SIMPSON MUTIZE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 22 November 2018 & 5 June 2019

Criminal Appeal

A Rubaya, for the appellant
E Mavuto, for the respondent

HUNGWE J: The appellant was convicted of one count of rape[1] and two counts of aggravated indecent assault[2] after contested trial. He was sentenced to twelve years for rape and five years imprisonment in count two and six months in count three in respect of the aggravated indecent assault charges. He appeals against both conviction and sentence.

In his grounds of appeal the appellant attached the judgment of the court on finding that the complainants and the other State witnesses were credible. This ground of appeal was made in not less than ten paragraphs in two pages. The learned trial magistrate responded to these grounds in equal measure. Whilst her judgment is six page long, the reply to the grounds of appeal is three pages. The length of the judgment should not fool anyone reading it. As compared to the voluminous transcribed record, it might appear short. It condensed findings of facts on all the critical issues in a rape trial. It dwelt on the issues relevant to each disputed fact and made appropriate conclusions of law.

The learned trial magistrate found the following facts to have been proved.

[1] As defined in s 65 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].
[2] As defined in s 66 (1) (a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23].

Nicolate Maziwisa's evidence established that the appellant was a neighbour to the complainants. He called her to come and assist him harvest his crop of onions. When she obeyed him, the appellant came behind her and took out his male organ and placed it between her buttocks. At the same time he would insert his fingers into her vagina without her consent. The two complainants were aged ten and nine years at the time.

On another date he called Alicia Mlambo into his house. She had been playing with her two friends outside. These friends are the complainants in respect of the rape and indecent assault charges. When she got inside, the appellant had sexual intercourse with her without her consent. He then gave her biscuits, but she threw these away and ran home.

In respect of Rumbidzai Gumbo, she and Nicolate were passing by accused's residence. He asked the two children to assist him clean his house. The two children dutifully offered their services to the old man. As the pair went on about their voluntary task, the appellant fondled the complainant's buttocks against her will. He gave them some money with which they bought snacks.

In each case no immediate report was made to either the parents or the authorities. These events emerged when an alert parent casually put questions to her daughter, Nicolate. This revelation lead to the other children disclosing what the appellant had done to them. The parents made a report to Police. Police ordered medical examination of all three children. In respect of Alicia Mlambo the examination found that her hymen was attenuated, that is stretched. There was no evidence on the other two children either way.

In coming to the conclusion that the complainants were credible, the trial magistrate reasoned that there was no evidence of prior animosity between the complainants' parents and the appellant. There had been a good rapport between the children and the appellant as evidenced by their voluntary services to him upon request. He was an ordinary elder who deserved the children's respect and help. The children did not implicate some other persons besides the appellant when they were asked about improper conduct.

In the trial court's assessment, Alicia was a clever little girl who knew exactly what she was about. She ably withstood persistent questioning during cross-examination. She gave the clearest evidence of what happened compared to the other two. The magistrate noticed that her

efforts in using the anatomically correct dolls were aimed at demonstrating how appellant effected penetration. She used her finger.

The magistrate took account of issues of demeanour when assessing the credibility of the children. She took into account the need to exercise caution when assessing the testimony of children. She cited relevant case authority as guidance for her approach. She correctly applied the rules of evidence where a court was dealing with young girls in sexual offences. The magistrate correctly considered as sufficient corroboration, the fact that each of the three children gave the same method by which the old man lured them into his house and gave them biscuits. He was found to have this confectionary at the time of the investigations into the cases. She took note of the inconsistences in the evidence of the children but was satisfied that this could rationally be accounted for. The incidents did not take place when all three were present in a room at the same time. One cannot, in any event, expect children to able to recount such embarrassing events with photographic detail. The delay in report was well accounted for. They were not expected to know how to handle such socially embarrassing situations.

In Munyaradzi Kereke v The State[3] I had occasion to observe as follows:

> "There are many reasons for not reporting or delaying a report. Victims are faced with the decision to contact the police in the immediate aftermath of a rape, when they may be traumatised and are trying to make sense of what has happened. In the aftermath of the rape victims experience a wide range of physical, psychological, and emotional symptoms both immediately and in the long term[4]. These symptoms may include fear, anxiety, anger, depression, phobias, panic, disorder, and obsessive compulsive disorder. A rape victim may experience all, some or none of these reactions[5]**.** As a consequence, victims may behave in a manner that appears counter intuitive, but is in fact merely a normal expression of the victims' unique strategy of coping with the overwhelming stress of the assault."

I find that these remarks apply with equal force in the present matter.

The learned trial magistrate clearly applied the relevant principles of law in her determination of the issues of credibility. A witness is not to be adjudged as untruthful merely because she cannot recall a minor detail correctly or because she could have handled the situation in a better way than she did when she was in the throes of anguish.

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[3] H-H-374-19

[4] Shirley Kohsin Wang, et al, World Health Organization/Sexual Violence Research Initiative, Research Summary, Rape: How Women, the Community and the Health Sector Respond 2 (2007).

[5] Patricia L. Fanflik, Nat'l District Attorney Association, Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive? 5 (2007) (citing Patricia Frazier, The Role of Attributions and Perceived Control in Recovery from Rape, 5 Journal of Personal & Interpersonal Loss 203, 204 (2000)).

Credibility is relative. One cannot expect a child witness to fare as well as an adult woman when subjected to rigorous cross-examination by seasoned counsel. The yardstick must and need to be different. The bottom line in each case is whether the truth has been told and whether the witness ought to be believed when she says her assailant is the accused. A court seized with such a task must weight all the available evidence given both against the accused as well as in his favour and including the evidence which is ultimately disbelieved. All the evidence must be taken into account in deciding the probabilities of the case.

What I find critical in this case is that although there is no onus on the appellant to prove anything it is curious that when he was asked to give his defence he gave a bare denial. Even as he was being led by his own legal practitioner, he was asked to narrate his version so as to controvert the evidence given by the complainants in respect of the crucial issues. He failed to rebut that evidence by placing before the court a version which could cast some doubt in the version given by the children.

He admitted that the young girls indeed helped him to harvest his onion crop. He offered them biscuits for their help. He denied the allegation of indecently assaulting Nicolate on this occasion by stating that he did not know of the incident. He hid behind the claim that he was sexually inactive and therefore he could not have done what was alleged he did. His wife testified to the lack of enjoyment of conjugal rights with her husband. That is beside the point. If, as he indicated, his grandson was present on the occasion when the girls helped him harvest onion, he may have assisted him in rebutting the clear evidence by the children. His wife clearly was unable to say how the harvesting of onion proceeded. She was not there. The children were there.

Trial courts enjoy a unique advantage by virtue of their role as triers of fact. They are seized with a fact-finding duty at the beginning of litigation. In that role they see the parties, they feel the atmosphere of what happened as they are immersed in the action of the day in question. They feel what the complainant felt by observing the demeanor of the complainant as she testifies. They compare that with the blank-faced and stone-walled denial given by an accused who may choose to test the State case by denying each and every allegation of the offence charged. The trial court's patience may be tested to the limit by the accused who denies the obvious.

In all this, a record of proceedings is kept so that as an appeal is presented, an appellate court may have an insight as to the quality of evidence led leading to a conviction. Volumes and

volumes of paper with black letters cannot imbue an appeal court with the environment which was created by the trial when each player acted his part and left the stage. Only an officer presiding over a trial enjoys the unique advantage of gauging the environment in which a witness' demeanor made its mark and persuaded the umpire to rule one way or the other.

This is the reason why, on findings of credibility an appellate court generally defers to the trial court's findings of fact unless the findings are so wrong that no court applying its mind to the facts could have come to such a finding.

In light of the above I am unable to state that the findings on credibility by the court *a quo* were so grossly irrational that no court faced with the same facts could have made such findings on credibility. I therefore am unable to disturb the conviction on each count.

As for sentence the submission was that the trial court did not give due weight to the mitigatory factors in this case and therefore imposed an unduly harsh sentence. We were not referred to any case authority for the submission that the sentence was unduly harsh. It is not unduly harsh when regard is had to the sentencing trends in similar cases. Rape of children has been widely condemned in our society. The legislature has provided for life imprisonment. The courts have however been reluctant to impose this maximum sentence. I believe that time is now ripe for a sentencing guideline making it a minimum sentence where this crime is committed on children. I make this remark because of the devastating effects of rape on minors. In *Kereke's* case[6] I remarked:

> The intimate and personal nature of this act makes this a particularly reprehensible form of assault involving not only the application of force to the body of the victim but, by ignoring the unwillingness to engage in sexual penetration, also a serious invasion of privacy and autonomy[7]. The effects of a sexual assault are considerable. Studies have shown that rape victims frequently suffer from a "rape trauma syndrome," a condition involving the deep disruption of the victim's life patterns and thought-processes, not just in terms of the physical effect of rape (physical pain, inability to sleep, prolonged distress) but also in terms of the effects on emotional, spiritual well-being (new found fears, mistrust of surroundings and other people, embracement, and so on.)[8]

[6] Note 3 supra at page 13 of the cyclostyled judgment
[7] CMV Clarkson, Understanding Criminal Law (2001) 208.
[8] See J Tempkin, Rape and the Legal Process 2nd Ed (2002); D Hanson, What is rape Trauma Syndrome? (1992); Rape Trauma Syndrome: A Psychological Assessment for Court Purposes (199).

The grave nature of rape cannot be over-emphasized. Consequently I am unable to find any undue harshness in the sentence imposed.

However, I am of the view that in light of the fact that the offences were committed around the same time, and that they are all of a sexual nature, in order to ameliorate the length of the resulting sentence, the trial court ought to have ordered the sentence on count 2 and 3 to run concurrently with that in count one before suspending the 3 years portion. Notwithstanding the granting of the crime, the fact of the matter is that the appellant is of an advanced age. I do not believe that after his release he will pause any danger to children as he did before.

Consequently, the sentence imposed on the court *a quo* is set aside and in its place the following is substituted.

Count 1: 12 years imprisonment.

Count 2: 5 years imprisonment.

Count 3: 6 months imprisonment. The sentences in count 2 and 3 are ordered to run concurrently with that in count one. Of the 12 years, three years is suspended for 5 years on condition the accused does not during that period commit any offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine.

WAMAMBO J authorises me to state that he agrees with his judgment.

Rubaya & Chatambudza, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners