KABAMBA KIBUKILE
versus
THE STATE

HIGH COURT OF ZIMBBAWE
ZHOU & CHIKOWERO JJ
HARARE, 2 & 9 February 2023

Criminal Appeal

Appellant in person
F I Nyahunzvi, for the respondent

CHIKOWERO J:

1. On 22 September 2016 the Regional Court sitting at Mutare convicted the appellant, a 35 year old Congolese refugee, of raping an 8 month old baby girl at Tongogara Refugee Camp in Chipinge.
2. The appellant was sentenced to 20 years imprisonment of which 2 years were suspended for 5 years on the customary conditions of good behavior, to leave an effective sentence of 8 months imprisonment.
3. This is an appeal against both the conviction and the sentence.
4. The following facts were common cause at the trial. The appellant stayed at the refugee camp in question. So did the baby's mother, 12 year old sister and father. All are Congolese refugees. The appellant is uncle to the baby's mother. He entered the mother's bedroom on 5 November 2015 around 2pm and was seen by all three witnesses holding the nude baby in his arms. Those witnesses were Florence Ndabwa (the 12 year old sibling), Sylvie Azama (the mother) and a passer-by called Wangi Matiera Amos. He too is a Congolese refugee staying at the same camp.
5. The magistrates court reposed credibility in the State witnesses, relied on the medical report, disbelieved the appellant and proceeded to convict him.

6. None of the witnesses testified that they saw the appellant committing the offence. What the mother said was this. She was at the verandah, performing her household chores. Florence was playing nearby. The appellant then appeared. He took a chair. He joined her at the verandah. She bathed the baby. She wrapped the baby, who was naked with a towel, got into the bedroom and lay the child on the bed. The baby had fallen asleep. Thereafter, she told the appellant that she was proceeding to fetch water from the borehole. The appellant also got up and started walking away. About 15 minutes later, she was horrified to see Florence running to the borehole with the message that the appellant was in the bedroom, beating the baby. Inside that bedroom, the appellant neither explained his presence nor did he hand up the baby to its mother. It was only when the mother roped in Wangi Matiera Amos, who was passing by, that the appellant surrendered the baby. The baby was bleeding from the private parts and its eyes were swollen.
7. Florence's evidence was broadly similar except that she testified that the appellant remained at the residence as the witness proceeded to the toilet and her mother went to the borehole. While still in the toilet, Florence heard the baby crying. She rushed to check. She peeped through the window. She saw the appellant inside the bedroom with the baby in his arms beating or patting it around the back. She concluded that the appellant was beating the child and rushed to relay that message to the mother
8. Amos's testimony was simply that he was passing by when he heard the baby's mother crying for his assistance to retrieve her child from the appellant. He went inside the bedroom, saw the appellant sitting on a chair holding the baby and asked the latter to release the child to him. The appellant obliged. The witness in turn surrendered the baby to its mother. The baby's lips and mouth were swollen. The baby, who was naked, had defecated. Under cross-examination from the appellant on whether he had seen any bleeding from the baby's private parts, the witness answered that he saw that the baby's lip and eyes were swollen.
9. The appellant's defence was simple. It was straight forward. It was this. As uncle to the baby's mother, he paid the husband a visit. On arrival, he heard a baby crying from inside the house. Once inside, he discovered that the child had fallen from the bed. He

picked the baby, who was naked, from the floor. The child was bleeding from the mouth. She had also been injured on the eye. As he was comforting the baby the mother appeared. She declined to receive the child asking instead what he had done to it. He tried to explain his presence at her residence and in particular inside the bedroom. The mother dashed out of the house. She called out for people to come to her residence. That is when a certain man came and on handing over the child to him the appellant noticed that the baby had soiled herself. Many people appeared. They started assaulting the appellant.

10. In challenging the conviction the appellant contends that the evidence was circumstantial and did not justify the conviction. Allied to this, he argues that the court misunderstood the medical report which, far from proving that the baby was raped, actually confirms his defence. He contends that the failure by the prosecution to call the medical doctor who examined the baby was fatal to its case. He submits that his defence was reasonably possibly true. Therefore, he ought to have been acquitted. He also invites us to find fault with the trial court's conclusion that Florence and he r mother were credible witnesses. Resultantly, he urges us to overturn the factual findings stemming therefrom.
11. Mr Nyahunzvi defends the conviction on the basis that the evidence is very clear and straight forward. He argues that what the evidence shows is this. The appellant visited Sylvie Azama's house at the refugee camp. He found and conversed with her as she did her laundry. Thereafter, she left for the borehole but not before instructing Florence to mind the baby. The appellant left at the same time. Florence answered the call of nature but while still in the toilet she heard the baby crying. On checking, she found the appellant abusing the naked baby but thought that the appellant was assaulting her sibling. Having been alerted, the mother found the appellant still at the scene, baby in his arms, but only surrendered the child when a passer-by, Amos, intervened. On examining the child, the mother noted bruises on the face and bleeding from the vagina.
12. The witnesses testified well and were correctly believed by the trier of fact, he argues. Mr *Nyahunzvi* urges us not to interfere.

13. He submits that the witnesses' evidence was corroborated by the medical report. The doctor observed bruises on the baby's vagina. Counsel referred us to *S* v *Mhanje* 2000(2) ZLR 4 where the court stated that:

> "The medical perception of what constitutes penetration does not coincide with legal penetration. For rape to take place, it is not necessary that there should be full penetration. The slightest degree of penetration will suffice."

14. We are aware that an appellate court will only interfere with the factual findings of the lower court where the decision is irrational to the extent that no sensible court could have made it. See *Chevhu Housing Cooperative Society Limited and Ors* v *Crest Breeders International (Private) Limited and Anor* SC 19/21; *Chimbwanda* v *Chimbwanda* S 28/02; *S* v *Katsiru* 2007(1) ZLR 364(H).
15. In *Shuro* v *Chiuraise* SC 20/19 the same principle is clearly enunciated, at pp 13-14, in these words:

> "It is an established tenet of our law that an appellate court should be slow in interfering with the factual findings made by a lower court and that this should happen only where it is clear that the decision of the lower court is irrational, in the sense that no sensible court, seized with the same facts, could have reached such a conclusion… In short, an appellate court can only interfere with the findings of a lower tribunal where it is convinced that the findings by the lower court are not supported by the evidence or are otherwise irrational. See *Hama* v *National Railways of Zimbabwe* 1996(1) ZLR 664(S)."

16. We are satisfied that the court fell into error in finding that Florence and her mother were credible witnesses. The factual findings made pursuant to that assessment cannot be relied upon. The duo's evidence differs from the State outline in a fundamental respect. That contradiction, which was never explained, gives a totally different complexion to the matter. We say this fully cognizant of the position that the State outline was not prepared by those two witnesses. In the absence of any explanation for the variance, however, we proceed on the basis that whoever prepared the outline of the State case did so from the contents of the prosecution's witnesses, in particular Florence Ndabwa and Sylvie Azama. The State outline is clear that the mother was away fetching water and the baby asleep on the bed when the appellant arrived at the house. He entered the house through the open door. Once inside the bedroom he lifted the baby from the bed, removed her pampers, placed her on his lap while still on his feet, unzipped his trousers, produced his penis and forced it into the baby's vagina.

Unbeknown to him, all this was in full view of Florence who was hiding behind the door. She left the appellant busy raping the baby as she went to make a report to the mother. Needless to say, this version does not speak to any interaction between the appellant and the baby's mother, on the day in question, before the offence was committed nor is this the same thing as Florence hearing the baby crying while the former is in the toilet, peeping through the window and seeing the appellant seated on a chair, baby on his lap beating or patting the child. The version in the State outline speaks to the appellant stealthily accessing the bedroom and committing the offence under the full glare of Florence. That would be direct, rather than circumstantial, evidence of the commission of the offence. The appellant was not legally represented at the trial. Neither the public prosecutor nor the trial court sought an explanation for the fundamental contradiction between the evidence of the State witnesses and the outline of the State case. In its judgment, the trial court did not comment on the contradiction at all. In the circumstances, our view is that there is reasonable doubt that the appellant committed the offence. We say this because there are two different versions setting out the circumstances in which the offence is said to have been committed. Those versions were not reconciled.

17. We think the appellant's defence was reasonably possibly true. The threshold of proof beyond a reasonable doubt was captured in *State* v *Makanyanga* 1996(2) ZLR 231 (H), wherein GILLESPIE J said at p235 ;

> "a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complainant, but the fact that such credence is given to the testimony does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that a complaint be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true."

18. We have elsewhere in this judgment set out the appellant's defence. We take the view that the prosecution did not rebut it. It was common cause that the baby was only 8 months old and that she was placed on the bed, naked. The appellant did not therefore undress her. The medical examination was conducted by a qualified medical doctor at

Chipinge Hospital on 6 November 2015. The charge sheet records that the offence was committed on 5 November 2015. On external examination of the baby the doctor noted subconjuctival hemorrhage and facial swelling. There are two lines on the diagram indicating facial bleeding in particular from the eye and the cheek. The external examination also shows bruises on the external female genitalia and that the labia majora and labia minora were grossly swollen. The doctor's handwriting is not clear. He writes;

"blood onsbin". We do not know what the underlined word means. On whether the hymen was oestrogenised, the doctor ticked "no". Similarly, on whether the hymen was attenuated or stretched the doctor again ticked "no". As for evidence of penetration, the medical report contains five boxes with the doctor required to mark the appropriate one by means of a tick. The boxes are "definite", "very likely", "probable", "inconclusive but possible" and "no visible evidence" in that order. He went for the second last box. He then commented:

> "No obvious penetration but bruises on introitus bleeding noted"

19. Read as a whole, the medical report tends to support the appellant's defence that the baby fell from the bed. It seems that the baby fell facedown. Hence the observations;

> "subconjuctival hemorhage bolderolly
> -facial swelling
> < > k"

Again, we do not know what the underlined word and codes mean. The doctor was not called to explain his report. What is clear, however, is that the baby sustained some injuries on the head. She bled from the mouth, the eye and had a swollen lip. While it is true that the child was grossly swollen on the labia majora and labia minora, had bruises and blood on her external genital this must not be read in isolation from the observations on the head, particularly the face, the hymen and that there was inconclusive evidence of penetration. This is a case which cried out for the oral evidence of the doctor to shed light on what could have occasioned the injuries not only on the baby's external genitalia but also on her face. This was necessary because the baby lay on the bed, naked. The appellant explained that

she fell from the bed, hence making direct contact with the floor. Deprived of the oral testimony of the doctor who examined her, we do not think that it was safe for the trial court to ignore the evidence of injuries on the head (as he did) and to conclude that the appellant had raped the baby on the basis of only a portion of the medical report. In short, there was no evidence placed before the trial court to rebut the explanation that that which injured the baby on the head is the same thing which occasioned injuries to the child's external genitalia particularly in view of the fact that the injuries to the head were frontal.

20. The court therefore erred in deciding the matter on some rather than all the evidence placed before it. See *Principles of Evidence 4th Edition by* P J Schwikkard and SE Van de Merwe at 567-568.

    By cherry-picking portions of the medical report the court misunderstood the meaning of that document and convicted on a wrong appreciation of the medical evidence.
21. Ultimately, we are convinced that the factual findings grounding the conviction are not supported by the evidence and are irrational.
22. Regrettably, the appellant has already served more than 6 years of the 18 year effective custodial sentence. A warrant for his immediate release has been issued.

23. I the result, **IT IS ORDERED THAT:**
    1. The appeal is allowed.
    2. The conviction is quashed and the sentence set aside. The following is substituted: "the accused is found not guilty and is acquitted".

CHIKOWERO J:……..

ZHOU J: I Agree……..

The National Prosecuting Authority, respondent's legal practitioners