TARISAYI ZIYAMBE

vs

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & WAMAMBO J
MASVINGO, 19 June & 24th July, 2019

Criminal Appeal

O. Mafa for the appellant
Ms S. Masokovere for the respondent

MAWADZE J: The appellant appeals against both his conviction and sentence.

In count 1 the appellant was convicted of contravening section 67(1)(a)(i) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] (the Criminal Code) which relates to indecent assault. He was sentenced to a fine of $150 or 3 months imprisonment wholly suspended for 5 years on the usual conditions of good behaviour. In count 2 the appellant was convicted of rape as defined in 65(1) of the Criminal Code [*Cap 9:23*] and sentenced to 16 years imprisonment of which 2 years imprisonment were suspended for 5 years again on the usual conditions of good behaviour. Both counts relate to the same complainant then aged 12 years. The 22-year-old appellant was convicted and sentenced on 20 December, 2018 by the Senior Regional Magistrate sitting at Chiredzi.

In the notice and grounds of appeal the appellant seems to be appealing against the conviction and sentence in respect of count 2 of rape only. In the heads of argument and submissions in court it appears the appellant is appealing against both conviction and sentence in counts 1 and 2. This confusion probably emanates from the nature of the sentence which was imposed in respect of count 1 which is payment of a fine wholly suspended for 5 years. Realising this anomaly we called both counsel to clarify this issue and it turned out that the appellant is appealing against both conviction and sentence in both counts.

The grounds of appeal are couched as follows:-

"AGAINST CONVICTION

1. The court erred by convicting the appellant when it was apparent that the alleged report was not made freely and voluntarily. Further the report was not timeously made when the first opportunity presented itself. The allegations therefore do not meet the threshold required of a valid rape report.

2. The court erred in convicting the appellant in the absence of evidence proving all the essential elements of rape beyond any reasonable doubt.

AGAINST SENTENCE

3. The sentence of 16 years on a youthful offender aged 22 years is excessive in the circumstances and instils a sense of shock due to its severity."

During the trial the appellant vehemently denied the allegations in respect of both counts. He pointed out that the appellant is well groomed girl who could not have failed to reveal the sexual abuses in both counts to their grandmother whom they stayed with and was close to her. Secondly, the appellant states that the report the complainant made in both counts was not voluntarily made.

The state led evidence from Patience Manyasa, the complainants mother, Cst Vengesai Dongo of the Victim Friendly Unit and Atalia Huseni a 13-year-old friend of the complainant. While there is no required sequence in which the state calls its witnesses it is logically accepted that generally in cases of this nature it is desirable to call the complainant first and other witnesses thereafter. The reason for this is obvious. All other state witnesses would be called to corroborate the complainant's testimony and or to comment on the evidence of the complainant. The state case may be placed in an invidious position if other witnesses are called first like what happened in this case where both the complainant's mother and the investigating officer testified first before the complainant was called. No reasons are proffered as to why this rather bizarre sequence was adopted. Indeed, when one considers the totality of the evidence adduced by the state in this case this sequence negatively impacted on the state case.

The appellant gave evidence and did not call any witnesses.

The fact that the 12-year-old complainant was sexually abused is not in issue. This is confirmed from the medical report Exhibit I. The doctor who examined her on 29 August 2018 observed healing tear on her hymen and concluded that penile penetration was effected. What was in issue during the trial is the identity of the person who sexually abused the complainant.

The background facts of this matter and the sequence of events go a long way in resolving this dispute.

The 22-year-old appellant is a cousin to the 13-year-old complainant. They were both not residing with their parents but with their paternal grandparents at No. 2684 Jamula Road, Tshovani in Chiredzi. The complainant's parents were residing at Jerera in Zaka. In fact, it is said the complainant had been staying with her grandparents since she was a toddler. At the material time she was in Grade 6 at a primary school in Chiredzi.

The alleged offences in count 1 and count 2 came to light as a result of the following sequence of events;

On 28 August 2018 the complainant did not put up at home. She spent the night at her friend Atalia Huseni's place (Atalia). At the material time Atalia was 13 years old and also in Grade 6. There were no adult persons at Atalia's house which is in the same area with that of the complainant. The complainant's grandparents did not authorise the complainant to put up at Atalia's place. In fact, they fortuoisly discovered that night that the complainant was not in her bedroom. Alarmed by this discovery they telephoned the complainant's parents in Jerera. By the time the complainant sneaked back into her bedroom in the early hours of 29 August 2018 at about 0300 hrs her grandparents and the appellant whom she stayed with had already discovered that she was away. Thus upon her return the complainant's parents were again advised. This prompted the complainant's parents to drive to Chiredzi later that morning on 29 August 2018 in a bid to interrogate the complainant's conduct.

It may be necessary at this stage to deal with the evidence of how the complainant sneaked out of her residence on the night of 28 August, 2018. Suffice to say that both complainant and her friend Atalia gave conflicting evidence on the material aspect surrounding this episode. Nonetheless one is inclined to accept Atalia's evidence as it is clear that it is the complainant who wanted to sneak out of her residence and thus in all probabilities took an active role. In fact, Atalia testified that it is the complainant who was the brain child of this plan and who meticulously executed it. The complainant blamed Atalia. As already said it is most likely that the complainant was the architect of this well thought out and executed plan as it was herself who wanted to sneak out of her residence without the knowledge of the persons she stayed with being her grandparents and the appellant. What is missing from this whole episode is that the trial court never sought to establish why complainant was so eager to sneak out of her residence to the point of conjuring up such an elaborate plan.

Atalia in her evidence said it is complainant who called Atalia to the complainant's house that night in order to assist the complainant to sneak out of the complainant's house. This was on the pretext that Atalia was studying with the complainant. Atalia said complainant gave her a book to pretend to read so as to hoodwink the complainant's grandparents who were still awake. This was at night.

As per Atalia's evidence by 20.00 hrs the complainant's grandparents were still awake hence they could not sneak out of the house. They were in a hurry to leave. Atalia said the complainant decided to drop the electricity breaker and plunge the whole house into darkness. The complainant said it is Atalia who switched off the breaker. However, as Atalia pointed out it is complainant who knew where the breaker at her residence was. After this act the complainant's grandparents believed there was an electrical fault.

Atalia's evidence is that before they sneaked out of the complainant's bedroom the complainant took her big doll and put it underneath her blankets on the bed. This was to disguise that she was in the bedroom and hoodwink her grandparents in case they entered her bedroom. Thereafter they sneaked out of the complainant's house and proceeded to Atalia's house. The complainant shifts the blame to Atalia but as already said one is inclined to accept Atalia's evidence.

It is common cause that the complainant spent the night at Atalia's house. There were no adult persons at Atalia's house. Instead there were some two boys including one Samuel and girls. According to Atalia the complainant slept on the bed and Atalia on the floor as complainant shared the bed with some girls. Both Atalia and complainant said Samuel and the other boy used the other room. However, the complainant's mother when she visited Atalia's house said she was not happy with the sleeping arrangement hence her suspicion that her daughter had been sexually abused.

According to Atalia the complainant woke her up at 0300 hrs asking her to accompany the complainant back to her house. Atalia said she suggested they go at about 0500 hrs but the complainant insisted saying by 0500 hrs appellant and her grandparents would find out that she had been away. Atalia said she capitulated and accompanied the complainant to her house around 0300 hrs. However, by then the complainant's grandparents and appellant had discovered that the complainant was away.

After the arrival of the complainant's parents she was interrogated and disclosed she had spent the night at Atalia's house. Her mother took her to Atalia's house to confirm that and

the sleeping arrangement. As already said this prompted the complainant's mother to suspect that she had been sexually abused at Atalia's house.

As per the evidence the complainant was taken to Dr Ngere a private doctor who declined to examine her and referred them to the police. The complainant was taken to the police who questioned her but she did not disclose any sexual abuse. This is confirmed by her mother Patience Manyara (Patience) and the investigating officer Cst Vengesai Dongo (Cst Dongo). Thereafter the complainant was referred to Chiredzi hospital by the police where she did not disclose the sexual abuse. As a result, she was examined and it was established that she had been sexually abused. A pregnancy test was done and she tested positive although this later turned out to be a false positive result. She was probed as to who had sexually abused her. At hospital the complainant disclosed that she had been sexually molested by one Samuel.

The complainant was then taken back to the police who again probed her. She implicated Samuel. The police took her to Atalia's residence and later to complainant's own residence still probing her. It is at this stage that she then implicated the appellant in count 1 and 2.

In count 1 her report was that sometime in April 2018 at around 2000 hrs she was seated on a sofa when the appellant forcefully fondled her breasts after which he threatened her not to report and she obliged. However, in court the complainant gave a different version. In count 1 she said she was coming from the kitchen when the appellant touched her breasts and she pushed his hands away after which the appellant threatened her not to disclose that saying he would deny such conduct. Later during the trial, she seemed to say her beasts were fondled twice, once in April 2018 and later in August 2018 on the date on the alleged rape.

Needless to say these contradictions remained unresolved during the trial.

In respect of count 2 her report was that sometime between July and August 2018 she was watching TV with the appellant in the house at night when she was dragged into appellant's room and raped. She said the appellant threatened her with death if she disclosed the rape. She indeed did not report until events unfolded in the manner already outlined. In count 2 she said the rape occurred in the house when her grandparents were present. Apparently complainant's grandparents were not called as state witnesses.

The complainant's evidence is that some 3 days or a week later Samuel also raped her.

Atalia brought another dimension to this matter. Whereas the complainant said she did not have any boyfriend Atalia was adamant that complainant had a boyfriend and would pass through Atalia's residence to see the boyfriend.

In a nutshell this was the evidence placed before the trial court.

The requirements for the admissibility of a complaint in sexual matters are outlined in the case of *S* v *Banana* 2000 (1) ZLR 607 (S) which are;

(i) that the report must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature.

(ii) the report must have been made without undue delay and at the earliest opportunity in all circumstances to the first person to whom complainant could reasonably be expected to make it

From the evidence outlined the complainant's report in respect of both counts 1 and 2 was clearly not voluntary. The complainant had slept away from home for a yet to be explained reason. Her parents had to be called all the way from Jerera. She nonetheless did not disclose the sexual abuse. As a result, she was taken to police who questioned her and still she did not reveal the sexual abuse. This prompted the police to take her to hospital where after an examination and a false positive pregnancy test she was again probed. She nonetheless made a partial disclosure implicating Samuel. She did not reveal count 1 or the alleged rape by the appellant. The complainant had to be taken to the police who further questioned her after which she then implicated the appellant in count 2 and disclosed count 1.

It is accepted that the cautionary rule in sexual offences in not a requirement see *S* v *Banana* supra at 614 G but nonetheless the nature and circumstances of each case should be considered carefully in order to rebut fabrication. The question which should have loomed large in the mind of the learned Senior Regional Magistrate is whether after considering the totality of all evidence adduced the complainant can be deemed to be a credible witness see *S* v *Kaseke* 1996 (1) ZLR 51 (S). Put differently the question is whether the complainant should be believed when she points at the appellant as the culprit in both counts?

Considering the circumstances of this case the court *a quo* was enjoined to approach her evidence with caution. As was pointed out by GILLESPIE J in *S* v *Magaya* 1997 (2) ZLR 39 (H) the need for caution may arise in cases of this nature where victims of sexual abuse may not only lie about the alleged assault itself but may also try to shield the real culprit. *In casu* while the complainant was indeed sexually abused in count 2 the danger is that she may not be

pointing at the real culprit. The learned Senior Regional Magistrate should have been alive to this possibility in view of the evidence placed before her and the sequence of events hence should have exercised proper caution before reposing her confidence in the complainant.

In the case of *S* v *Sibanda* 1994 (1) ZLR 394 (S) EBRAHIM JA deals in much detail with inherent dangers associated with the evidence of young people or children in cases of this nature. The simple question to have been asked by the Learned Senior Regional Magistrate is this;

In view of the sequence of events and how this matter came to light should I believe the complainant and why?

The credibility of the complainant in this case does not relate to the sexual abuse itself but the identity of the culprit. As already said the medical evidence is clear that she was sexually abused at the age of 12 years. The question is can she be believed when she points at the appellant as the culprit? This is where corroboration may be essential. The danger of false incrimination is not imaginary in this case. The complainant's wayward behaviour had been reported to her parents. The parents had come to ask her to explain her conduct. Indeed, she had put up an elaborate plan to sneak out of her bedroom late at night. Where was she going? Why was it so important for her to leave her bedroom late at night and return at 0300 hrs presumably undetected? What was she hiding?

As already said the complainant's grandparents who were staying with her were not called as state witnesses. They may have explained if indeed the complainant at the material time relevant especially to count 2 exhibited signs of physical or emotional distress consistent with being sexually molested against her will see *S* v *Munemo* 1992 (2) ZLR 222 (S).

From the evidence placed before the court *a quo* the complainant's report was not timeous. She alleges that this was because of the threats made to her by the appellant. However if she was also sexually abused by Samuel 3 days or a week later, was she again threatened by Samuel who happens also to be a Grade 7 pupil at the material time? It is common cause that the appellant was not promptly identified as the culprit by the complainant. Surely after the parents had come to Chiredzi and probed her and she had been taken to police or worse still after being examined at hospital and was told she was pregnant did she have cogent reasons to continue to shield the appellant? I find no plausible explanation for her conduct.

While the complainant at 12 years of age is still a young child who should not be judged like an adult woman my respectful view is that her credibility is in doubt given her failure to

make a prompt, spontaneous and voluntarily report. The report she finally made implicating the appellant was after persistent questioning for which answers were required by her parents, the police and medical personnel. The voluntary nature of the report is thus compromised see *S* v *Zaranyika* 1997 (1) ZLR 539 (H).

Having considered all the evidence in this matter it is without doubt that the complainant albeit of tender age is not credible. The danger of false incrimination is real in this matter and it has not been removed. This point is made clearly by CHINHENGO J in *S* v *Madzomba* 1999 (2) ZLR 214 (H).

The complainant's character cannot be said to be beyond reproach. Her conduct in sneaking out of her room after such an elaborate plan smacks of a dishonest and deviant child. Her reason for doing so remains unclear. Her own close friend said she already was seeing another person as a boyfriend. There is real danger that when she points at appellant as the culprit she is not being truthful. The appellant should be given the benefit of the doubt.

In the result I have come to the conclusion that the appellant's conviction and sentence in respect of both counts must be set aside.

Accordingly, it is so ordered.

For avoidance of doubt it is ordered that;

1. the appeal be and is hereby upheld
2. the conviction in both counts be and is hereby quashed and the sentences in both counts are set aside.
3. the appellant is found not guilty and acquitted in respect of both counts

Wamambo J. concurs ……..

Mutendi, Mudisi & Shumba, counsel for the appellant
National Prosecuting Authority, counsel for the respondent