations by the police and a prosecution that could have been better conducted.

[36] That Chiwenga and Takura voluntarily boarded the complainant's truck to afford them the opportunity to beg for forgiveness from the appellant's spouse cannot be sufficient basis for criticizing the trial court for not reaching the same conclusion in respect of the complainant. The complainant was clear that he boarded that vehicle on the understanding that the appellant would drive to the police station to make a police report. He was shocked that the appellant drove past two police stations and had instead driven him to Goodhope, without his consent, where the two offences were committed. The complainant would not have escaped from the appellant's house on the fourth day of the unlawful detention if he had been there voluntarily.

[37] The mere fact that Takura and Chiwenga implicated the complainant in the theft of the laptops, is no basis for criticising the trial court for not finding that the complainant raised false kidnapping and assault allegations against the appellant. We have already demonstrated that the assessment made by the trial court that the complainant and other state witnesses were credible is unimpeachable.

[38] The trial court accepted the complainant's evidence that his wallet and mobile phone were taken away from him by the appellant on reaching the latter's house in Goodhope. This appears to have been designed to disable the complainant from taking flight. It appears also to have been done to cut off any communication between the complainant and the outside world while he was unlawfully detained by the appellant. It was only when the complainant got his phone from the appellant's son, without the appellant's knowledge, that he secretly made the call that led to a taxi being sent to fetch him as he made good his escape from the appellant's house at night.

[39] It was not necessary to hold an inspection in loco at the appellant's house. The prosecution did not have to prove every single fact. It did not have to prove, by way of a physical inspection, that the appellant's house was gated and locked at the material time. His assertion that his house was under construction and hence unsecured was of no consequence. There was overwhelming evidence justifying his conviction on both counts, despite the absence of an inspection *in loco*. Indeed, why would the complainant make a dash for his freedom at night, and on foot, if he had not been kept under lock and key for the past four days?

[40] The decision to convict on both charges is unassailable.

[41] The appeal against the sentences passed is without merit.

[42] Sentencing is an exercise of the trial court's power of discretion. That discretionary power must not be interfered with on appeal unless the sentence is marred by an irregularity, misdirection or is so harsh and excessive as to induce a sense of shock. This position is trite. See *S V Ramushu* & *ors* 525/93.

[43] The trial court did not commit a misdirection in not treating the two charges as one for the purposes of sentence. It mattered not that the assault was committed when the complainant had already been kidnapped, and when the latter offence was continuing. The two offences are distinct. They have different requirements. If the trial court had treated the two charges as one for the purposes of sentences it would have come unstuck in coming up with a proper and sensible condition for suspension of portion of the sentence on the usual condition of good behavior.

[44] Considering that the offence of assault attracts a sentence of a fine up to or exceeding level fourteen or imprisonment for a period not exceeding ten years or both the sentence of four months imprisonment wholly suspended on the conditions of good behavior imposed in this case cannot be attacked on the basis that it is manifestly harsh and excessive as to induce a sense of shock. The trial court settled for a wholly suspended sentence because the assault was committed during the same period that the complainant was kidnapped.

[45] In terms of s 93(1) A of the Criminal Law Code the penalty for kidnapping is imprisonment for life or any definite period of imprisonment, except where the offence is committed in mitigating circumstances. In the latter scenario the penalty is a fine not exceeding level seven or imprisonment for a period not exceeding two years or both. The trial court was mindful of these penal provisions in assessing an appropriate sentence.

[46] It also considered the Criminal Procedure (Sentencing Guidelines) Regulations, 2023. It was alive to the presumptive penalty of 12 months imprisonment where the offence of kidnaping is committed in mitigating circumstances as well as the presumptive penalty of 4 years imprisonment where the same offence is committed in aggravating circumstances.

[47] The court properly found that the kidnapping was committed in aggravating circumstances. The offence was accompanied by violence in the sense that the complainant was assaulted using open hands, electric cables and a hosepipe. Although the complainant sustained moderate injuries there can be no doubt, considering the weapons used, that the intention was to cause grievous bodily harm. The complainant was subjected to cruel and degrading punishment. The four day period that the complainant was deprived of freedom of bodily movement was rightly adjudged to be lengthy. It will be remembered that the complainant escaped from his kidnapper. This means that the appellant cannot take credit for the fact that the complainant did not exceed four days in detention. The complainant was severely traumatized as demonstrated by him repeatedly breaking down as he testified. The complainant was further traumatized because he gave oral evidence on how the kidnapping impacted him. This was during the pre-sentencing hearing. Indeed, the trial court rightly factored in the violation of the complainant’s constitutional rights. These included freedom from all forms of violence from private or public sources and freedom from physical or psychological torture or from cruel or degrading treatment or punishment as enshrined in ss 52(9) and 53 of the Constitution of Zimbabwe.

[48] The court also drew from some decided cases for guidance. In this vein *S V Nyathi* and *Anor* HB 19/92 & *Mahuni* & *Ors* v *State* HH 06/86 concerned kidnappings not exceeding 3 hours yet custodial sentences were imposed.

[49] Even though it had found that the kidnapping was committed in aggravating circumstances, the trial court still considered the imposition of a fine or community service. It gave sound reasons for finding that these were inappropriate. Mr Mapuranga properly conceded that the appellant was no longer contending that the court a quo did not consider the imposition of the sentence of either a fine or community service.

[50] The mitigating factors, chiefly the appellant’s status as a first offender and fairly advanced age (fifty nine years old) account for the court settling for a sentence below the presumptive penalty of 4 years imprisonment. The appellant was sentenced to 36 months

imprisonment of which 12 months imprisonment was suspended for five years on the usual conditions of good behavior. The effective custodial sentence was therefore 24 months imprisonment. The sentence imposed does not shock us. It complied with the sentencing principles. see *S V Nhumwa* S40/88.

[51] The entire appeal is unmeritorious.

[52] The appeal is dismissed in its entirety.

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CHIKOWERO J

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ZHOU J: I Agree

Tabana and Marwa, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners