

MAXWELL MANDEYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & WAMAMBO J
MASVINGO, 24 November 2021 & 17 February 2023

S. Ganya, for the appellant
B.E Mathose, for the respondent

Criminal Appeal

MAWADZE J: On 24 November 2021 my brother WAMAMBO J and myself heard arguments in relation to this appeal matter from *Mr S. Ganya* for the appellant and *Mr B. E Mathose* for the respondent being the State. We then proceeded to give reasons for the judgment *ex tempore*. The following order was granted;

“It is ordered that;

The appeal be and is hereby dismissed for lack of merit.”

On 6 February 2023 I received a letter from the Deputy Registrar to which was attached the appellant’s letter dated 11 January 2023. The appellant who apparently is now a self-actor was requesting the written reasons for dismissing the appeal; probably to enable him to escalate his battle further to the Supreme Court. Despite the seemingly inordinate delay in making such a request I nonetheless now proceed to provide the written reason hereunder;

On 14 April 2021 the appellant who was a self-actor in the court *a quo* was convicted and sentenced after a fairly contested trial of 2 counts of rape by the Senior Regional Magistrate sitting at Chiredzi. He was however acquitted in respect of the third count of rape.

The court *a quo* treated both counts as one for purposes of sentence. The appellant was sentenced to 20 years imprisonment of which 2 years imprisonment were suspended for 5 years on the usual conditions of good behaviour thus leaving an effective prison term of 18 years imprisonment.

Aggrieved by both the conviction and the sentence the appellant approached this court on appeal.

Despite the numerous grounds of appeal both in respect of conviction and sentence I am of the view that these grounds of appeal can be reduced and summarised as follows;

In respect of the conviction six grounds of appeal are raised but they are essentially four discernible grounds of appeal. These are;

- i) that the complainant was not a credible witness who should have been disbelieved
- ii) that the court *a quo* improperly applied the law in respect of the admissibility of the report of rape
- iii) that the medical evidence produced is not supportive of the complainant's evidence of sexual abuse
- iv) that the appellant was falsely incriminated and that pressure was brought to bear upon the complainant to falsely incriminate the appellant

In respect of sentence three grounds of appeal are raised but essentially its just one ground of appeal which is that the sentence imposed is too excessive and induces a sense of shock.

Back ground Facts

The appellant then aged 50 years is the biological father of the then 10 year old complainant who was in Grade 4 at Mutumwi Primary School in Zaka, Masvingo.

During the month of October 2020, the appellant's wife who was pregnant went to Ndanga hospital awaiting delivery. She left her children being the complainant and complainant's 8 year old and 4 year old siblings in the custody of their father, being her husband who is the appellant.

In count 1 it is said the appellant came home in the afternoon in the absence of the other children and forcibly had sexual intercourse with the complainant after which he threatened her

with assault if she divulged the sexual act and proceeded to assault her. The complainant did not make an immediate report.

It is said the appellant repeated the same acts on two separate occasions.

The matter is said to have come to light when the appellant wanted to rape the complainant again and the complainant managed to flee. It is said she met a stranger who inquired why she was fleeing and crying but the complainant could only say she was running away from her father the appellant. It is said the complainant only divulged the rape after being taken to the police.

The appellant totally denies sexually assaulting his daughter the complainant. He said these allegations were fabricated after he tried to chastise the complainant for refusing to look after some goats after which complainant fled from home. The appellant said some strangers decided to put her up to allege the so called rape probably because the appellant was involved in a dispute for village headmanship.

The Evidence

During the trial evidence was led from the complainant, a councillor Moleen Chikwenhere, a nurse Febby Mukaro, a Victim Friendly police officer one Getrude Manzvera and the investigating officer Clayton Makombe. The accused gave evidence and did not call any witnesses.

The complainant was clear that the appellant raped her on two separate occasions and that she fled when he tried to rape her on the third occasion. This explains as to why appellant was then acquitted of the third count.

The complainant gave a fairly detailed account of how she was raped by the appellant. She used anatomically correct dolls. She revealed feeling pain inside her genitalia and that she bled. She revealed that in count one the appellant in fact first assaulted her before the rape and that after both counts the appellant threatened to further assault her if she disclosed the sexual assaults. The complainant explained how the matter came to light when she said the appellant tried to rape her for the third time after which she managed to flee she then met a certain lady who took her to a local councillor. The complainant said she only disclosed the assault and not the sexual assault to the councillor and that she only revealed the raped to the police.

The councillor Moleen Chikwenhere confirmed meeting the complainant who was brought to her crying. She said the complainant was unwilling to return home saying her father the appellant was assaulting her and fondling her breasts. She took her to the police.

Getrude Manzvera a police officer recorded the complainant's statement which is in tandem with the complainant's evidence. She said the complainant was visibly distressed and crying.

The evidence of the investigating officer Clayton Makombe is simply formal evidence which is inconsequential.

The nurse Febby Mukaro examined the complainant and compiled a medical report. During the examination the complainant was sad and crying. Although there were no hymenal tears she found clear evidence of penile penetration. There was redness on the complainant's *labia majora, labia minora, urethra* and *perineum* which areas are illustrated as numbers (1) to (5) on the medical report. The complainant's age is not an issue and proof of her age was produced.

The appellant's evidence was that he never sexually molested the complainant. He insisted that the complainant was lying and had been coached to falsely incriminate him.

The analysis of the grounds of appeal

The appellant wisely abandoned the appeal in respect of sentence during the hearing of the appeal. This is understandable as it would have been a herculean task to convince any reasonable court that an effective sentence of 18 years for raping one's 10-year-old daughter twice induces a sense of shock. In fact that sentence is rather lenient.

The contestation therefore remained in respect of conviction. I shall now deal with the grounds of appeal as I have earlier on listed them.

1. The credibility of the complainant is a factor the court *a quo* was alive to. The reasons for judgement pay particular focus to it. Her conduct of fleeing from home was indicative of the fact that something was amiss. She was continuously crying. She clearly explained why she behaved in that manner.

In relation to the sexual assault, she gave a vivid account of how she was raped. She demonstrated the manner of rape using anatomically correct dolls with the female doll lying on its back and the male doll being the appellant on top. The complainant

further explained that the appellant's body was very heavy on her chest and stomach. Further she said the appellant made body shaking movements as he raped her. She felt pain also on her genitalia and she bled. All this was uncontroverted.

It would be foolhardy to believe that a 9 year or 10-year-old girl could fabricate all such evidence supportive of sexual assault.

2. The court *a quo* did consider the law in respect of the admissibility of a report of sexual assault. See *State v Banana* 2000 (i) ZLR 607. The complainant explained why she could not make an immediate report. Her mother was away. The abuser was her father and custodian. She was not only threatened with assault but was assaulted. She only got the opportunity to disclose the rape after she fled and was in the safe hands of the police. Her report can therefore not be impugned on any lawful or factual basis.
3. The appellant is not truthful that the medical evidence does not support the complainant's evidence of sexual assault. I have outlined in detail the contents of the medical report. Clearly, the appellant is simply choosing to close his eyes to such evidence.
4. The court *a quo* was alive to the inherent dangers associated with the evidence of young children in cases of this nature. See *State v Musasi* HH 52/02. These include among other things poor memory, suggestibility, possible influence, fantasising and shielding of the abuser. In *casu* the danger of false incrimination is clearly eliminated. The complainant's report of rape cannot be false as per the medical evidence, which corroborates her evidence. Her conduct of fleeing from her own father crying is consistent with being sexually violated.

The appellant on his part gave a bare denial which is difficult to sustain in light of such evidence against him. The complainant at her age cannot possibly comprehend issues pertaining to disputes of village headmanship. Again, why would strangers like the local councillor, the police and the nurse fabricate evidence against the appellant. The appellant could not explain away the medical evidence or why the complainant his own daughter would falsely incriminate him.

The court *a quo* gave a well reasoned and detailed judgment. All the factual and legal issues were not only identified but properly assessed. We find no misdirection at all on the part of the court *a quo*.

The appeal against conviction clearly lacks merit and cannot succeed.
Accordingly, we dismissed the appeal for lack of merit.

MAWADZE J

WAMAMBO J agrees

Ganya Legal Practice, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners