MATARANYIKA NEMUKUYU
versus
STATE

HIGH COURT HARARE
KARWI and UCHENA JJ
HARARE 17 September and 21September 2009

Criminal Appeal

Mr *Machingauta*, for the appellant
A Masamha, for the respondent

UCHENA J: The appellant was convicted by a Regional Magistrate sitting at Marondera Magistrate's Court, on a charge of contravening s 65 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] (rape). He appealed to this court against conviction and sentence.

In his grounds of appeal it is alleged that:

1. The trial magistrate did not give due consideration to the fact that whereas the offence is alleged to have occurred in September 2007 it was reported at a far much later date in October. Furthermore, no reasonable explanation was given to indicate what really prompted the complainant to make a report to her aunt and mother.
2. The trial magistrate did not give adequate consideration to the fact that despite the fact that the complainant made a report to her aunt and mother in October 2007 the matter was reported to the police on 2 July 2008, that is some eight months later…
3. The trial magistrate failed to give due consideration to the fact that initially the complainant alleged that the appellant had attempted to rape her but later changed her story and alleged that the appellant had actually raped her.
4. The matter was unusually fast tracked and the appellant who is an unsophisticated old man was not given an opportunity to prepare his defence to the serious allegations that he was facing.

B**)** Against Sentence

The sentence imposed by the honourable magistrate is manifestly excessive and is out of touch with current sentences that are being imposed in similar cases.

The evidence led at the trial of the appellant on the basis of which the magistrate convicted the appellant, established that the complainant came from school and found the appellant at home sitting in the kitchen smoking a cigarette. She greeted him and proceeded to the bedroom to change her clothes. While she was changing her clothes the appellant opened the door. She was half naked, as the top part of her body was exposed and her skirt was not zipped. This far the appellant's and the complaint's evidence agrees. They differ only on the complainant's evidence that he forced his way in, and when she tried to run out of the house he embraced her, dragged her to the bed and raped her once. After he had completed his purpose he warned her not to tell anyone or he would kill her. According to the appellant when the complainant told him that she was changing, her clothes, and he had seen that she was not fully dressed he backed off and went away. It is common cause that the incident took place on 15 September 2007. The State's evidence from the complainant, Fungayi to whom the complainant first made her report and the complainant's grandmother, establishes that the complainant made a report to Fungayi the next day. The magistrate believed the complainant and the State's wittiness. The appellant confirmed that, by admitting that he was questioned by his wife about the rape the following day.

Mr *Machingauta* for the appellant relying on the grounds of appeal referred to above submitted that the magistrate erred in convicting the appellant. Mr *Masamha* for the respondent supported the conviction, but at the end of his submissions conceded that the sentence imposed by the magistrate induced a sense of shock and that this court was at large as to what would be the appropriate sentence.

Mr *Machingauta* submitted that the complainant reported the rape to her aunt and mother in October 2007, when the incident on which the rape charge arose had occurred in September 2007. Mr *Masamha* for the respondent argued that the report was made the following day as per the evidence of the complainant. It is true that the complainant said she was raped on a Friday afternoon and she made her first report to Fungayi, on Saturday which was the following day. This is confirmed by the appellant's own evidence on p 12 of the record, where the following exchange took place between him and the prosecutor:

Q "When did you learn that the complainant was alleging rape against you?

A The following day I got it from my wife

Q What did your wife say to you?

A She said my husband the child is saying you raped her."

There is therefore no merit in the appellant's first ground of appeal. It is based on the appellant's counsel's failure to correctly read the evidence led at the appellant's trial. The appellant's counsel also missed the point when he said that report was made to the complainant's aunt and mother, as the record clearly states that the report to the complainant's aunt and to her mother was made in 2008, after which the complainant's mother and father, confronted the appellant at Masomera. The complainant's mother then made the report to the police while she was on her way from her father's home. The issue of what prompted the report does not arise when it is common cause that the incident took place the previous day. Once the appellant is believed when she says the appellant raped her, then that prompted the report. The fact that she was seen by Fungayi walking on the tarmac with a young boy becomes peripheral, and of no significance. The bottom line is that the complainant's story is based on events which had taken place between her and the appellant the previous day. The evidence is that Fungayi saw her walking with the boy on the tarmac and joked with her. She does not say she saw anything suspicious between the complainant and the young boy.

The second ground of appeal is also a result of the appellant's counsel's failure to appreciate the evidence led. The evidence led is to the effect that the complainant reported to Fungayi the next day who on the same day reported the case to the complainant's grandmother. The complainant's grandmother and Fungayi did not take the matter any further. The complainant then went to stay with her mother where she exhibited signs of distress. She moved on to her father's house. Her father noticed that she had something troubling her and encouraged her to open up. She asked to be allowed to go and stay with her father's young brother. She eventually made her second report to her uncle's wife. Her father was then informed, and he in turn informed his former wife the complainant's mother. They together went to the appellant's home and confronted the appellant, who had previously been confronted by his wife about the same issue. The complainant's mother then reported the case to the police on 2 July 2008.

It is unfortunate that the appellant's counsel either misread the record or sought to mislead the court. The first duty of a legal practitioner, presenting a case on appeal is to assist

the court to decide the case on the basis of the evidence led at the trial by correctly analyzing the evidence and applying it to the law. He as an officer of the court must formulate his grounds of appeal from the evidence led, and the decision arrived at by the court *a quo*, and not from what is clearly an incorrect restatement of the evidence led.

In his third ground of appeal counsel for the appellant submitted that at first the complaint alleged that the appellant had attempted to rape her, but later changed and said, he had raped her. He submitted that, that shows inconsistence on her part. Mr *Masamha* for the respondent submitted that the correct sequence of the evidence led was that the complainant reported to Fungayi that the appellant had raped her. Fungayi called her mother in law, who is the complainant's grandmother and the appellant's wife. It is to her grandmother that the complainant changed her story and said the appellant had attempted to rape her. He argued that the complainant said she was afraid of her grandmother. That fact is corroborated by the complainant's grandmother when she on pp 6 to 7 of the record said

> "I then enquired from the complainant as to why I had been called and she said grandmother, grandfather came into the room when I was changing clothes, he intended to rape me, but he did not rape me, in other words he had attempted. Fungayi told complainant that was not a report she had presented. I demanded the truth from her but she did not tell. I left her there for two days thinking that she may tell the aunt the truth since she was more comfortable with her than me.
>
> Q What did you do yourself?
> A I went to the accused person and confronted him, he called Bridget (complainant) and asked if he had touched her or done anything on her, but complainant did not say anything so I just took it as a case which has no merit.
> Q When was this?
> A Last year in October"

The correct sequence of the evidence on record is the complainant reported to Fungayi that the appellant had raped her. Alarmed by the nature of the complainant's report Fungayi went and called her mother-in-law the complainant's grandmother to come and hear the complainant's report. When Fungayi asked the complainant to repeat her report to her grandmother the complainant then said the appellant had attempted to rape her. The complainant's grandmother demanded the truth from her. The complainant did not tell her anything further. She left her with Fungayi for two days hoping she would open up to Fungayi with whom she was more comfortable with than herself. It must be noted that in her evidence

the complainant confirms that sequence of events and the details of the evidence given by her grandmother and Fungayi, but adds that she told her grandmother that the appellant attempted to rape her as she was afraid of her. Her fear of her grandmother is confirmed by her grandmother's confession that she was more comfortable with Fungayi than herself. It is also apparent from the complainant's grandmother's evidence that she was not gentle with the complainant. She said she demanded the truth from the complaint. The use of the word demand by the complainant's grandmother suggests firm and harsh questioning which must have further intimidated the complainant who had according to her evidence been threatened with death if she revealed what had happened between her and the appellant. She was immediately taken to the appellant were the appellant was given an opportunity to question her about what she had revealed to Fungayi. This in my view must have further intimidated the complainant into silence even over the two days she was left to stay with Fungayi.

Our courts have since the case of *S* v *Banana*, 2000 (1) ZLR 607 (SC), moved away from the cautionary rule which required the courts to start assessing the complainant's evidence in sexual cases from a suspicious angle. In that case GUBBAY CJ at p 614 D-G said:

> "Recently, in *S* v *K* 2000 (4) BCLR 405 (NMS), the Supreme Court of Namibia followed the decision in *S* v J*ackson supra*. It held that the cautionary rule had outlived its usefulness. There were no convincing reasons for its continued application. It exemplified a rule of practice that placed an additional burden on victims in sexual cases which could lead to grave injustice to the victims involved (see at 418H-419D).
>
> It is my opinion that the time has now come for our courts to move away from the application of the two-pronged test in sexual cases and proceed in conformity with the approach advocated in South Africa. In so holding, I have not overlooked the well-researched judgment of GILLESPIE J in *S* v *Magaya* 1997 (2) ZLR 138 (H). But having regard to the abrogation of the obligatory nature of the rule in such countries as Canada, the United Kingdom, New Zealand and Australia, as well as by the State of California (see *Chaskalson, et al, Constitutional Law of South Africa* at 14-62; Hatchard, *1993 Journal of African Law* 97 at 98; (1983) 4 *Canadian Journal of Family Law* 173), I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I would emphasise that this does not mean that the nature and circumstances of the alleged sexual offence, need not be considered carefully".

This means the courts must now treat a complainant in a case of a sexual nature like any other wittiness. It must in doing so as is expected in any other case carefully consider the nature and circumstances of the alleged sexual offence. This means like in any other case the

court must without placing an additional burden on the complainant because she is a complainant in a case of a sexual nature, carefully consider the evidence placed before it to confirm the commission of the offence and by whom, if it finds that the offence was committed.

In this appeal it is important to note that the evidence of the complainant and the appellant converges on the following:

1. that the complainant come from school on the afternoon of Friday15 September 2007, (see pages 1, 2, and 11 of the record);
2. she found the appellant seated in the kitchen smoking a cigarette;
3. she greeted him and proceeded to the bedroom to change her clothes;
4. the appellant followed her to the bedroom where he opened the door and found her half naked;
5. that the complainant said to him grandfather I am still changing;
6. that he entered the bedroom when complainant was changing and was half naked; (see p 12 of the record),
7. that the appellant was confronted about the rape by his wife the following day; and
8. that in July 2008, when she was taken to the appellant's home to confront him the complainant persisted with the allegation that the appellant had raped her.

This makes the complainant's evidence convincing. She is obviously not talking about imaginary things. Her story was corroborated on minute details by the appellant's own evidence. Only the sexual act was disputed by the appellant, yet the appellant clearly attempted to mislead the court when he in his defence outline said he arrived from where he was coming from, and entered the bedroom where the complainant was changing her clothes. He later agreed with the complaint's sequence of events that she arrived from school and found him smoking in the kitchen. She greeted him and then went to change her clothes. The appellant must have agonized over how, he could reasonably have followed the complainant to the bedroom when he knew she had gone there to change her clothes. To avoid that difficulty, he in his defence outline proffered an innocent explanation by saying that he was arriving from where he had gone when he entered the bedroom where he saw the complainant half naked. He must have realized that if he said he followed her to the bedroom conscious of the fact that she

had gone there to change her clothes, that would raise the question, why follow her into the bedroom at that time? That question now arises and tilts the scales of justice against him. His defence crumbled under cross-examination when he conceded that the complainant found him in the kitchen and that he followed her to the bedroom. It is therefore clear that the complainant is a more credible witness than the appellant who attempted to mislead the court on an essential portion of the events which took place on the day in question. The trial magistrate cannot therefore be faulted for believing the complainant and disbelieving the appellant.

Mr *Machingauta* for the appellant also submitted that the appellant was not given an opportunity to prepare his defence. The case was reported on 2 July 2008. His trial started on 8 July 2008. According to the record of proceedings the appellant did not seek a postponement of the trial. He did not say he wanted time to prepare. The provisions of ss 188 and 189 of the CP&E Act were explained to him before he gave his defence outline. He thereafter gave what appears to be a reasoned defence outline though he could not sustain it under cross examination. It seems to me that the efficiency of the court *a quo* is being used to criticise it, when there is nothing on the record to show that the appellant told the court that he was not ready for trial. Trial courts are not expected to refuse to hear cases just because the trial is too close to the date of the commission of the offence or the date on which it was reported to the police. On the contrary courts should be commented for working hard to clear the backlog of cases awaiting trial. That can be achieved by hearing cases without unnecessary delays. I find no merit in this ground of appeal.

The appellant's counsel's criticism of the delay it took before the complainant was examined by the doctor who found that penetration was effected is accepted as a valid observation which diminishes the probative value of the doctor's findings. It must however be noted that that was not because the complainant had not reported timeously. She had reported the case the next day. Her own grandmother who both Fungayi and herself looked up to, to take up the case decided to suppress it. While the delay dilutes the force of the Doctor's report it does not affect the fact that the complainant raised the issue the next day, and the issue she raised is corroborated by the Doctor's finding that her vagina was penetrated. The delayed examination does not therefore diminish the complainant's credibility as a witness.

I would in the result find that there is no merit in the appellant's appeal against conviction.

Appeal against sentence

The appellant was sentenced to eighteen years imprisonment of which four years imprisonment was suspended for five years on conditions of good behaviour. It was argued on the appellant's behalf that the sentence is too harsh and induces a sense of shock. Mr *Masamha* supported the sentence in his written submissions .but conceded in his oral submissions that it was too severe when it was pointed out that in the case of *S* v *Nyathi* HB 60/03 an accused who raped his sixteen year old daughter on ten occasions and was sentenced by the trial court to thirty years, had his sentence reduced to an effective sentence of 18 years. The concession was properly made as the fact that Nyati was facing ten counts of rape should distinguish his crime from the accused's.

Section 65 (2) of the Criminal Law (Codification and Reform) Act [*Cap 9*:*23*], provides for the factors to be taken into consideration in assessing the appropriate sentence. It provides as follows:

(2) For the purpose of determining the sentence to be imposed upon a person convicted of rape, a court shall have regard to the following factors, in addition to any other relevant factors and circumstances -

(*a*) the age of the person raped;
(*b*) the degree of force or violence used in the rape;
(*c*) the extent of physical and psychological injury inflicted upon the person raped;
(*d*) the number of persons who took part in the rape;
(*e*) the age of the person who committed the rape;
(*f*) whether or not any weapon was used in the commission of the rape;
(*g*) whether the person committing the rape was related to the person raped in any of the degrees mentioned in subsection (2) of section *seventy-five*;
(*h*) whether the person committing the rape was the parent or guardian of, or in a position of authority over, the person raped;

(*i*) whether the person committing the rape was infected with a sexually transmitted disease at the time of the rape.

The trial magistrate's reasons for sentence, are short, but full of furry, against male members of society and do not cover all aspects to be considered in passing sentence for the contravention of s 65 (1) of the Code. She reasoned:

> "Accused pleaded not guilty to the charge of rape. He is a paternal grandfather, to the child and was actually staying with the child in a loco parentis relationship. C/S 65 (1) is a very serious and heinous offence if perpetrated on a minor by a relation. It calls for stiffer sentences that send a message to society that crime does not pay. It is the duty of the courts to curb this monster of child sexual abuse and teach men that they should learn to control themselves. It is difficult these days to trust any man with a female child even if the man is her father. Who is there to protect children if parents turn into rapists and grandparents have lost their role in society of protecting and teaching and guiding children through life? What accused did was unspeakable and should be punished severely. He has tarnished the image of the family and made him loose respect of his children and grandchildren. His submissions in mitigation are outweighed by the seriousness of the offence and must be given a custodial sentence."

A judicial officer must in considering sentence, be dispassionate, and avoid being propelled by emotions into passing ever increasing sentences. He or she must look at all factors which can be considered in passing the appropriate sentence for the offence under consideration. He or she must avoid over emphasizing some factors, while playing down or ignoring others. He or she must avoid language which displays, gender insensitivity, or bias against a class of people as that gives an impression that the offender is over and above being punished for his offence, being punished for belonging to a class which the judicial; officer has displayed bias against. Where the factors to be considered are provided by statute he must consider all such factors. If he or she does not consider factors which the statute requires him or her to consider, the sentence may be set aside, if its shown that a consideration of the omitted factors would have resulted in the court arriving at a different sentence.

In this case the magistrate said the offence calls "for stiffer sentences that send a message to society". While deterrence is a valid consideration a judicial officer must avoid giving the impression that the sentence is a tag which society must read for it to be deterred. The sentence must suit the offence and the offender. If others have to be deterred they should

be deterred by a deserved sentence, and not one which over emphasises deterrence, and punishes the offender beyond the level his offence deserves.

The magistrate, said she was out to "teach men that they should learn to control themselves". The question is which men. The magistrate fell into the danger of purporting to be dealing with a class of persons she wants to teach through the convicted person. The magistrate goes further to say:

> "It is difficult these days to trust any man with a female child even if the man is her father".

Again the magistrate seems to have been more concerned about society in general than the convicted person before the court. Due to that approach the magistrate forgot to specifically deal with the convicted person's mitigation, and age. These are factors which should in terms of s 65 (2) of the Code be taken into consideration before arriving at the appropriate sentence. This court is therefore at large as regards sentence.

The convicted person was aged 59 at the time of his conviction and sentence. Courts generally consider advanced age as a mitigating factor, for which the ordinarily deserved sentence is reduced. The age difference between the appellant and the complainant is aggravating. She is a young child while he is an old man who should have protected her. He took advantage of his being in loco parentis over her.

The complainant was aged 12. She is the convicted person's daughter's daughter. The relationship between them is aggravating as it is within the range prohibited by s 75 (2) of the Code. The convicted person is therefore guilty of an incestuous rape.

The convicted person did not use a lot of force. He simply over powered the complainant, causing no further physical harm beside that he inflicted on her private parts. He however caused the complainant mental anguish as demonstrated by her leading a restless life thereafter. She could not continue staying with the appellant's family. She resorted to shading tears which remained unrewarded until July 2008. She stayed with her mother for a while but she was not afforded an opportunity to speak about her anguish. She moved on to her father's house. He noticed the complainant's distress and encouraged her to speak out whatever was bothering her. She asked to be allowed to go and stay with her uncle, her father's young brother. Her father allowed her and she eventually reported the rape for the second time after nine and half months. Her close relative who she looked up to raped her. Her grandmother

who got to know of the offence the next day took no interest. She bottled up when she went to stay with her mother. She must have lost confidence with relatives on her mother's side because of the manner some of them had handled her initial report. The complainant suffered a lot of psychological trauma because of what the accused did to her. He threatened her with death if she reported. When she reported the report was suppressed, sending home a message that her aggressor was being afforded protection at her expense.

After considering the offence of which the appellant was convicted, and the fact that he is self employed and of little means, it becomes apparent that a fine is out of consideration. The offence is a serious one and calls for imprisonment. However when the offence is compared to that of *S* v *Nyathi* already referred to above the sentence imposed by the trial magistrate becomes too severe. A sentence for one count of rape can not be equal to one for ten counts of rape. The reduction of the sentence must however not trivialize the offence. I am convinced that a sentence of twelve years imprisonment, with four years suspended on conditions of good behaviour will do justice in this case.

The appellant's appeal against conviction is dismissed, but his appeal against sentence is upheld. The sentence imposed by the magistrate is set aside and is substituted by the following:

> Twelve years imprisonment of which four years are suspended for five years on condition the accused does not during that period commit any offence of a sexual nature for which he will be sentenced to imprisonment without the option of a fine.

KAWI J; agrees ……..

Sakala & Company, appellant's legal practitioners
Attorney General's *Office*, respondent's legal practitioners