

GILBERT BALOYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
MASVINGO: 2 August 2017 & 14 February 2018

Criminal appeal

Mr *J. Makiseni*, for the appellant

Mr *B.E. Mathose*, for the respondent

MAFUSIRE J:

- [1] There has been an inordinate delay in delivering judgment in this matter. It was a criminal appeal from the magistrates' court. We heard argument on 2 August 2017 and reserved judgment. My Brother, MAWADZE J, was the lead judge in the case. It was hoped to deliver judgment in the forthcoming weeks. It was not to be. A dreadful family tragedy struck and scuttled all the work in progress, leaving the station somewhat disoriented for some considerable time afterwards. A horrific traffic accident claimed the lives of the Judge's beloved wife; his driver and his sister-in-law. May the souls of the departed rest in eternal peace.
- [2] The appeal was against both conviction and sentence in count one, and against sentence only in count two. The facts were these. The appellant, thirty eight [38] years of age at the time of his arrest, was a father of six children from two customary law wives. On 15 February 2017 he was convicted of the two counts by the Provincial Magistrate's Court sitting at Mberengwa in the Midlands Province.
- [3] Count one was indecent assault, in contravention of s 67[1][a][i] of the Criminal Law [Codification and Reform] Act, *Cap 9:23* ["the ***Criminal Code***"]. The appellant was alleged to have indecently assaulted his own biological daughter, Anesuishe Baloyi ["***Anesu***"]. She was seventeen [17] years old at the time. The incident happened at the family's village homestead in rural Mberengwa. The appellant allegedly smeared and

applied some foul smelling and bitter tasting herbs onto her breasts and privates. This allegedly followed advice from a traditional healer, or *n'anga*, who had supplied the herbs. The whole gory business was so that the appellant could amass untold wealth.

- [4] Count two was physical abuse, in contravention of s [3][1][1][a], as read with s 4 of the Domestic Violence Act, *Cap 5:16*. The appellant was alleged to have assaulted his first wife, Susan Sibanda [**Susan**] so severely that she fell unconscious. She was pregnant at the time. He beat her all over the body with clenched fists, booted feet and a switch. The reason for the assault was said to be her adamant refusal to share their matrimonial home with the appellant's new wife.
- [5] The appellant pleaded not guilty to both counts. But after a full trial he was convicted of both. In count one he was sentenced to thirty six [36] months imprisonment. In count two he was sentenced to six [6] months imprisonment. Thus, the total period of imprisonment was forty two [42] months. Nothing was suspended. No periods of imprisonment were ordered to run concurrently.
- [6] Certain facts were agreed or were common cause. The offence in count one occurred on the evening of 29 November 2015. The one in count two occurred on 6 January 2017. Both offences were reported to the police either on 6 January 2017 or so soon thereafter. Thus for count one, the report was being made fourteen months after the event.
- [7] Anesu was the single witness for the State in count one. In a nutshell, her evidence was this:
- She was very close to her father. He sometimes confided certain secrets in her. For example, he would from time to time entrust her with his money without Susan's knowledge.
 - On the day in question, Susan had been away from home attending some agricultural show elsewhere. In the afternoon, the appellant informed Anesu that he would be coming to her in the evening. In the evening, at around 21:00 hours or 22:00 hours, whilst she had already retired to bed, the appellant called her to his bedroom. Everyone else had gone to asleep. Inside his bedroom, the appellant urged her to sit

on the bed. She was hesitant. He lifted her up and sat her on the edge of the bed. He was wearing a navy-blue short. Lighting inside the room was from a single candle.

- From underneath the bed the appellant took out a black bag. It had different kinds of herbs inside. They looked like stale potatoes. He mixed them together to produce some fluids. He asked her if she was menstruating. She said yes. He ordered her to stand up. She did. He lifted up her blouse, leaving her breasts exposed. He applied the herbs all over her body from top to bottom. Afterwards, he produced some more herbs and ordered her to drink. They tasted sour. He then gently instructed her to get into his bed and sleep. She hesitated. She sat on the bed. He pushed her down into a lying position. He had lowered his shorts, leaving his genitals exposed. She freed herself, bolted from the room and went back to her bedroom.
- After about thirty minutes, the appellant followed her. He bade her to keep her silence over the issue and never to tell Susan or else he would rot in jail. He gave her \$2 which he said she was to clutch onto as she slept. He went back to his bedroom.
- Anesu said she reported the matter only in January 2017 because after she had gotten married, she was continuously thinking about the appellant. Her marriage was collapsing. The incident was tormenting her. She said she did not “enjoy” her husband.

[8] The appellant’s cross-examination of Anesu was meaningless. In fact, it bolstered the State’s case.

[9] When she gave evidence in count two, Susan was also asked to say what she knew of count one. She gave several anecdotes that corroborated some aspects of Anesu’s evidence. She said Anesu had married but that the marriage was facing turbulence. Anesu’s husband had implored them, his in-laws, to assist. Anesu had come back home. They kept forcing her to go back. They also consulted some prophets. Anesu eventually disclosed what the appellant had done to her.

[10] Anesu had narrated to Susan the intrinsic details of the incident concerning the appellant, namely:

- that the appellant had asked her about her menstruation;
- that the appellant had lifted her blouse and applied herbs all over her body;

- that the appellant had made her drink the remnants of the concoctions;
- that the appellant had forced her to lie on the bed;
- that the appellant had lowered his shorts and exposed his privates to her;
- that she had fled from the room and gone back to her bedroom; and
- that the appellant had given her \$2 to hold onto as she slept.

[11] Susan confirmed the appellant kept some herbal concoctions the ingredients of which included chameleon tails. In cross-examination, the appellant asked Susan not a single question in respect of count one.

[12] In respect of count two, Susan said the appellant had severely assaulted her for a prolonged period extending for about two hours from around 17:00 hours to around 19:00 hours. The reason for the assault was to break down her perceived stubborn resistance to the appellant's resolve to bring into the single matrimonial household another woman as a second wife.

[13] Susan said the assault was so brutal that she lost consciousness. The foetus inside her womb stopped moving.

[14] As with Anesu, the appellant's cross-examination of Susan was not only incompetent, but it also bolstered the State's case. She stuck to her story. She was unmoved.

[15] To both counts, the appellant's defence was basically a bare denial. In respect of count one; he confirmed a *n'anga* from Beitbridge town had given him herbs to administer on his daughter so that he could get rich quickly. The idea to visit the *n'anga* had been planted in his head by friends. He admitted calling Anesu to his bedroom. However, he denied he had himself administered the herbs on her body. He said he had given them to her to do it by herself. He admitted this ritual had to be done in the evening when nobody else was watching. He denied the allegations by the prosecutor that he fondled her breasts and private parts and that he intended to sleep with her.

[16] In respect of count two, the appellant claimed he and Susan had been fighting and that he had merely overpowered her. They had been fighting over the issue of his second wife. He conceded that it was him who had started hitting Susan, who was pregnant at the time.

[17] In its judgment, the trial court accepted the evidence of Anesu and Susan in its entirety. On the question of the delay in count one, the court said Susan's objective in divulging the incident after that long, was not so that the appellant could be arrested. It was so that she could be assisted in her troubled marriage. On count two, the court found that the appellant assaulted Susan to force her to accept the appellant's second wife into the household and for her [Susan] to leave.

[18] As against conviction in count one, the grounds of appeal were that the trial court erred in failing to appreciate:

- that Anesu had not made her complaint freely and voluntarily;
- that there had been an undue delay between the date of the offence and the time the report was eventually made;
- that in making that report, Anesu had been influenced by Susan whose design had been to fix the appellant for having married a second wife;
- that the court should not have convicted on the evidence of a single and unreliable witness.

[19] As against sentence in both counts, the grounds of appeal were that the trial court had misdirected itself:

- by not giving sufficient weight to the appellant's status as a first offender and to the other mitigating features;
- by regarding imprisonment as the only punishment that is appropriate for all purposes.

[20] We find the appeal devoid of merit. The State witnesses' evidence was robust, straightforward and thoroughly incriminating. The grounds of appeal and Counsel's

submissions bore no relationship to the reality on the ground. The trial court dealt competently with the relevant issues. For example, it is not true that the court convicted on the evidence of a single witness, even though this would not have been a misdirection in itself. Both Anesu and Susan gave evidence on count one.

- [21] The appellant argued broadly about the delay of fourteen months in count one. It was said Anesu's report was not made freely and voluntarily or timeously. Inevitably, the cases of *R v Petros*¹ and *S v Banana*², and the general principles espoused in them, were quoted liberally. Basically, these principles are that a complaint in sexual assault cases must be made freely and voluntarily, and without undue delay, to the first person to whom the complainant could reasonably be expected to have made it.
- [22] Plainly, the appellant was misapplying those principles. In a sense, Anesu's report was not made immediately or voluntarily. But the circumstances under which it was made actually vindicate her sincerity. But for the turbulence in her marriage, the result of the trauma she was suffering by reason of the appellant's macabre conduct, she would not have reported the incident. As the court *a quo* correctly noted, her disclosure was not so that the appellant could be arrested. It was so that she could be assisted.
- [23] In fact, it is our considered view that some legal practitioners misconstrue the true import of the principles laid out in such cases as *Petros*; *Banana, supra*, and *S v Nyirenda*³, to mention just but a few. An early complaint in a rape case, or any other sexual offence, is admitted, not as proof of the rape or of the sexual offence. It is admitted, not to corroborate the complainant [*our emphasis*]. Rather, it is admitted to show consistency by the complainant. It is admitted to negative a defence that the act was consensual: see *Nyirenda, supra*, at p 75E.
- [24] In this case, there was not much in the form of a defence that the appellant himself proffered. He admitted virtually everything else surrounding the commission of the crime, except the intrinsic part forming the essential ingredient of the offence, namely

¹ 1967 RLR 35

² 2000 [1] ZLR 607 [S]

³ 2003 [2] ZLR 64 [H]

his smearing of the herbs on Anesu's breasts and private parts. He said he merely gave Anesu the herbs to apply them on her body herself. But this was at night; with just himself and the vulnerable girl present; in the privacy of his own bedroom; when everyone else had gone to asleep; on a day Susan was sleeping out, and for the furtherance of some occult ritual prescribed by some dubious practitioner of the nether world.

- [25] Anesu's evidence was quite graphic. It left nothing to imagination. Evidently, the appellant's singular intention was to rape her. The charade about smearing herbs on her body and asking her to drink some of them was evidently to numb her psyche and make it easy for him. Defence Counsel said, on the authority of *R v Difford*⁴, no onus rests on an accused person to convince the court of the truth of any explanation given by him. That is too sweeping. Not when the State has led such damning and incriminating evidence as to allow no other inference to be drawn, except that of guilty as charged. The evidential onus shifts to the accused. For him to fool around with a fanciful; whimsical; far-fetched, and inherently implausible explanation is to play Russian roulette.
- [26] Only the appeal against sentence made sense. But surprisingly, in the court below, it seems neither the parties nor the court itself paid attention to the prescribed sentences. In count one, the sentence passed was incompetent, incidentally, a point not forming part of the appeal. As the State correctly concedes now, the penalty provision for indecent assault in the Criminal Code, namely s 67[1][a][i], prescribes a sentence of a fine not exceeding level seven [i.e. \$400], or imprisonment for a period not exceeding two years, or both. The court imposed thirty six months imprisonment. This was a manifest misdirection. As such, this court can interfere.
- [27] Defence Counsel pressed for twenty months imprisonment for count one, not because of the above misdirection, but on the grounds that the appellant was a first offender whose mitigatory circumstances the court *a quo* allegedly failed to take into account.

⁴ 1937 AD 370

- [28] In count two, Defence Counsel pressed for three months imprisonment wholly suspended on condition he performs community service. The sentence of the court *a quo* was six months imprisonment. The penalty provision in the Domestic Violence Act, namely s 4, prescribes a sentence of a fine not exceeding level fourteen [\$5 000], or imprisonment for a period not exceeding ten years, or both.
- [29] Since the court *a quo* did not treat the two counts as one for the purposes of sentence, it ought to have considered such sentences as would have been appropriate for each individual count. It seems the court's paltry six months imprisonment for count two was influenced by the relatively staggering thirty six months imprisonment for count one. Apparently the court did not appreciate that, from the perspective of the prescribed sentences, count two was the more serious offence of the two.
- [30] In our view, the mitigating circumstances of the appellant can be summed up in two short sentences. He was a first offender. He was a married man with heavy family responsibilities. But the aggravating circumstances far outweighed those mitigating factors. The appellant is self-centred. Both offences were committed for selfish benefit. He wanted to get rich quickly. So he got herbs to abuse his own flesh and blood. He wanted a second wife. So he pummelled his first wife to breakdown her resistance. He was not contrite. So he put forward a maladroit defence. His actions in count one had far reaching effects. They destroyed, or threatened to destroy, his daughter's marriage. His actions in count two must also have left nothing of what had been his marriage with Susan.
- [31] We consider that the appropriate sentence for count one should have been twenty four months imprisonment, of which four months could have been suspended on condition of good behaviour. In count two, the appropriate sentence also ought to have been twenty four months imprisonment, four of them also being suspended on condition of good behaviour. Both counts could have been made to run concurrently, leaving an effective twenty months imprisonment.
- [32] We reiterate that unless the circumstances militate against it, judicial officers should not, out of impulse or whim, or caprice, or otherwise, depart from the sentencing

practice of suspending portions of prison sentences on conditions of good behaviour. In *Zunidza v State*⁵, HUNGWE J, sitting with CHIWESHE JP in a criminal appeal, said:

“..., we believe that in all matters where a first offender is sentenced to imprisonment, he ought to enjoy the benefit of a suspension of a portion of the sentence as a salutary recognition of his status as a first offender. Any offender is capable of reform. He must benefit from the usual and time-honoured practice of our courts to suspend a portion of a term of imprisonment in spite of how the court assesses the usefulness of this approach. A failure to observe this salutary practice may, in certain circumstances, such as here, constitute a misdirection entitling this court to interfere with [the] sentence.”

[33] In *S v Gadzai*⁶, a judgment by myself, with which my Brother MAWADZE J agreed, I said suspending portions of prison sentences is a very useful tool at the disposal of a sentencing court to salvage multiple benefits out of a situation of criminality. Among other things, a suspension on condition of good behaviour is both deterrent and rehabilitative. For that period that the suspension order is operative, the accused knows that a sword is hanging over his head, and that it will strike if he should step his foot wrong again.

[34] I also said in that judgment, drawing on the case of *S v Mugwenhe & Anor*⁷, that for that period that the accused is kept out of jail, the pressure on the fiscus is necessarily reduced, for the State does not have to concern itself with his upkeep. The accused regains his responsibility or privilege to feed himself and his family. He avoids the full wrath of prison life, and the exposure to dangerous elements inside prisons.

[35] In the final analysis therefore, we make the following orders:

- i/ The appeal against conviction in count one is hereby dismissed;
- ii/ The appeal against sentence in count one is hereby allowed;
- iii/ The appeal against sentence in count two is hereby dismissed;

⁵ HH 778-15

⁶ HMA 51-17

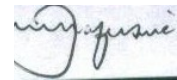
⁷ 1991 [2] ZLR 66 [SC]

iv/ The sentence of the court *a quo* in count one is hereby set aside and substituted with the following:

“Twenty four months imprisonment of which four months imprisonment is suspended for five years on condition that during this period the accused is not convicted of an offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine.”

v/ The sentence in count two shall run concurrently with the sentence in count one.

14 February 2018

A handwritten signature in blue ink, appearing to read 'M. J. Mawadze', written over a horizontal line.

Hon Mawadze J: I agree _____

H. Tafa & Associates, legal practitioners for the appellant

National Prosecuting Authority, legal practitioners for the respondent