

TICHAFA MUHOMBA
v
THE STATE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & HLATSHWAYO JA
HARARE, JULY 2 & DECEMBER 5, 2013

J Dondo, for the appellant

F Kachidza, for the respondent

MALABA DCJ: This is an appeal from the decision of the High Court sitting as an appellate court dismissing an appeal from the decision of the Magistrates Court against conviction and sentence for rape. The appellant was convicted of rape as defined in s 65 of the Criminal Law (Codification & Reform) Act [*Cap* 9:23] by the Regional Magistrates Court on 25 September 2007. The allegations were that he had, on 4 September 2007 had sexual intercourse with a 77 year old woman, Evenesi Kanyimbo, without her consent. The appellant was sentenced to twenty (20) years imprisonment of which three (3) years were suspended for five (5) years on the usual conditions of good behaviour.

He appealed to the High Court against both conviction and sentence. The appeal against conviction was on four grounds. The first ground was that the learned trial magistrate misdirected herself by convicting the appellant in light of the fact that the appellant gave a version of events which was reasonably possibly true and was not demonstrated to be false by the evidence led during trial.

The second ground was that the learned trial magistrate appeared to have unduly placed too much reliance on the age of the complainant and the fact that she broke down during her testimony. The third ground was that the learned trial magistrate ought not to have placed any reliance on the medical report in arriving at the decision to convict. The fourth ground was that the learned trial magistrate ignored the fact that beside complainant's word, no other acceptable evidence was adduced to prove that the appellant raped the complainant.

The appeal against sentence was on the ground that the sentence was unduly harsh and induced a sense of shock. The allegation was that the learned magistrate misdirected herself in the assessment of the sentence by placing less weight on the personal circumstances of the appellant particularly that he was a youthful first offender aged 18 years at the time of the commission of the offence.

It was also alleged that the learned magistrate over-emphasised the age of the complainant when there were no particularly aggravating features in the manner the rape was committed which would have justified a sentence more severe than sentences in similar cases.

The court *a quo* was not persuaded by the submissions on behalf of the appellant in respect of the grounds of appeal against both conviction and sentence. The facts of the case are as follows:

On 4 September 2007, complainant was collecting maize cobs in her employer's field and putting them in sacks to form heaps. At about that time she saw the appellant who she knew as a resident of the compound approach her. He was in the company

of a young boy, Gift Moyo aged ten years. When the appellant got to where she was, he told the boy to go and tend cattle in the bush. The appellant remained behind and proposed love to her. She turned down the proposal but the appellant suddenly bent down and got hold of both her legs pressing them together and pulled her off balance. She fell to the ground and the appellant quickly got on top of her and pulled up her dress and had sexual intercourse with her without her consent. As the appellant overpowered her, he uttered words to the effect that he wanted to effect a deep penetration to feel her body. After making a couple of sexual movements, he withdrew his male organ and stood up, leaving her lying on the ground. He told her to get up and go, threatening to kill her should she report to anyone what had happened. She said she immediately left the scene and proceeded to her home. Later the same day, she went to her son and reported that the appellant had raped her. The two then proceed to Shamva Police and reported the matter.

The complainant was examined by a doctor at Shamva Hospital on 6 September 2007. The medical report established that she was sexually inactive and had reached menopause. There were bruises on her perineum and her vestibule was torn. The doctor concluded that penetration had been effected after some force was exerted on the complainant's body and genitalia. He also observed that her clothes were soiled.

The complainant's son Kindon Chinomwe gave evidence to the effect that he was approached by his mother on 4 September 2007 at his workplace. She reported to him that the appellant had raped her at the field. She looked distressed at the time and her clothes were soiled. He suggested that there was nothing much he could do except to report the case to the police. He took the mother to the police and reported a rape case against the appellant.

The appellant's story was that the complainant had falsely implicated him in the commission of the offence. He said the reason for the alleged false allegation against him was that he assaulted the complainant at the field at the time she alleged he raped her. According to him, he had been herding cattle in the company of Gift Moyo and his elder brother, Last Muhamba. He then saw cattle which had moved into the field in which complainant was collecting maize cobs. He, together with Gift, went to drive away the cattle from the fields.

The complainant approached him and shouted insults at him. He moved away but the complainant followed him still shouting insults until she mentioned his parents' private parts. He said he got angry and slapped her once in the face. He left the complainant at the field but was later approached by the Police on allegations that he had raped the complainant.

The appellant called Gift Moyo to testify on his behalf. The evidence of Gift Moyo was inherently contradictory. He at first said that he approached complainant together with appellant who struck complainant twice on the face accusing her of having stolen maize. He, however, later said in his evidence that he was on his way home and found the appellant and complainant together. He first said that he witnessed the assault from a distance of 6 metres but later said it was 15 metres away. He did not see complainant following the appellant shouting insults at him.

The appellant also called his elder brother Last. His evidence was also riddled with inconsistencies. At first he said that he heard the complainant crying from a distance of 100 metres, where she was with the appellant. He at the same time said, he saw Gift

approach the complainant and the appellant when the appellant had said that he had approached the complainant together with Gift. He said when he heard the complainant crying he went to where the complainant was and saw the appellant strike her twice. On the other hand, he said that he saw the appellant strike the complainant twice before he got to where they were while at the same time saying he could not see what was happening because there was grass obstructing his vision. According to the witness, the appellant was holding complainant with one hand while slapping her with the other when he got to where the two were.

The learned magistrate examined the evidence of the complainant relating to the commission of the offence and the identification of the appellant as the rapist. She found the complainant to be a credible witness. She also found that her evidence on the unlawful sexual intercourse was corroborated by the finding in the medical report. She also found that the fact that she had the courage to disclose to her own son that she had been raped was supportive of her credibility. She analysed the evidence of the respondent on the assault and found that there were serious contradictions which convinced her that the version of the appellant was false. She said the following:

“It is important to note here that this witness never made mention of the insults episode which forms the basis of the accused’s defence. He talked of the stealing of maize as the reason for the assault, which was news to this court.

Further his evidence was at variance with the accused’s. Accused asserted that he slapped the complainant once, yet this witness said she was slapped twice and he said he was only 6 metres from where he observed accused slapping complainant twice. Now the variance in their evidence makes it difficult to believe that the alleged assault ever happened because if they were indeed together then their evidence was supposed to be the same or at least similar. To this end, I am inclined to believe the complainant’s evidence that this witness had been sent away by the accused before the rape happened. This is why this witness said under cross-examination he could not dispute that the rape occurred because he had not been present all the time.”

When it comes to the evidence of Last Muhamba, the learned Regional Magistrate made reference to the contradictions which have already been referred to in his evidence. She said the following:

“This puts in doubt whether this witness was present at all or he just heard from this Gift. In another breath he said his attention was divided as he was busy guarding the beasts.

Added to this, this witness also said he saw the accused slapping the complainant twice contrary to the accused’s assertion that it was only once that he had slapped the complainant, which also dented accused’s story, and throws doubt of his presence at the scene, particularly as he was also prevaricating under cross-examination. Juxtaposing his evidence and that of Gift Moyo, the first defence witness, one would be inclined to believe that he rehearsed evidence with Gift Moyo who had been present before being chased away by the accused prior to the rape and then came up with this story of the slapping of complainant by the accused twice, yet the accused himself was talking of slapping her once.

As such the evidence of these two defence witnesses did not take the defence case anywhere at all, as it dented it instead of corroborating it.

On the other hand evidence of the complainant was clear, straightforward and consistent. She exhibited a very good demeanour and gave a detailed account of the events and how the rape happened and even gave detailed account of what accused was saying when he was penetrating her. Surely to suggest that such an old, unsophisticated elderly rural woman would fabricate and/or invent such details would be an affront of common sense. A lying witness would in my view, not fabricate the type of detail as narrated by the complainant. Her story sounded original and rang bells of truths in it. She even broke down during proceedings. Surely she could not have been stage-managing all that. She was consistent and stood her ground under cross-examination.”

Like the court *a quo* this Court finds no basis for holding that the magistrate misdirected herself in any manner in finding the complainant a credible witness and accepting her evidence as proving beyond any reasonable doubt the commission of the offence and identification of the appellant as the offender. The evidence adduced clearly shows that the complainant must have had sexual intercourse with a male person before she made the report to her son.

The suggestion by the appellant's legal practitioner that she could have had sexual intercourse with a man between the time she reported to her son and the time she was examined by the doctor does not deserve serious consideration. The reason is that medical examination formed part of the investigation to establish the truth of the allegations of the rape which had already been made to her son. So it is those allegations which formed the subject of the medical examination to the establishment of the truth of which the findings thereof were relevant. It must therefore be accepted that the injuries to the complainant's private parts and the evidence of penetration established by the examination by the doctor related to sexual intercourse which took place before the report to the complainant's son. The complainant's son observed soil on the complainant's clothes, confirming her evidence that she was felled to the ground.

There was no suggestion that complainant could have deliberately soiled her clothes to fabricate evidence of rape. Her son's evidence that she was distressed at the time she made a report to her together with his observation of the soil is confirmatory of her credibility in so far as the fact that she had had sexual intercourse with a man before the report was made is concerned.

The question the learned magistrate and the court *a quo* had to answer is why the complainant would implicate the appellant as the man who had sexual intercourse with her in the fields without her consent. This question is important because the complainant would have to be found to have shielded a man who injured her in the manner found by the doctor whilst effecting penetration of her private part without her consent.

The appellant's explanation that the complainant falsely implicated him because he assaulted her once by clapping her in the face had to be found to be reasonably possibly untrue to be rejected. A close examination of the judgment of the learned magistrate which was accepted by the court *a quo* shows that the story by the appellant and his witnesses was found to be false. This finding is clearly supported by the contradictory evidence of the assault. Whilst the appellant says he assaulted the complainant once in the course of being pursued by her under the barrage of insults Gift did not observe the pursuit. He said the respondent struck the appellant twice and gave a different reason for the assault. The other contradictory aspects of it noted by the magistrate shows Gift did not witness the assault he talked about. The same goes for Last who gave evidence, the effect of which is, that the appellant struck the complainant more than twice.

It is clear therefore that the only consistent and credible version on this issue of the assault was that of the complainant to the effect that the assault never took place.

In *S v Trainor* 2003(1) SACR 35 SCA 1 ALL SA 435 at 41B-C the court said:

“A conspectus of all evidence is required. Evidence that is reliable should be weighed alongside such as may be found to be false.... In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated, as must be evaluated against the onus on any particular issue as in respect of the case in its entirety.”

On all the circumstances of the case, the learned magistrate and the court *a quo* were entitled to find that the evidence of the complainant had proved the offence against the appellant beyond any reasonable doubt. The appeal against conviction must therefore be dismissed.

On the question of sentence, it has been said time and again, that sentencing is a matter for the exercise of discretion by the trial court. The appellate court would not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as a trial court. There has to be evidence of a serious misdirection in the assessment of sentence by the trial court for the appellate court to interfere with the sentence and assess it afresh. The allegation in this case is that the sentence imposed is unduly harsh and induces a sense of shock. In *S v Mkombo* HB-140-10 at p 3 of the cyclostyled judgment it was held that:

“The position of our law is that in sentencing a convicted person, the sentencing court has discretion in assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and in aggravation. For an appellate tribunal to interfere with the trial court’s sentencing discretion there should be a misdirection see *S v Chiweshe* 1996(1) ZLR 425(H) at 429D; *S v Ramushu and Others* S-25-93.”

It is not enough for the Appellant to argue that the sentence imposed is too severe because that alone is not misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence. In *S v Nhumwa* S-40-88 (unreported) at p 5 of the cyclostyled judgment it was stated that:

“It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severe than one that the court would have imposed sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court.”

The factors relied upon are that the sentence does not reflect sufficient weight having been placed on the fact that the appellant was a youthful first offender. The court *a quo* observed that the learned magistrate considered the factors of mitigation referred to and placed the weight she considered sufficient on them as reflected in the sentence imposed. The learned magistrate observed, in particular, the social outrage emanating from the increase in the rape cases involving elderly women in her area as well as in the country generally.

There is of course no gainsaying the fact that rape is a very serious offence which has become very prevalent requiring stern sentences by the courts to protect society. The court *a quo* made a pertinent observation of the fact that the appellant being a young and strong man took advantage of the age of the complainant and her frailty knowing that she was powerless to resist his aggression. The utterances he made during the commission of the offence indicate not only determination to commit the offence but also the total control he had over the complainant.

The court agrees with the court *a quo*'s observation expressed in the following words:

“The fact that the sentence may be harsher than we would have imposed in similar circumstances is not a proper ground for interfering with the sentencing discretion of the court *a quo*. In any event we find that the hurtful words spoken by the youthful appellant to the complainant during her humiliation only added salt to aggravate the humiliation. Those young strong men who take advantage of the very young or very old do so because these two groups are indeed vulnerable to their vulgar and deplorable attacks. When they are properly found guilty of committing such heinous crimes on society's vulnerable, they should not expect mercy from the courts.”

In *S v Nyamimba* 2002(2) ZLR 607 it was held that complainants in sexual cases are traumatised by the act of rape.

It is trite that an appeal court will only interfere with the discretion of a trial court where the sentence is disturbingly inappropriate or where the discretion of a trial court in respect to sentence has been exercised capriciously or upon a wrong principle. In *S v Sidat* 1997(1) ZLR 487(SC) it was held by McNALLY JA at 491 as follows:

“Once it is decided that there has been a material misdirection in relation to sentence then there has been a substantial miscarriage of justice. The appellate court is then at large to consider on the right facts, what an appropriate sentence should be. In so considering, it is not fettered by a consideration of the sentence by the lower court.

If, on the other hand, there has not been a misdirection by the lower court, then there can only have been a substantial miscarriage of justice if the sentence is “disturbingly inappropriate” or “so severe as to induce a sense of shock”. Lacking a misdirection, in other words, the court will not be “at large” and will only be able to interfere if the severity of the sentence amounts to a substantial miscarriage of justice.”

The court is not at large to interfere with the sentence imposed by the trial court and confirmed by the court *a quo*. The appeal against sentence thus has no merit and it must also fail.

Accordingly the appeal against conviction and sentence is dismissed.

GOWORA JA: I agree

HLATSHWAYO JA: I agree

Dondo & Partners, appellant’s legal practitioners

The Attorney General’s Office, respondent’s legal practitioners