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SIMBARASHE GIBSON
v
THE STATE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE, OCTOBER 15, 2013 & MARCH 20, 2014

F. Girach & J. Dondo, for the appellant
S. Fero, for the respondent

PATEL JA: This is an appeal against a judgment of the High Court confirming the conviction of the appellant by the Harare Magistrates Court. The appellant was charged with the rape of an 11 year old girl. After a protracted trial, he was convicted on 14 November 2011 and sentenced to a term of 12 years imprisonment with 5 years suspended on condition of good behaviour. On appeal to the High Court, his appeal against conviction was rejected and the sentenced imposed upon him was upheld. He now appeals against that decision.

The court *a quo* summarised its findings of fact as follows. The complainant, who had left her home in Glen View, was on her way to Dzivarasekwa in search of her relatives. She met the appellant for the first time outside his business premises on 29 August 2010. He called her and, after speaking to her, he gave her $2 for bus fare. She then spent the nights of 29 and 30 August at Dziravasekwa Police Station.

On 31 August she was taken to Glen View II Police Station. At about 3.00pm she returned to the appellant's premises and slept there on the nights of 31 August and 1 September. She was raped on the second night. On the morning of 2 September the appellant gave her $80 to spend. She arrived in Mutare on the same day and met a Mrs Jongwe who took her to the police. The offence was then discovered at the police station and the complainant named the appellant as the perpetrator. A medical examination conducted on 3 September 2010 revealed a fresh tear on her hymen and some discharge from her vagina. The doctor concluded from his observations that there was definite evidence of penetration and that the discharge may have been a sexually transmitted disease.

The appellant denied raping the complainant or committing any other offence. His defence was that he was merely a Good Samaritan assisting a young girl in dire circumstances and that the charge against him was fabricated by her in collusion with the police in order to extort money from him. In his testimony, he either confirmed or did not dispute most of the complainant's evidence. However, his position was that the complainant had only spent one night at his business premises.

In his notice of appeal, the appellant noted nine grounds of appeal against conviction, some of which grounds tended to overlap. He also appealed against the sentence imposed upon him as being unduly harsh and severe so as to induce a sense of shock. At the hearing of the matter, counsel for the appellant concisely and quite properly confined himself to four salient grounds of appeal, as follows:

(i) The court *a quo* failed to place due weight on the material inconsistencies in the complainant's evidence.

(ii) The complainant's version of events was not credible.

(iii) On the complainant's version, the essential element of penetration was not established.

(iv) The court *a quo* erred in holding the appellant capable of rape despite his medical condition.

INCONSISTENCIES IN COMPLAINANT'S EVIDENCE

According to the record, the State's evidence consists of the following: the complainant's statement at Dangamvura Police Station, dated 2 September 2010 (the Dangamvura statement); the later undated statement made at Southerton Police Station (the Southerton statement); the undated outline of the State Case; and the complainant's evidence-in-chief and under cross-examination. According to Adv. *Girach*, these together constitute four different versions of the State case. However, Ms. *Fero* takes the view that there were two versions before the courts below, *i.e.* the Dangamvura statement as read with the State outline on the one hand, and the Southerton statement coupled with the complainant's evidence on the other. Whichever position one adopts, there are several notable inconsistencies as between the Dangamvura statement, the State outline, the Southerton statement and the complainant's testimony in court.

Firstly, there is the complainant's evidence that she spent two nights in the appellant's cottage and was raped on the second night. Her statements to the police and the State outline indicate that she only spent one night in the cottage. I do not think that this inconsistency is particularly significant in light of the probability that she did not

divulge as much detail in her statements as she did in her testimony, particularly under cross-examination. On balance, having regard to all of the evidence adduced at the trial, it seems to me that her version of having slept in the cottage on two nights was properly accepted by the trial court.

The second set of inconsistencies arises from the manner and circumstances in which the alleged rape was carried out. The complainant's evidence was that the appellant entered the cottage holding a firearm and threatened her with it. The act of rape involved him placing his penis on her vagina rather than inserting it. After she was raped, he forced her to lick his penis. He then left at some later stage and did not spend the whole night in the cottage.

The Dangamvura statement and the State outline make no mention of any firearm having been used on the night in question, whereas the Southerton statement is consistent with the complainant's evidence in this respect. Again, the Dangamvura statement and the State outline are silent as to the licking of appellant's penis. The Southerton statement does refer to the eating of appellant's penis but indicates that this occurred before instead of after the alleged rape. As regards penetration, the State outline avers sexual intercourse, while both the Dangamvura and Southerton statements clearly indicate that the appellant inserted his penis into the complainant's vagina. Lastly, the State outline and the Dangamvura statement are to the effect that the appellant spent the whole night in the cottage, while the Southerton statement accords with the complainant's evidence at the trial.

The question of penetration, in my view, is a particularly difficult aspect of this case. It is an aspect that I will revert to later in this judgment. As for the inconsistencies in the evidence generally, it is clear that the State outline was drawn from the Dangamvura statement, which is relatively thinner in its coverage. The Southerton statement, on the other hand, is somewhat more detailed and, in essence, broadly consistent with the complainant's testimony. In this regard, I am inclined to agree with Ms. *Fero* that, in the Southerton statement and her evidence in court, the complainant was adding flesh to her earlier report at Dangamvura Police Station. She gave the latter statement soon after the alleged rape, at a time when she was probably not in full control of herself, and only made full disclosure at Southerton Police Station. On that basis, it seems to me that the trial court and the court *a quo* cannot be faulted for having placed greater reliance on the Southerton statement coupled with the *viva voce* evidence, as opposed to the Dangamvura statement as read with the State outline.

Generally speaking, as was held in *S* v *Mandwe* 1993 (2) ZLR 233 (S) at 237, a State outline is crucial to criminal proceedings. If the divergence between the outline and the evidence of the complainant is gross and irreconcilable, it may be proper and necessary for an appellate court to set aside the conviction as being unsafe. However, it was also observed in that case that a State outline is usually compiled by police officers without the requisite legal training. As was highlighted by Korsah JA at 237C-E:

> "It is, however, incumbent to caution that, as the State outline is often a précis of the testimony of the State's witnesses, often compiled by a poiceman with no legal training (as opposed to the defence outline being a categorical assertion by the accused person of facts upon which he relies for his defence), the divergence between the State outline and the testimony of a State witness must be

> so gross as to be utterly irreconcilable, so as to invite an adverse conclusion. As Squires J clearly stated [in *S* v *Seda* 1980 ZLR 109 (G) at 110H], the departure by a witness in his evidence from the outline must be significant and unexplained to be deserving of an adverse conclusion."

In the instant case, I take the view that the inconsistencies as to the specific manner in which the alleged rape occurred are largely attributable to the youthfulness of the complainant. Having regard to the record of proceedings as a whole, the complainant's detailed evidence in court could not possibly have been concocted. She did not implicate anyone else and there was no ulterior motive for her to implicate the appellant. Indeed, she might not have raised any complaint of rape at all had she not been thoroughly interrogated at Dangamvura Police Station. Furthermore, many material aspects of the complainant's testimony are clear and were not challenged at the trial. These relate to the events prior to the rape, the place where the offence was committed, the identification of the alleged assailant, and the events that occurred after the rape. All in all, I am inclined to agree with Ms. *Fero* that the inconsistencies alluded to, apart from the element of penetration, are not so gross as to be utterly irreconcilable or unexplained in material respects as to vitiate the credibility of the complainant's evidence in court.

CREDIBILITY OF COMPLAINANT'S VERSION OF EVENTS

Adv. *Girach* submits that both the trial court and the court *a quo* misdirected themselves in accepting the complainant's version of the alleged rape. That version, so he argues, is clearly not credible in light of its cumulative inconsistencies. In particular, it was not possible for the complainant to have entered the appellant's

premises unnoticed. The appellant's evidence in this regard was corroborated by that of his night guard. Again, it is not probable that the fifty-four (54) year old appellant would have used a firearm to coerce the eleven (11) year old complainant or that he would have given her a sizeable sum of money in full view of his employees. The complainant then went shopping and did not report the matter to anyone until the complaint was coaxed out of her at Dangamvura Police Station. Her failure to report the alleged rape was clearly unusual in the circumstances of the case.

Bearing in mind the complainant's tender age and dislocation from her home and family, it seems to me that her initial reticence was obviously induced by a mixture of fear, confusion and extreme anxiety. The very fact that the complaint had to be coaxed out of her demonstrates the distress that she would have experienced in her predicament. Accordingly, having regard to all the events preceding the complaint lodged at Dangamvura Police Station, I do not think that it was particularly unusual for the complainant not to have reported the rape at the earliest opportunity.

The appellant's version of events was that he did not commit any offence and that the police colluded with the complainant to extort money out of him. However, the evidence shows that the allegation of rape first emerged at Dangamvura Police Station, where the complainant was taken by Mrs Jongwe, and after she was interrogated by the police. The complaint was then referred to Southerton Police Station. The attempted extortion only occurred much later, through a police officer based at Southerton, and the culprit was duly apprehended and dealt with. What all of this shows is that the alleged rape could not have been fabricated when it was initially reported at

Dangamvura simply in order to extort money from the appellant. The appellant's contention in this regard is clearly untenable.

With respect to the evidence corroborating the appellant's version of events, his Defence outline identifies several witnesses, members of his staff, none of whom saw the complainant entering or leaving his premises. In particular, the outline refers to Itayi Tom, being the night guard on duty, and Remember Chimpanyanga, one of the bus cleaners. However, Itayi Tom was not called as a witness at the trial. Instead, Chimpanganya was called to testify and his evidence only relates to the events of the morning of 2 September 2010 as distinct from what occurred on the night of the alleged rape, *i.e.* 1 September 2010. In effect, his evidence does not serve in any way to support the appellant's denial of having been present at the premises on the night in question.

In the final analysis, I take the view that the trial court and the court *a quo* did not misdirect themselves in preferring the complainant's version of events to that proffered by the appellant.

WHETHER EVIDENCE OF PENETRATION ESTABLISHED

It is trite that penetration is an essential element of the offence of rape. See *S* v *Banda* 2002 (1) ZLR 156 (H). In the words of Kamocha J at 158D-G:

> "What has now come to be known as legal penetration is where the male organ is in the slightest degree within the female's body: …. the slightest penetration establishes the necessary element for liability of an accused person. The slightest penetration …. being entry (in the sense of *res in re*) into the *labia* (the anterior of the female genital organ).
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> …. The mere contact of the male organ with the female genital organ without any slightest penetration does not amount to legal penetration."

As I have already noted, both the Dangamvura and Southerton statements explicitly aver that the appellant inserted his penis into the complainant's vagina. However, the evidence adduced in court appears to contradict this position.

In her evidence-in-chief, the complainant states that the appellant "*removed his trousers and lay on top of me and put his thing on to my thing*". After demonstrating what happened with the use of dolls, she then states "*He put it on my vagina. I felt pain. I advised him that I was in pain but he said I was lying. He said I should lick his penis which I did by holding it and licked it. He then took a white sheet/cloth and told me to wipe my private parts. He used it to wipe his penis. I noticed some white substance looking like mucus on my vagina. There was some blood*". When asked to clarify her evidence under cross-examination, she insists that "*I told the police that he placed it on my vagina. I did not say or tell them of inserting it into my vagina*". She then seems to accept that the allegation of insertion was untrue. Immediately thereafter, however, when asked "*So how did you know it was a penis he put in your vagina*?" she replies "*It was after raping me that he wiped his penis*". When questioned further as to what she did during the alleged rape, she states "*I only told him that I was in pain and he said I was lying. I did not cry*".

The complainant is clear in her evidence that she felt pain when the appellant lay on top of her and that there was blood on her vagina after he withdrew. However, she is evidently confused about the significance of actual insertion and the degree of penetration required to establish such insertion. Nevertheless, the medical evidence, following her examination two days after the alleged rape, categorically

indicates that there was a tear on her hymen constituting definite evidence of penetration. There can be no doubt, therefore, that the complainant's vagina was penetrated, at least to the minimal extent necessary to establish legal penetration.

In this respect, Adv. *Girach* accepts that the torn hymen shows evidence of sexual activity and penetration but disputes that such penetration was necessarily effected by the appellant. In my view, however, the overwhelming effect of the complainant's detailed testimony coupled with the undisputed facts is to emphatically dispel and negative any reasonable doubt as to the identity of the alleged perpetrator. I am accordingly satisfied that that the trial court and the court *a quo* did not misdirect themselves in finding that it was the appellant who effected the penetration in question.

RELEVANCE OF APPELLANT'S MEDICAL CONDITION

One of the appellant's principal defences is that he was impotent. Adv. *Girach* submits that neither of the doctors called by the State gave any clear evidence on this aspect, while that given by Dr. Boskovic clearly shows that the appellant was impotent and therefore incapable of sexual intercourse. Accordingly, the conclusion of the trial court as to penetration cannot be supported.

It is necessary and instructive to recall the testimony of Dr. Boskovic in this regard. He states, firstly, that the appellant is a long-term diabetic whom he has treated for 15 years. Secondly, he asserts that all diabetic people suffer sexual weakness and impotence after 7 to 10 years and that impotent men lose their libido and capacity to have erections. He then proceeds to mention the availability of treatment through

medication, such as Viagra or Cililis, and, rather confusingly, the possibility of ejaculation without erection or penetration leading to actual pregnancy. Finally, he states that the appellant has been diabetic for 27 years and is therefore absolutely impotent and incapable of sexual intercourse with a woman.

Apart from the startlingly contradictory nature of this evidence, no documentary exhibits were adduced to support it. More critically, the witness did not furnish any evidence of recent tests conducted on the appellant or of the treatment prescribed for his condition. Although his testimony was not adequately ventilated under cross-examination, I do not perceive it as affording a sufficiently reliable basis for buttressing the appellant's defence.

The trial court rejected the appellant's claim of impotence and sexual incapacity. Its reasoning was that it was not impossible for a non-erect penis to penetrate a woman's vagina and that the slightest penetration is sufficient. Having regard to the concept of legal penetration as explained in *Banda's* case (*supra*), I am unable to find any fault with this reasoning or any convincing basis for setting aside the resultant findings of the trial court.

SEVERITY OF SENTENCE

The appeal against the sentence imposed *in casu* is premised on the personal circumstances of the appellant, *i.e.* that he is an elderly first offender and a respectable businessman whose trial received considerable publicity. It is averred in the notice of appeal that the sentence confirmed by the court *a quo* was unduly harsh and so

severe as to induce a sense of shock. However, at the hearing of the appeal, Adv. *Girach* did not proffer any submissions in this regard.

The Magistrates Court imposed a sentence of 12 years imprisonment of which a period of 5 years was suspended on condition of good behaviour. In imposing this sentence, the court took into account all the relevant mitigatory considerations, including the appellant's age and diabetic condition and the fact that he was a first offender. It also had regard to the aggravating features of the offence *in casu*, in particular, that the appellant took advantage of a poor young girl.

The High Court confirmed the sentence imposed. In so doing, the learned judges relied on the decision in *S* v *Nyaminda* 2002 (2) ZLR 607 (H) at 611F-G, where it was held that a rape perpetrated upon a young girl should attract a sentence of at least 10 to 12 years imprisonment. The court noted that in this case a sentence within the expected range was imposed with a substantial portion being suspended on condition of future good conduct.

I am unable to perceive any misdirection in the sentencing discretion exercised by the trial court or the court *a quo*. Accordingly, there is no merit in the appeal against sentence.

In the result, the appeal against both conviction and sentence is hereby dismissed in its entirety.

ZIYAMBI JA: I agree.

GARWE JA: I agree.

Dondo & Partners, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners