MUNYARADZI KUPAMUPINDU
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 30 May 2022

Criminal Appeal

A Masawi, for the applicant
C Muchemwa, for the respondent

ZHOU J: This is an appeal against conviction and sentence. The appellant was convicted of rape as defined in s 65 of the code following a full trial. He was sentenced to 10 years imprisonment of which 4 years imprisonment was suspended leaving an effective 6 years imprisonment.

The appellant was found by the court *a quo* to have dragged the complainant, a 14 year old juvenile, into his house with the assistance, of another 14 year old girl who was accused two in the court *a quo*. He was then found to have raped her inside the house. Appellant denied having sexual intercourse with the complainant at all. He denied that the complainant entered his house, but stated that he merely heard the complainant's voice as she was outside the house.

In challenging the conviction, the appellant took issue in his first ground with what he perceives to be inconsistences in the evidence of the state witnesses. In particular he raises the issue of whether the complainant had gone to attend a funeral or to play. This aspect is clearly not material to the rape allegations, it being common cause that the complainant was indeed at the appellant's homestead at the material time. Whether she ended up there because she had gone to attend a funeral at a nearby homestead or merely to play is irrelevant. The presence of the complainants at the appellant's homestead is common ground. There is no inconsistency as regards when the complaint of rape was reported to the next available person. Complainant stated, and was not challenged, that she informed her young sister who also testified, and instructed her to tell their aunt that the appellant had raped her. The suggestion that the young sister was an irresponsible person is not valid. She was indeed responsible as she went on to tell the aunt about the rape as per the instruction of the complainant to her. The reference to compensation is equally irrelevant. After all, what would be the compensation for if the

appellant had not raped the complainant? In any event, the court *a quo* correctly dealt with this aspect by noting that in a rural set up it is normal experience that a village head would be informed of rape that has taken place in his area, but he has no jurisdiction to deal with such a case whether by way of ordering compensation or any other remedy.

The second ground of appeal is difficult to follow. Appellant seems to take issue with the acquittal of his co-accused. The court *a quo* comprehensively explained why that accused was given the benefit of doubt. The court *a quo* found that indeed she had pushed the complainant into the accused's house but found no evidence to prove that she knew or appreciated that the appellant intended to and would rape the complainant. This finding is not in any way favourable to the appellant's case. For this reason, the ground of appeal is meritless.

The third ground of appeal relates to the time that it took for the report to be made, to the extent that such time has a bearing on whether or not there was consent. As noted by the Magistrate, the first report was made immediately after the act. It was made by the complainant herself to her young sister with a specific instruction to alert the "mother", the aunt, of the sexual assault. Whatever happened after that does not have a bearing on the conduct of the complainant. She had played her part by disclosing the rape.

The fourth ground of appeal raises the issue of the bleeding of the complainant after the rape. The matter did not turn on this aspect. The court *a quo* believed, correctly in our view, that the appellant penetrated her without her consent. The complainant's testimony regarding the sexual intercourse was corroborated by the medical report which shows that penetration had definitely taken place. The medical examination was done about 2 weeks after the sexual assault, hence the hymenal tears were correctly described as old. For these reasons, the ground of appeal is without substance.

The final ground of appeal pertains to the issue of the appellant's failure to call witnesses. The conviction did not turn on that aspect, but on the solid evidence of the state witnesses. Appellant was correctly disbelieved by the learned magistrate. It will be noted that while in his defence outline he posited no probable reason for the allegations of rape to be made, in his evidence in chief he sought to rely on alleged acrimony between his family and that of the complainant based on what he described as a "longstanding conflict" between the two families. This was clearly an afterthought. In contradistinction, the evidence of the state witnesses was clear, coherent and satisfactory as to how the appellant dragged the complainant into the house, how he raped her, and how the information about the rape was delivered to complainant's aunt.

As regards sentence, the submission that an effective imprisonment term of 6 years for a rape committed so violently induces a sense of shock is not sound. The sentence is patently lenient, even if consideration is given to the age of the appellant at the time that he committed the offence. He started at what has been described as the deep end of crime. Sentences for this kind of offence committed by the use of force are much more severe than that imposed upon the appellant.

In the result,

IT IS ORDERED THAT:

1. The appeal is dismissed in its entirely.
2. A warrant for the arrest of the appellant is issued.

Masawi & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners