ISAAC TAPFUMA TAFIRENYIKA
and
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 25 September 2012 & 30 October 2013

Criminal Appeal

Ms M Mushaka, for the appellant
J Uladi, for the respondent

HUNGWE J. The appellant, a seventy-year old man, was convicted of rape as defined in s 65(1) of the *Criminal Law (Codification and Reform) Act, [Cap 9:23]* after a trial. He was sentenced to 15 years imprisonment of which 7years were suspended on conditions of good behaviour. The appellant was convicted on the following facts found to have been proved in the court *a quo*. The complainant was aged 11 years at the time of the alleged offence. She was staying with the appellant who is married to her aunt. On an unknown date in December 1998 her aunt left her together with the appellant. She instructed that complainant sleeps in the same bedroom with her husband that night. She would sleep on the floor and he would be on their bed. Appellant, on that night, took off his clothes and forced himself on the complainant. The following day, he instructed her to bring him bath water to a structure used as a bath room. When complainant did so, he again ravished her. He threatened her against telling anyone lest he would throw her into a crocodile infested pool.

The appellant noted his appeal to this court on the following grounds of appeal:

> "1.1 The learned regional magistrate did not accord due credence to the fact that the complainant was a 6 year old minor from which a highly creative imagination could be reasonably expected at the time of the alleged offence although she testified as a major at 19 years.

1.2 The court a quo also omitted to take into cognisance the fact that the complainant's report was formally made four years after the alleged offence and that the said report was not made freely and voluntarily.

1.3 Given the time lapse between the commission of the alleged offence and its consequent report, the learned regional magistrate did not accord due weight to the fact that in the absence of concrete circumstantial evidence, proof of penetration *per se* does not necessarily imply that the appellant was the penetrator (sic).

1.4 The court a quo also adopted an over-cautionary approach against the appellant's sole witness whose evidence it deemed to be total lies aside from holding her to be a highly probable accomplice given her understandable contention (given the complainant's infancy) that she never left the complainant in the custody of the appellant (sic).

1.5 In believing the complainant's testimony it would seem that the regional magistrate overlooked to note the inconsistencies by the complainant as regards her age at the time of the alleged offence which would in turn throw grains of dust on her overall recollection of events (sic).

1.6 The court *a quo* also handled the trial on the conviction that the complainant was eleven (11) years old at the time of the alleged offence when she was in fact six (6) years old. It is contended that the trial court is likely to have handled facts, circumstances, evidence and/or the complainant's testimony with a higher degree of caution had it taken into account the complainant's real age at the material time.

1.7 The trial court also omitted to enquire into the fate of the alleged blood stained skirt, if at all it ever existed. This is more particularly so if regard is had to the fact that the appellant was a self-actor and the dress is on record for alleged giving rise to criminal proceedings against the appellant (sic).

1.8 The learned regional magistrate therefore overlooked the fact that the appellant's conviction and consequent sentence is extremely unsafe at law on the least (sic)."

Background

It is necessary before dealing with the specific grounds of appeal advanced on appellant's behalf, to correct appellant's apparent mis-reading of the evidence on record. This can be achieved by going over the facts proved at trial. It may well have arisen from the fact that appellant's counsel was not part of the trial proceedings being briefed only after the appellant's conviction and sentence. That, however, on its own, cannot excuse the distortion of the record of proceedings.

The record reflects that the complainant was born on 19 June 1987. The official report to police was recorded sometime in January 2002. The crime, according to the complainant, was committed during December 1998. She then left the village in Goromonzi, where the offence was committed, sometime in 1998 during the school holidays. She had, soon after the offence, been threatened by the appellant. Later, the appellant brought her clothes from his residence in Goromonzi to Chiswiti, Mount Darwin, Mashonaland Central. Complainant's aunt took the clothes from where the appellant had left these at a shop. She noticed on complainant's skirt, a washed blood-stain and alerted complainant's mother. Upon being quizzed, the complainant revealed how she was raped by the appellant on two occasions. A report was made to a local police base in Mount Darwin. Police at Juru, in Mashonaland East only recorded the official report in about January 2001. It is clear that complainant was 11 years old when she was raped, not 6 years as suggested by the appellant in his heads of argument. She was actually 24 years when she testified at trial not 19 years as she states in her evidence in court. The trial court found these facts proved. It is therefore erroneous to suggest that she was only 6 years when she was raped. The report was made around the time she came to her parents' village in 1998 which would make it contemporaneous with the events regarding the discovery of the blood stain. The police report was made, around January 2002 going by the CR reference for Juru Police. The report to Juru came well after the report to the police base Chiswiti in Mount Darwin which report was made immediately after the discovery of the offence. The report to police was, at the very latest, made some two years after the offence was discovered but after an earlier report had been filed with a local police base in Chiswiti.

The finding in favour of complainant's credibility was challenged on the basis of the report complainant made to her aunt and, subsequently, to her mother. This followed the discovery of blood-stained clothing which appellant had brought. She was 11 years then. That report included details as to how the crime was committed on the two occasions she said she was ravished. Corroboration of the report was found in what the second state witness, who is the complainant's aunt, told the court about complainant's description of the circumstances under which the crime was committed. The fact that she gave a consistent account of how she was ravished indicates the degree of probative value to be attached to her report. The formal report to police was recorded in 2001, some two years later, not four years as suggested in the appellant's

second ground of appeal. Complainant was not asked to explain why the police report took so long to make. Her aunt, the second state witness was asked. Her explanation was that complainant's mother went to report to a nearby police base. By inference this would be soon after complainant revealed her ordeal in Chiswiti, Mount Darwin, Mashonaland Central. She testified that this led to acrimony between the complainant's parents. The wife blamed the husband for the complainant's plight as he had sent complainant to stay with appellant. The husband has since died. All this may have, in my view, contributed to the delay in lodging the report at Juru in Mashonaland East, which is the police station administering the village where the crime occurred. There is no suggestion that the report to her mother and to her aunt was not made freely and voluntarily as suggested in the second ground of appeal. This ground was not persisted with in the heads of argument.

Issues of evidence

In convicting the appellant, the court stated in its reasons for judgement;

> "When the alleged offence occurred complainant was aged 11 years old and she testified when she was 19 years old. According to her testimony she told the court that she was raped in the absence of her aunt who had left instructions that she would sleep in the bedroom, and she slept on the floor. Accused then sexually abused her and the following day abused her in the garden while giving him water to bath.
>
> She was threatened to be thrown in a pool full of crocodiles if she discloses hence she kept quite. The matter came to light after a blood stained skirt was discovered among her clothes and when confronted she disclosed."

The thrust of the appellant's dissatisfaction with the conviction appears to be grounded on the acceptance of the evidence given by a child, whether six or eleven years old. It was argued, on appellant's behalf, that the complainant's evidence could not be relied upon because of her age at the time of the commission of the offence. On the other hand respondent's counsel urged the court to reject the appellant's contention since the complainant's evidence met the criteria set out in *S* v *Banana* 2000 (1) ZLR 607 where, at page 616, the Supreme Court stated as follows:

> "(c) Complaints made in sexual cases
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> Evidence that a complainant in an alleged sexual offence made a complaint soon after its occurrence, and the terms of that complaint, are admissible to show the

consistency of the complainant's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant has fabricated the allegation.

The requirements for admissibility of a complaint are:

(1) It must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature. See *R v Petros* 1967 RLR 35 (GD) at 39G - H.

(2) It must have been made without undue delay and at the earliest opportunity, in all the circumstances, to the first person to whom the complainant could reasonably be expected to make it. See *R v C* 1955 (4) SA 40 (N) at 40G - H; *S v Makanyanga* (supra at 242G - 243C).*"*

Flowing from this and other cases cited in this case the general principles which can be gleaned from the court's approach may be stated in the following terms. It is a well-established rule of our law that judicial officers are required to warn themselves of the danger of convicting on the uncorroborated evidence of certain categories of witnesses who are potentially suspect. Complainants in sexual offences is one such category. Single witness cases is another. The fact that the witness is a child would add to the caution required in assessing the credibility of such a witness. This however does not detract from the ability of the court to satisfy itself on the issues of competency when confronted by a child witness. It is not suggested that a court will, in all cases, require a child interviewer to be specialist in order to adduce evidence from a child. There is no principle of law that says it is inconceivable that a child of tender age will not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in future.

As a general rule, it can be said that in a case where a child explains relevant events at the crime scene without improvement or embellishment, and, at the same inspire the confidence of the court, his or her deposition does not require corroboration whatsoever. The child at tender age, it is now accepted, is incapable of having any malice or ill-will against any person. The competency of a child to give evidence is determined by the common law. It relates to whether the child has sufficient intelligence, sense and reason in order to understand the difference between truth and falsehood and recognise that it is wrong to lie. This is determined by the

presiding judicial officer after the judicial officer, as well as the prosecution and defence, have had an opportunity to question the child.

In my respectful view, this position is in accordance with Article 12(1) of the UN Convention on the Rights of the Child, 1989, which states:

> 12.1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

There are, however, two restrictions to the rights in Article 12(1) namely that the rights are only extended to children who are capable of forming their own views and those views are only given due weight according to the age and maturity of the child in question. The courts can rely on evidence tendered by a child if it inspires its confidence and there was no embellishment or improvement in it.

The complainant was questioned by her mother as to how she had lost her virginity. At first she maintained her silence. She expressed the fear induced in her by the appellant that she would be thrown into a crocodile infested river should she tell anyone what he had done to her. After being assured that she was not returning to stay with the appellant, the complainant then divulged, in detail, how she the appellant had raped her. In my view there is nothing to suggest that the requirements set out in *Banana's* case (supra) were not met. The fact that thereafter the complainant told her story tends to confirm her naivety, which in turn lends transparency to the truthfulness of her evidence.

The first ground of appeal is that the magistrate failed to observe the "cautionary rule", especially in regard to the evidence of children. I have expressed my view as to the admissibility of evidence by children in general and the particular evidence tendered by the complainant in the present matter. I dismiss this ground out of hand. The competency to give evidence displayed by the witness in my view, removed any fear that may have been entertained when the matter was not reported at the earliest possible opportunity. She had been threatened by her assailant. She was 11 years then. It is quite clear that the magistrate had considered the issues of capacity and suggestibility at the time complainant made her initial report. He carefully analysed the evidence placed before him and treated it with caution, seeking corroboration of the evidence of the

complainant, both on the ground of her youth and on the ground that she was the victim in a sexual offence. He accepted that evidence. I find no misdirection in his doing so.

Counsel for the appellant maintains that the magistrate failed to observe this evidential requirement and thus did not exclude the possibility of false incrimination. I will consider this contention in detail presently. There is no basis for the argument regarding the age of the complainant being 6 years. She was 11 years old. As pointed out above, there is no rule excluding young children from testifying in sexual offences; or adults, from relating in court what happened to them when they were children of a given age. The capacity of a child to form his or her views does not mean that the child must be fully developed to do so since it is up to the court only to give weight to the views expressed by a child in accordance with her age and her maturity. The question to ask is whether the child is in a position to form a view on an issue in question and not on a whole range of possible issues in a particular case. This is the basis upon which, over the years, the evidence of children has been relied upon, with necessary assistance in appropriate cases, to determine the question of sufficiency of evidence in such cases as rape where the child was the victim. In any event, complainant in the present case was 24 years when she gave her evidence. She was testifying to her experience several years ago. Her evidence was sufficiently corroborated by her aunt. I find no misdirection in the acceptance of her evidence by the court *a quo*.

The rest of the grounds of appeal attack the findings of fact made by the trial magistrate. Appellant is not on firm ground. I say so because it is a well established rule of procedure that on appeal an appellate tribunal will disturb the findings of fact only when there are demonstrably wrong. Criticism was levelled at the learned trial magistrate's findings rejecting both the appellant and his wife's evidence. Upon a perusal of the evidence on record, I am not prepared to hold that the learned magistrate was wrong in disregarding it.

The appellant seemed to suggest that the court was not entitled to rely on the testimony tendered by the complainant on the basis that she was of tender age. Clearly she was not when she gave that testimony. She was 24 years old when she testified, as confirmed by her birth certificate produced in court. In any event no authority for this submission was cited. Even if the suggestion was that her initial report to her aunt was given when she was a child, the court can rely on the evidence tendered by a child if it inspires confidence and there was no embellishment

or improvement in it. The law on the issue can be summarised as being that the testimony of a child witness may require corroboration, but in case his or her deposition inspires confidence of the court and there is no embellishment or improvement therein, the court may rely on his or her evidence. The evidence of a child must be evaluated more carefully and with greater circumspection because he or she is susceptible to suggestions and other influence more easily than an adult. Only in the case where there is evidence on record to show that a child has been so influenced, will the court be justified in rejecting her testimony partly or fully. However, the inference as to whether a child has been coached or not, can be drawn from the content of her evidence. There was no evidence that she had been coached or influenced in her testimony. The complainant gave her evidence when she was an adult. The criticism levelled against her, therefore, is unjustified. Even if it did, for the reasons I have given, I find no fault in her evidence both at law and in fact. The trial court, correctly in my view, and for the reasons it gave, accepted her testimony and rejected that of the appellant. Only in the case where there is evidence that the child has been tutored or coached on record can the court reject his or her evidence, partly or fully. However, the inference as to whether a child has been tutored or coached or not can be drawn from the content of his or her testimony. In the present case there is no suggestion that the record in some way reflects such an irregularity.

Since complainant was testifying to events which occurred over a decade before, her evidence required to be treated with caution. The trial court, in my view, was alive to the danger which passage of time wrecked on memory. The learned trial magistrate sought corroboration of her evidence regarding the event in issue. It found sufficient corroboration in the reference to the blood stained dress which aroused the suspicion from complainant's aunt, the subsequent account given by the complainant in explaining the stain and the medical examination report which confirmed penetration of her vagina.

The significant facts that were revealed by the examination were:

(1) it was confirmed that the complainant had lost her virginity; and

(2) she was not currently sexually active (the examination was painful).

Her explanation fits in with her version of events. The fact that she was not sexually active suggests that penetration occurred in the distant past rather than recent past. The question as to who penetrated her is answered in the consistent explanation which she gave from the

moment the blood-stained skirt was discovered. When asked to explain the blood stain, her first reaction was to express her fear of being dumped into a crocodile infested river by her uncle. It is only after she was assured that she was not returning to stay with him that she narrated her ordeal. In my view, the absence of the blood-stained clothing did not detract from the sufficiency of the evidence placed before the court *a quo.* The conviction was not based on the blood stained clothing, but it was a piece of evidence that triggered the suspicion leading to the discovery of the crime. How the production of this piece of evidence could, in some way, be exculpatory of the appellant is not clear. I am unable to find that the failure to produce the piece of cloth in evidence during trial in any was affected the propriety of the conviction. Had it been produced, then it would have corroborated the evidence tendered in support of the conviction rather than exculpate the appellant.

Some oblique reference was made to the failure to bring the appellant to trial within a reasonable time as required by s 18(9) of the old Constitution of Zimbabwe. First, this ground was raised for the first time in the heads of argument when addressing sentence only. Second, no notice of the intention to raise a constitutional point was given to the respondent. As such it was not persisted with at the hearing of the appeal and therefore did not fall for consideration. - See *S* v *Nkomo & Another* SC 52/06.

As for sentence, the ground of appeal advanced was that the trial court failed to give due weight to the age of the appellant, and the period which he spent awaiting trial when assessing an appropriate sentence. I am unable to find merit in this ground. The trial court specifically mentioned those factors it considered mitigatory when assessing sentence. Age was identified as one such factor. The court also correctly gave due weight to the fact that it would treat both counts as one for sentencing purposes. Generally sentences of 10 years imprisonment per count are a regular feature in cases of this nature. See: *S* v *Moyo* 1992 (1) ZLR 158 (HC); *S* v *Chuma* 1994 (2) ZLR *2*84 (SC).

The *Criminal Law (Codification and Reform) Act, [Chapter 9:23]* provides for up to life imprisonment for this type of offence. Where, therefore a shorter sentence is imposed, with an indication that the sentencing court exercised its sentencing discretion properly, an appellant would have to show more than just that another court would have imposed a different sentence in the circumstances. An appellant would have to demonstrate clearly that the sentence impugned

was, in one way or the other, out of line with the usual sentences imposed in similar cases. Without that an appeal court would not interfere with a sentence simply because it felt that it would have imposed a different sentence.

In light of the above, I dismiss the appeal in its entirety.

MAVANGIRA J agrees.

Masawi & Partners appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners