HH 455/17
CA 702/13

SHELTER CHIMUSARU
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 25 March 2014 & 30 August 2017

Criminal Appeal

O.M. Simango, for the appellant
Mrs S. Fero for the respondent

BERE J: The appellant appeared before a Magistrates' Court sitting at Bindura charged with the offence of contravening section 66 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] – aggravated indecent assault (5 counts).

At the conclusion of the trial the appellant was convicted on the first 2 counts and acquitted on the 3rd to 5th counts. Count 1 and 2 were taken together for purposes of sentence resulting in the appellant being sentenced to 12 years imprisonment 3 years of which were suspended on the usual conditions of future good conduct leaving her with an effective sentence of 9 years imprisonment.

Aggrieved by both conviction and sentence the appellant has now approached this court on appeal.

In bringing this appeal the appellant initially raised 6 grounds of appeal which she reduced to 4 at the hearing. The 4 grounds of appeal are as follows:

> "(i) The court *a quo* misdirected and erred itself in treating the complainant as a witness who could be comprehended and capable of giving coherent evidence when the evidence placed before the court showed that the complainant was mildly mentally retarded. In fact the court erred in failing to treat the evidence of the complainant with caution as he was confirmed to be a mentally retarded person.

(ii) The court *a quo* erred and misdirected itself in treating the complainant's evidence selectively in that, for the purpose of giving evidence in chief the court ruled that complainant's testimony was coherent and credible but for the purposes of sentencing the court reasoned that complainant was mentally retarded.

(iii) The court *a quo* erred and misdirected itself in convicting the appellant on the basis that she had made threats of stabbing complainant when in actual fact the evidence before the court and that of the complainant failed to establish that the appellant made threats which induced the commission of the offence in question, and that,

(iv) The totality of the evidence presented before the court did not prove beyond any reasonable doubt that the appellant indecently committed the offences as charged."

The Prosecutor General's office represented by *Mrs Fero* has indicated that it does not support the conviction and in this regard has filed the appropriate notice and reasons for so doing in terms of section 35 of the High Court Act[1]. A proper analysis of the evidence which was tabled before the court *a quo*, in our view supports the position adopted by the respondent.

In this court's view the first monumental error which was made by the court *a quo* was to treat the complainant as an ordinary and normal witness despite the court having been furnished with sufficient medical evidence which projected the complainant as suffering from mild mental retardation and epilepsy.

Both doctors who examined the complainant concluded that the complainant was mentally retarded and it is difficult to imagine how the learned magistrate in his judgment attempted to gloss over the two medical reports by suggesting without the aid of *viva voce* evidence from the doctors that the complainant gave comprehensible evidence. If the learned magistrate wanted to take this line of reasoning, the best he could have done was to call the doctors to testify in court and assist on the possible limitations of the complainant.

1. Chapter 7:06

As correctly observed by the respondent's counsel, section 246 of the Criminal Procedure and Evidence Act[2] does exclude the complainant from giving evidence in court because of the inherent dangers of the evidence of such persons.

For clarity sake the section is framed as follows:

> "246. **Incompetency from mental disorder or defect and intoxication**
>
> No person appearing or proved to be afflicted with idiocy or mental disorder or defect or labouring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of reason shall be competent to give evidence while under the influence of any such malady or disability."

It is amazing how the court *a quo,* faced with such a witness and unaided by medical evidence could have concluded like it did that the complainant gave his evidence well to the extent of relying on such testimony to secure the conviction of the appellant.

Given the nature of the allegations which were preferred against the appellant, the evidence of the complainant was critical and decisive on its own.

It is the court's view that on the shortcomings of the complainant's testimony alone as highlighted it was not possible for the appellant to have been convicted.

Secondly and more importantly, the record will show that it was as a result of probing of the complainant by his mother that he then disclosed the alleged sexual abuse. The "thrush" which led to the pointing of the appellant as the cause of same was never brought to the attention of the appellant to enable him to have exercised the option of himself being medically examined to try and exonerate himself. The failure of justice that occurred in the instant case is similar to what McNALLY JA noted in the case of *S* v *Munemo*[3] when he remarked:

2. Chapter 9:07

3. 1992 (2) ZLR 222 at 223 (A-B) (S)

> "… there had been a failure of justice in that the appellant had not been informed that the complainant had a sexually transmitted disease so that he had the chance to be medically examined and by doing so perhaps establish his innocence. The investigating officer had also lost a golden opportunity to test whether the appellant was the culprit by inviting him to undergo medical examination …"

In conclusion, whichever way one looks at this case, the inevitable conclusion is that the appellant was wrongly convicted.

Consequently, the conviction and sentence is quashed and the appellant is found not guilty and acquitted.

Hungwe J ……. I agree

W O M Simango & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners