CLIFFORD MAIMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
DUBE JP & MAWADZE J
MASVINGO, 27 SEPTEMBER & 8 NOVEMBER, 2023

Criminal Appeal

G. Sithole, for the appellant
Ms M. Mutumhe, for the respondent

MAWADZE J: Our courts have for a long time grappled with the difficulty in dealing with mentally retarded victims of sexual abuse in rape cases. This relates mainly to their competency as witnesses in their own cases. While various legislative provisions have been promulgated in order to protect these vulnerable members of society, those accused of sexually molesting them have most of the times seek to exploit the vexing question of their competency as witnesses. This appeal therefore is no exception.

The appellant, who was unrepresented, was convicted after trial by the Regional court sitting at Masvingo on 30 November 2022 of rape as defined in Section 65 as read with Section 64 of the Criminal Law [Codification and Reform] Act (*Chapter 9:23*). The appellant was sentenced to 14 years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions of good behaviour thus leaving an effective prison term of 11 years.

The appellant is aggrieved by both the conviction and the sentence hence the appeal to this court.

In respect of the conviction the appellant has raised 5 grounds of appeal which may be summarised as follows,

1. *That the complainant was not competent to testify regard being made to the psychiatric report (medical report) tendered in court and also her own evidence in court which was riddled with inconsistencies and was incomprehensible.*
2. *That the identity of the assailant was unreliable as the complainant was not credible in that regard.*
3. *That Georgia Bhendembe (or Dendembe) who allegedly received the report of rape from the complainant merely gave hearsay evidence and did not materially corroborate the complainant.*
4. *That the conviction of the appellant is solely based on his nocturnal visit to the complainant's residence despite that the appellant gave a credible explanation for such a visit which is consistent with his innocence.*
5. *That the court a quo failed in its duty to assist the appellant in prosecuting his case especially where the matter was solely based on circumstantial evidence.*

In respect of the sentence the appellant in essence raised a single ground of appeal. This is to the effect that the court *a quo* failed to strike a proper balance between the aggravating and mitigating factors thus resulting in a manifestly excessive sentence which induces a sense of shock. The appellant prayed for a sentence of 24 months imprisonment of which 6 months imprisonment is suspended for 5 years on the usual conditions of good behaviour, leaving an effective term of 18 months imprisonment. However during the course of the hearing of the appeal *Mr Sithole* for the appellant, after the exchange with the court suggested an effective prison term of 5 years.

The appeal is opposed both in respect of conviction and sentence.

The facts of the matter giving rise to this appeal can be summarised as follows,

The appellant was 54 years old and the complainant 36 years old. They were both neighbours in the same village being Nzembe village, Chief Charumbira, Masvingo. The

complainant is mentally retarded. She was staying alone during school term as the child she normally stays with would be at boarding school.

The allegations against the appellant are that on divers' occasions on dates unknown to the Prosecutor but during the period extending 2020 to March 2022 the appellant would proceed to the complainant's residence at night, open the door and sexually ravish the complainant. It is said the matter only came to light when the complainant fell ill on 6 April 2022 and she was called to Masvingo town by her sister in law, Georgina Bhendembe (Dendembe) [hereinafter Georgina], to whom she disclosed all what appellant had done to her which culminated in a police report and the appellant's arrest.

The appellant profusely protests his innocence. He proffered a number of reasons. Firstly he raised an alibi that in 2020 he was employed by a Mr Tananai Mureyi in Harare as a gardener and would rarely visit his rural home. He said at the end of 2020 he relocated from Harare to Chaka mine where his young brother was until April 2021 after which he went to stay permanently at his rural home. Secondly the appellant said these allegations of rape were motivated by the fact that a relative of the complainant one Richard Mutanga raped the Appellant's niece who was doing Grade 6 in 2015 hence the complainant's family are just hitting back. Lastly the appellant said he never raped the complainant and is shocked by the allegations.

During the course of the trial the state led evidence from the complainant and her sister in law Georgina. The appellant testified and the witness whom he initially wanted to call did not testify as the appellant, after being afforded the opportunity to call the Village head's son, said the witness was hostile.

The medical report on the complainant's genitalia reveal that her hymen was torn and that penile penetration was effected. Considering her age it is not clear if the complainant had any children. The court *a quo* did not specifically explain the probative value it placed on this medical report.

The second Medical Report is a Psychiatric report dated 26 April 2022. The important contents are that,

i) The complainant had difficulties in narrating the rape incidents but was able to identify the perpetrators.

ii) the complainant has what is called "*intellectual disability*".

iii) That the complainant could not consent to sexual intercourse.

iv) That the complainant cannot be a witness at law.

We now turn to the grounds of appeal, firstly in respect of conviction.

1. <u>Complainant's competency as a witness.</u>

Sections 244 to 246 of the Criminal Procedure and Evidence Act (*Chapter 9:07*) deals with competency of witnesses in Criminal proceedings.

Section 244 of the said Act (*Chapter 9:07*) states that every person shall be a competent and compellable witness in criminal proceedings unless expressly excluded by the Act [*Chapter 9:07*]

Section 246 of the said Act [*Chapter 9:07*] specifically excludes persons afflicted with mental illness. It provides as follows;

"**<u>246 *Incompetency from mental disorder or defect and intoxication*</u>**.

No person appearing or proved to be afflicted with idiocy or mental disorder or defect or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason shall be competent to give evidence while under the influence of any such malady or disability."

In the case of *Peter Ngonidzashe Machona HH450/15 Hungwe J* [as he then was] discusses, at pp 2-3 of the cyclostyled judgment, the difficulty encountered by courts in dealing with mentally retarded persons, be they witnesses or accused persons in criminal proceedings. Whereas in that case the appellant did not deny having sexual intercourse with the complainant, [in *casu sexual intercourse is denied*] the question of incompetency of the complainant arose both in relation to the alleged consent and or to testify. The LEARNED JUDGE at page 4 had this to say;

"The issue that arises is whether a complainant victim of rape by virtue of this provision, [i.e., S246] is excluded from testifying.
Incompetence is relative and only lasts as long as mental illness lasts"

In terms of Section 245 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] it is the court which decides the competency of witnesses in criminal matters. It provides as follows;

"

It shall be competent for the court in which any criminal case is depending to decide upon all questions concerning the competency and compellability of any witness to give evidence."

Put differently, the issue of competency of a witness is left to the discretion of the court before which a case is being tried.

In the matter of *Clifford Masuku v The State* HB116/18 at pp 4 of the cyclostyled judgment MATHONSI J [as he then was] discusses how the competency of a witness in a rape matter is vested within the discretion of the trial court.

In our respectful view the court *a quo* dealt with the question of the competency of the complainant to testify in a perfunctory manner. Be that as it may one has to consider holistically the evidence of the complainant on record.

Despite laughing on her own and talking to herself in court the complainant gave a meaningful, and logical account on how the appellant raped her.

The complainant explained the sexual assault using anatomically correct dolls. She identified the male doll and its sexual organ. She demonstrated how the male organ was put inside the genital of the female doll. The complaint explained that her pants had been removed and that her skirt had been flipped up. This would happen after accused would have effected entry into her room at night, got into the blankets and mount her.

The complainant said she would be able to identify the accused as the room would be lit. She also explained how the matter came to light when she reported to Georgina.

Despite the Psychiatric report the complainant was staying on her own. This means that she could perform most of house hold chores on her own. In any event appellant and the complainant knew each other. They were neighbours. She identified the appellant as "*Baba va Joe*" a title not disowned by the appellant.

In cross examination she clearly explained that despite not being able to recall the exact dates the appellant raped her. She explained that the child Kudzie whom she normally stays with was at boarding school. The complainant even said she "*consented*" to sexual intercourse with "*her boyfriend*" Tererai and named other persons including appellant who had sexual intercourse with her against her will.

It is therefore incorrect to say that a person suffering from some mental illness is automatically an incompetent witness in a criminal trial of rape. The trial court has to take on board the expert evidence of the mental state of the witness and also assess the complainant in court in relation to demeanour and her evidence. Thereafter the court should give a value judgment on the competency of such a witness.

Where possible the trial court should look for corroborative evidence to the complainant's testimony on material issues. This could be from medical reports or the evidence of mentally sound people.

In *casu* Georgina materially corroborated the complainant. She stated that the complainant stayed alone. She corroborated her on how the matter came to light. She gave basically a similar account of how the complainant said the appellant raped her. She also mentioned other persons the complaint implicated inclusive of the accused.

The most critical corroborating evidence of Georgina is how the appellant acted in the same manner when Georgina, the appellant and the village head hid in the complainant's house at night. True to complainant's word the appellant came into the complainant's house at midnight. He entered without knocking. He was tongue tied when asked to explain his presence. The appellant's nocturnal visit is not in issue. The purpose of such a visit was rightly dismissed by the court *a quo*.

At the end of the day it is clear that the complainant was a competent witness. The issue raised by the appellant in the heads of argument are peripheral. The court *a quo* did not misdirect itself in allowing the complaint to testify and accepting her evidence.

2. <u>The identity of the assailant</u>

We find no merit at all in this ground of appeal. As aforesaid appellant was well known to the complainant. The complaint clearly explained how she identified the appellant on those divers occasions. The complainant was consistent in identifying appellant as the assailant to Georgina. The appellant so called *alibi* is no *alibi* at all even on its own. Further the appellant was caught in the act as it were when he came to the complainant's homestead at midnight. The identification of the appellant as the assailant cannot be successfully impugned.

3. <u>Georgina's Evidence</u>

The attack of Georgina's evidence clearly lacks merit and is incomprehensible. The report of rape she received from the complainant is admissible. It cannot be dismissed as hearsay evidence. Georgina materially corroborated the complainant.

4. <u>The nocturnal visit to complainant's homestead by the appellant.</u>

It is incorrect to say that the appellant was solely convicted on the basis of his nocturnal visit to the complainant's homestead. The court *a quo* did consider the complainant's evidence, the corroborating evidence of Georgina and the appellant incredible explanation for his nocturnal visit to the complainant's residence. Lastly the appellant's defence was rightly dismissed as untrue.

Similarly, the appellant's explanation for the nocturnal visit was found to be incredible. Even the appellant's so called witness could not come to testify. There is clearly no substance in this grounds of appeal.

5. <u>That the court *a quo* did not assist the appellant, a self-actor.</u>

It is not clear as to what assistance the appellant required. Can one after reading the record of proceedings say that the trial was not fair in substance and form. The appellant's rights were explained. He gave a fairly detailed defence outline. He cross examined the state witnesses. The appellant gave his evidence. The court *a quo* afforded him the opportunity to call his own witness whom he later could not call saying he had turned hostile. The court can

only assist an unrepresented accused during the trial to the extent that is necessary to ensure a fair trial and that justice is achieved. However the trial court cannot turn into a defence counsel for the accused. It is not clear as to why it is alleged this matter was solely decided on circumstantial evidence. That clearly is not a correct appreciation of the evidence on record. There is no misdirection in how the court *a quo* handled this trial.

Appeal in respect of sentence

The exhortation should made that legal practitioners should not raise grounds of appeal in respect of sentence as a matter of practice. There should merit in such an appeal.

In *casu* can one seriously argue that a sentence of 24 months imprisonment is proper for raping a mentally retarded person on divers occasions? Even the fall back suggestion of 5 years remains shocking in its lack of appreciation of the aggravating factors and precedents.

The court *a quo* in its reasons for sentence pointed out the serious nature of the offence, the vulnerability of the complainant, the accused's persistent criminal conduct and other factors.

The sentence to be imposed in any criminal matter falls within the discretion of the court *a quo*. All the court a quo should do is to exercise that discretion rationally, judiciously and to ensure the resultant sentence is in line with sentences in similar cases. See *State v Mundova 1998 (2) ZLR 392 (H*), *State v Munechawo 1998(1) ZLR 129 (H), State v Mudzingwa 1999 (2) ZLR 225 (H*), *State v Kearns 1992 (2) ZLR 116 (S).*

In *casu* a sentence of 14 years is clearly in line with sentences imposed in rape offences. There is absolutely no reason or justification to interfere with this sentence.

Disposition

The appeal in respect of both conviction and sentence lacks merit. It should fail.

In the result it is ordered that the appeal be and is hereby dismissed in its entirety.

DUBE JP. Agrees.....

Kantor & Immerman, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners.