PICKSON SITHOLE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 29 January, 2014

Criminal appeal

C. Daitai, for the appellant
I. Muchini, for the respondent

BERE J: This appeal stems from the conviction of the appellant on a charge of indecent assault as defined in s 67 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Upon his conviction the appellant was sentenced to 18 months all of which was suspended on conditions outlined by the court *a quo*.

This appeal is against conviction only.

The appellant has raised a single ground of appeal which is basically that the learned Magistrate erred in reading the evidence led in the court *a quo* to justify the verdict of guilty. The appellant's position is that the evidence led ought to have resulted in the appellant's acquittal.

In this appeal the analysis of the evidence by the learned magistrate came under heavy criticism from the appellant.

Faced with such an appeal the first port of call must be the examination of the judgement of the court *a quo* relative to the evidence adduced by both the State and the appellant.

A simple perusal of the judgement of the court *a quo* clearly demonstrate the learned Magistrate's alerteness to both the legal issues involved and the facts that were presented to him.

In a well reasoned judgement the learned Magistrate adequately explained why he found the evidence of the three state witnesses to have been beyond reproach. A simple perusal of the whole record of proceedings supports the finding of the court *a quo* particularly if regard is had to the general tenure of the witnesses evidence given the fact that this offence

is alleged to have occurred during broad day light and in the full glare of the witnesses who gave evidence in support of the story told by the complainant.

One of the criticisms raised against the presiding Magistrate was his alleged failure to call independent witnesses. This is despite the fact that the appellant himself conceded that these allegations are supposed to have happened in the school corridor where only other students were. There is deliberately no reference to the particular independent witness(es) desired by the appellant. The appellant's argument becomes even more suspicious it regard is had to the fact that even when his turn came to give evidence he decided not to give himself the benefit of the so called independent witnesses. Such was the hopelessness of the stance taken by the appellant.

More importantly, the learned Magistrate made a specific finding that the giving out of money to the complainant privately, was indicative of further solicitation by the appellant. That reasoning in my view cannot be faulted. The idea of a school teacher (the appellant) secretly giving a 15 year old money without the approval and or knowledge of such a child's parents does portray the appellant in bad light given the nature of the allegations made against him. Like the court *a quo* found, it puts the appellant closer to the commission of the offence charged.

It will be noted that when the appellant gave his evidence in chief he jumped from one explanation to the other in an effort to project the State witnesses as having conspired to nail him. One wonder why all these several explanations were never made part of the defence outline. One cannot help gets the impression that the appellant was trying to improve his story as the trial unfolded.

The learned Magistrate was certainly correct in characterising the nature of the appellant's defence as one of bare denial.

It is not possible for this appeal court to interfere with findings of fact specifically made by the trial court because in my view such findings were well anchored. The findings were consistent with the evidence led.

I can only conclude by borrowing the remarks made by my brother BHUNU J when he stated:

> "It is trite in our law that an appellate court will not interfere with the findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage position of having seen and heard them[1]."

This is one case where I feel that the evidence was so overwhelming as against the

appellant that the appeal was deemed to fail from the onset.

In passing I wish to say that the appellant was lucky to get away with such a lenient sentence.

The appeal is dismissed.

HUNGWE J agrees ……

Messrs Mhungu & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's counsel