ITAI CHIRADZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 3 & 17 July 2018 and 30 January 2019

Criminal appeal

W Chishiri, for the appellant
R Chikosha, for the respondent

WAMAMBO J: The appellant and his co accused were convicted of rape as defined in s 65 (1) (a) of the Criminal Law (Codification and Reform Act [*Chapter 9:23*]. He was sentenced to 5 years imprisonment of which 2 years imprisonment were suspended on condition of good behaviour while his co accused was sentenced to 15 years imprisonment of which 3 years imprisonment were suspended on conditions.

Dissatisfied the appellant now appeals against both conviction and sentence.

The appellant was charged with one Tichavaona Chiutsi (hereinafter called Tichaona). The charge sheet reflects that the complainant is a mentally incompetent female person.

The grounds of appeal against conviction are six in number. Most of them are either not clear and specific or are a repetition of one or more of the other grounds.

What comes out of the grounds of appeal however is summarised below:-

The trial court should have exercised caution regarding complainant's unreliable and inconsistent evidence.

The trial court erred in dismissing appellant's explanation that he was mentally disabled and was taken advantage of by his co-accused.

The trial court erred by finding that appellant caressed complainant and thus took part in the rape, when complainant states that she was drunk and that her eye sight was poor.

The trial court erred by finding that appellant should have realised that complainant was of unsound mind when he is a mentally disabled person himself.

On sentence the appellant raised grounds that the trial court imposed a harsh sentence in the circumstances. Further that the trial court did not fully consider the mitigatory circumstances including that applicant was a 28 year old first offender with a mental disability.

The State did not support the conviction and filed a concession in terms of s 35 of the High Court Act [*Chapter 7:01*].

The State was alert to the fact that appellant was convicted as an accessory to the commission of the crime of rape. The State's position is that if complainant could be taken advantage of because of her mental condition why did the same court not find that appellant was also taken advantage of as he suffered from the same mental condition as complainant.

The State is of the view that it was not established that appellant could "defy, resist or disobey" his co-accused's instructions, and that the reports and medical affidavits produced as exhibits were never commented on or analysed by the trial court on their evidential value. The State also cited a number of cases notably *S* v *Katoo* (2004) ZASCA 109 (2006) 4 All SA 348 (SCA), *S* v *Machona* HH 450/15, *S* v *Chabala* 2003 (1) SACR 134 (SCA), *S* v *Mutizwa* HH 302/15.

The trial court should have called a psychiatrist to testify on the examination conducted on appellant and regarding his understanding of sexual intercourse and the ability to differentiate between the truth and falsehoods, so the State argued.

The defence cited the case of *S* v *Makanyanga* 1996 (2) ZLR 231 (H). The appellant's defence outline reads as follows:

He did not know complainant prior to her being brought by Tichaona to his residence Tichaona introduced complainant as his girlfriend. Appellant who was cleaning the yard advised the two to sit in his room and he would join them after completing his chores. The two went to his room and when he later went to join them he found then having sexual intercourse. He rebuked them leading to Tichaona apologising. When the two were having sexual intercourse the appellant observed no resistance from the complainant. The appellant Tichaona and the complainant had a meal which the appellant prepared. They were at this juncture joined by Simon. The appellant retired to bed and requested that the three should close the door once they left the room. Two hours later he woke up to find Simon sleeping by his side while Tichaona and complainant were on the floor having sexual intercourse. He asserts that he was taken advantage of by Tichaona because Tichaona knew he was of an unstable mental disposition. He never touched, drugged, caressed or had sexual intercourse with the complainant.

The evidence of the complainant does not quite complement or support the version tendered by the appellant.

The complainant's evidence is as follows:-

She was at Chicken Slice when she heard a driver calling a conductor called Tichaona. She was in a Dzivarasekwa-bound omnibus when she overheard the two saying they were looking for passengers to Warren Park. She wanted to disembark, as this was not her destination but appellant's co-accused advised her that he would look for another omnibus for her. They proceeded to Warren Park and appellant's co-accused took her bag. When she demanded it back he became angry and refused with it. They proceeded to a house with a black gate where they met appellant and one, Simon. She pestered Tichaona for her bag up to the stage where she followed Tichaona into the house. Tichaona had proposed love to her but she had refused. While in the house Tichaona gave his cousin (apparently appellant) 50 cents he took from her to go and buy cigarettes. Meanwhile Tichaona forced her to drink a beverage containing both raspberry and Zed flavours. She stated feeling dizzy and started viewing blue objects. Tichaona then raped her twice, while his uncle also raped her once. Appellant was instructed to hold her body and he caressed her from the breasts till her thighs. She could see appellant doing this. When Tichaona raped her, appellant was in the room seated on the bed smoking a cigarette. Contrary to the defence's assertion that complaint did not see appellant touching her because she was drunk and her eye sight was poor, the complainant's evidence proved otherwise.

Although there was some confusion in complainant's testimony what emerges in cross examination is that complainant persisted that appellant touched her. She even went further to testify that she asked appellant why he was touching her. Complainant, also never waived in her testimony in asserting that she was raped in appellant's presence. The complainant's mother testified to the effect that her daughter told her that appellant fondled her breasts.

That complainant's mother focused on the fondling of breasts while complainant herself testified that he fondled her from the breasts up to the thigh is of no moment. It is basically a matter of detail

Section 76 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23]* reads as follows:

> "76. Complicity in sexual crimes.
> For the avoidance of doubt it is declared that any person who
> (a) being the owner or occupier of any premises knowingly permits another person on the premises to commit rape, …… or
> (b) ……. ……..may be charged with being an accomplice or assessory to the commission of the crime concerned ……"

The evidence led through the complainant implicates the appellant on the face of it as an accessory or accomplice for the following reasons:

- It was at his home in his room where the events unfolded while he was the occupier of the room;
- He permitted Tichaona to commit rape in his room and sat and smoked, while the rape occurred;
- He went to the extent of caressing complainant's body in the ensuing circumstances of rape;
- He did not dissuade Tichaona from his actions.

Appellant's version of events has also been considered. His version is unsound and vague. At one moment in his version he is telling the other three to close his door while he sleeps and the next thing he discovers himself on the bed watching complainant and Tichaona having sex.

There is an exaggeration in the explanation when appellant avers that he did not observe any resistance from complainant when she was having sexual intercourse with Tichaona. This is clearly in the manner of supporting his friend and attempting to exonerate him from any wrongdoing. Complainant testified that Tichaona and Simon raped her while appellant's role was to caress her and also witnessing the rape in his own room. There is no reason proferred, nor can I fathom any, why appellant was not also implicated of the rape but was given a limited role unless it is true. Complainant's testimony was consistent on appellant's role.

Appellant appears to distance himself by asserting that Tichaona and complainant were left alone and embarked on sexual intercourse. He goes further to say he rebuked them from the exercise. This evidence has a ring of self preservation.

We are therefore of the considered view that appellant actually touched complainant in his room when the rape was perpetrated and that he was complicit in the rape as he sat and watched the rape and did nothing to stop it. Reading between the lines it appears that appellant was instrumental to some extent to the unfolding of the events leading to the rape.

The question still has to be asked whether in being complicit to the rape he did it knowingly. This goes to the issue of his mental state and capacity.

Appellant was examined by a medical practitioner one Doctor Moses Kasano in terms of the Mental Health Act [*Chapter15:06*] who found upon examining that he had "mental retardation, hallucination or orentation time and place" (*sic*).

A psychiatric Nurse Kwangwari Phineas also complied a report to the following effect;

> "rapport easily established, well groomed, his fund of knowledge is limited. Was in special class at school. Well orientated to time place and person. Denies any form of hallucination denies substance abuse."

It is to be noted that the two reports by the Doctor and Psychiatric nurse respectively were compiled on the same day on 19 January 2017.

There are three other documents produced as exhibits and in support of appellant's mental state. There is a report from St Giles Rehabilitation Centre titled "Confirmation of assistance: Confidential" date stamped 27 February 2017 relating to one Never Chiradza who was born on 20 November 1988. Never is said to be the same person as the appellant. This document reflects that Never scored an IQ score of 51 which translates to Intellectual disability (formerly known as mental retardation).

It goes further to aver that "intellectual disability is a condition of limited mental ability whose major feature is a difficulty in intellectually adapting to demands of life".

Another document drafted by a clinical and assistant psychologist from St Giles Rehabilitation Centre states the reason for referral as "Psychologic, re-assessment in view of learning difficulties". This document is date stamped 27 February 2017.

As the title suggests this report is focused on learning difficulties and not the present matter. The emphasis is on his learning difficulties and what progress he had made in basic arithmetic, spelling tests, word reading amongst others. The other document is an identification card reflecting the name Never Tayisekwa Chiradza and the date of birth as 20 November 1988.

The circumstances of the matter require that we closely examine the law in so far as it applies to an accused or an appellant who is alleged to have been a mentally disordered or defective person.

Section 192 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows:-

> "192 Trial of mentally disordered or defective persons.
> If at any time after the commencement of any criminal trial it is alleged or appears that the accused is not of sound mind, or if on such a trial the defence is set up that the accused was not criminally responsible on the ground of mental disorder or defects for the act or omission alleged to constitute the offence with which he is charged, he shall be dealt with in the manner provided by the Mental Health Act [*Chapter 15:06*]."

Section 2 of the Mental Health Act provides as follows:-

> "mentally disordered or intellectually handicapped in relation to any person means the person is suffering from mental illness arrested or incomplete, development of mind, psychopathic disorder or any other disorder or disability of the mind."

Also see s 29 of the Mental Health Act [*Chapter 15:12*] and sections 226 and 227 of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

In the *State* v *Jacob Chikandiwa* HH 281/17 at page 4 HUNGWE J said:-

> "In discharging the onus upon it the State is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which could ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged *actus reus* and if involuntary, that this was attributable to some cause other than mental pathology. See *S* v *Stephen* 1992 (1) ZLR 115 (HC). See also *S* v *Trickett* 1973 (3) SA 526 (T) at 532 G – 533A, 537 D-F. It follows that in most if not all cases medical evidence of an expert nature will be necessary to lay a factual foundation for the defence and to dispute the inference just mentioned. (See also *R* v *Romeo* [1991] SCR 86 where the court held that an accused is presumed sane until the contrary is proved, *R* v *Chaulk* [1990] 3. SCR R 1303. Insanity to be proved on a balance of probability, sanity is presumed by statute).

We have considered sections 2 and 2a of the Mental Health Act [*Chapter 15:12*] sections 226 and 227 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]and related case law and applied these to the circumstances in the instant case.

It is important to note a number of factors as follows

Appellant in his defence outline never raised the defence of insanity. The closest he came to raise it is when he alleged that he was of a unstable mental disposition. This does not by an measure amount to a mental disorder or defect or being mentally disordered or intellectually handicapped.

- The defence outline follows a chronological order of events. Although appellant effectively pushes the blame to his co accused for taking advantage of him implicit, in the defence outline is that of an alert mind cognisant of what is wrong or right.
- There was no oral evidence lead to prove that appellant was mentally disordered or defective

Appellant gave lucid and clear evidence in testimony.

None of the State witnesses was asked in cross-examination to comment on appellant's alleged mental disorder

When Tichaona was under cross-examination by the State he conceded that he was not aware of the appellant being mentally unstable.

Tichaona said under cross examination by appellant's legal practitioners that Tichaona, he knew appellant since 2005 a period spanning over 11 years at the time of trial yet Tichaona insisted that he never knew appellant was a mental patient.

Partio Chiutsi, a defence witness who testified that he has known appellant for a long time also testified that he was unaware of appellant's level of mental intelligence.

When appellant testified in his defence he never alleged that he is a mental patient. He only went as far as saying he is a slow learner who attended a special class at school.

The findings of mental retardation on the part of the appellant contained in the aforementioned report does not amount to finding that appellant was mentally disordered or intellectually handicapped.

Such findings were also not tested by the authors of the documents by giving oral testimony, which would have clarified their findings to the court.

It is also our finding that appellant is a slow leaner but who could fully appreciate the nature and consequences of his actions when he committed this offence.

For the reasons given above we find that appellant does not have a defence to the charge on the ground of suffering from a mental disorder or defect as provided for under s 227 of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

In the circumstances we dismiss the appeal against conviction.

On sentence, in the light of the grounds of appeal, we are of the considered view that the sentence imposed suits the appellant, the offence and the interests of society.

Besides imploring us to impose an appropriate sentence, the appeal against sentence appears to have been feebly pursued. In any case we find no error, misdirection or any basis at law to interfere with the sentence.

In the end we make the following order:

The appeal is dismissed in its entirety.

HUNGWE J agrees ……

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