ISHEUNOPA MUKUVARI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZENDA & SIZIBA JJ
MUTARE, 15 January 2025 & 29 January 2025

Criminal Appeal

Mr *P. Gwizo,* for the appellant
Mrs *T. Muuya,* for the respondent

SIZIBA J:

1. The appellant is dissatisfied by the decision of the learned Regional Magistrate sitting at Rusape Magistrates Court on 23 June 2023 whereof he was convicted of the crime of rape in contravention of s 65(1) as read with s 64(1) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. He was sentenced to 18 years imprisonment of which three years were suspended on usual conditions of good behavior. His appeal is against conviction only. After hearing submissions from both counsel on 15 January 2025, we were not persuaded to interfere with the decision of the trial court and we accordingly dismissed the appellant's appeal for lack of merit. We have been requested to provide our reasons and they are articulated hereunder.

THE EVIDENCE ADDUCED BEFORE THE COURT *A QUO*

2. The allegations levelled against the appellant are that on 13 September 2021 in the afternoon around 1630 hours, the accused person accosted the complainant, a grade six twelve year old girl who was on her way from school and had sexual intercourse with her without her consent.

3. It is alleged that the complainant resides with her grandmother at Mumbijo in Buhera under Chief Nyashanu and she is enrolled at Mumbijo Primary School. On the fateful day, as she was on her way home from school, she saw cattle which belonged to their family and she decided to take a detour from the road so as to drive them home. At that

juncture, a thorn went into her foot and she sat down to remove it and that is when she heard the accused person speaking to her from the road and he eventually came to where she was. She alleged that the accused person demanded to have sexual intercourse with her and that he dragged her with his hands and removed her pant and then removed his trousers and shorts and lay on her and had sexual intercourse with her without her consent. She alleged that the accused had a knife which he threatened her with to prevent her from screaming and she was also threatened not to reveal her ordeal to anyone. She then proceeded home thereafter and reported the incident to her grandmother on the same day. The complainant was adamant that she was raped by the accused person whom she knew as a businessman from the local business centre.

4. The complainant's grandmother one Gloria Mumbijo also testified in court. She told the court *a quo* that when the complainant arrived from school on that particular day, she looked unhappy and she was not as she used to be and she asked her what the matter was but she did not reveal the matter to her. She said that the complainant revealed her ordeal to her when she was asking her about her unhappy mood for the third time. She told her that she had been raped by the accused person whom she called Ishe. She noticed a whitish substance on her pant. She went to the local shops at 1800 hours to confirm if the accused person was there and she saw him even though she did not speak to him. She then reported the matter to the neighborhood police the following day after which she also accompanied the complainant to her school and also to Murambinda hospital for medical examination and treatment.

5. On 15 September 2021, the complainant was examined by a nurse at Murambinda General hospital who opined that penetration was very likely. The nurse also noted hymenal notches at 3 and 12 'o' clock positions.

6. On his part, the accused person denied having had sexual intercourse with the complainant. He maintained that at the alleged time, he was at Mutauto Secondary School where he teaches. It was common cause that the accused person has a shop and

a mill both at Mutauto and Mumbijo business centres. Mutauto Secondary School was said to be a distance of about ten kilometers from Mumbijo.

FINDINGS MADE BY THE COURT *A QUO*

7. The court *a quo* was satisfied that the charge against the accused person had been proven beyond reasonable doubt by the state. The court *a quo* reasoned that even though the complainant had been asked three times by her grandmother as to why she was looking unhappy, no suggestions, leading questions or threats were made by her grandmother so as to vitiate her report in a sexual complaint at law. The court also noted that the report by the complainant was made to her grandmother on the very same day of the incident.

8. Furthermore, the court *a quo* held that the inconsistencies between the complainant's *viva voce* evidence and the state outline which alleged that the accused approached her from behind and that she removed her pant on her own and lay down at the accused's orders and threats were immaterial. The court *a quo* reasoned that state witnesses do not prepare state outlines and that the complainant's *viva voce* evidence in court had been consistent.

9. The learned trial magistrate also found that both the complainant and her grandmother had been clear that the particular area where the offence occurred was bushy and grassy and not very clear as was being portrayed by the defense. It was about two hundred metres from the main road.

10. In addition, the court *a quo* made a finding of fact that the accused's presence at the crime scene was confirmed by the complainant who knew him very well as a renowned local businessman. The accused was also seen by the complainant's grandmother on the very evening after the alleged incident. The trial court was accordingly convinced that the accused person could not have been at his work station which is ten kilometers away at the time of the incident. The complainant was found credible in so far as she maintained that she was raped by the accused person.

APPELLANT'S GROUNDS OF APPEAL

l. The court *a quo* erred at law in rejecting Appellant's defence of *alibi* which was not disproved or investigated.

2. The court *a quo* misdirected itself on the facts and erred at law in making a finding that the inconsistencies in the evidence of the complainant were immaterial.

3. The court *a quo* erred at law in making a finding that the report of the rape incident was made freely and voluntarily.

4. The court *a quo* erred at law in discarding Appellant's defence which was reasonably plausible in the circumstances.

SUBMISSIONS BY COUNSEL

11. *Mrs Muuya* had taken a point *in limine* that the second and fourth grounds of appeal were not clear and concise. She later abandoned the point *in limine* as she was conceding to the appeal. This was proper. We do not find it consistent for any party to be raising points *in limine* which potentially go to the root of the case where the position taken by the opposite party on the merits is being conceded to. Such would be an act of approbating and reprobating which is totally discouraged by this court. It is nonetheless true that grounds 2 and 4 are badly framed. They lack precision. They are just too broad. The second ground of appeal can attack each and every finding of fact to the extent that the particular inconsistencies complained of were not spelt out. The fourth ground of appeal is equally bad to the extent that it is not specified which particular defence was discarded and how it remained possible. We however allowed appellant's counsel to address us on all grounds since the appeal was unopposed and also because we could still relate to the said grounds of appeal although they were inelegantly drafted.

12. For the appellant, *Mr Gwizo*'s main thrust was that the court *a quo* erred in relying on the evidence of the complainant in discarding the appellant's *alibi*. It was counsel's submission that the state did not investigate the appellant's *alibi* and hence it did not

disprove it and hence the accused's *alibi* should not have been discarded by the trial court. For the rest of the contentions, counsel abided by the appellants' heads of argument.

THE APPLICABLE LEGAL POSITION

13. The main issue for determination in this appeal is whether the court *a quo* can be faulted in having found the appellant guilty of having raped the complainant. The basis of an appellate court's interference with a lower court's findings of facts is limited to those instances where the lower court would have been irrational or grossly unreasonable in its findings of facts or assessment of evidence in a manner that can be shown to vitiate its decision. See *Mupande and Others* v *The State* SC 58-22 at p 6 to 7 of the cyclostyled. On the same vein, findings of credibility of witnesses are chiefly in the province of a trial court and an appellate court does not have to interfere in the absence of any misdirection. See *Khumalo* v *The State* HB 28-24. Put differently, an appellate court will not interfere with a lower court's decision in the absence of a misdirection on the law or on the facts.

14. *In casu*, we do not find any misdirection for the court *a quo* to have been satisfied that the appellant was sufficiently identified by the complainant who knew him very well as the person who raped her. The appellant was also seen by the complainant's grandmother at the local business centre on the very evening after the offence was committed. It was not disputed that the appellant was a well-known businessman in the area. The court *a quo*'s finding that the appellant could not have been ten kilometers away at Mutauto Secondary School at the time of the offence cannot be said to be illogical or irrational. The appellant was not an unknown stranger to both complainant and her grandmother who saw him at the area where the crime was committed and hence this identification of the appellant was enough to discard his *alibi*. The complainant's report was made without any coercion from her grandmother and on the very day of the alleged crime. The questions of what distance the rape occurred in relation to the road, that there was grass or bushes, how long the appellant spent waiting for the complainant to remove the thorn if ever he did wait and whether the complainant's pant was removed by herself or the appellant as per the state outline or

her *viva voce* evidence are simply immaterial aspects that the court *a quo* did not allow itself to be distracted by and correctly so in our view.

15. More importantly, whilst it is trite that the onus is on the state to disprove an accused person's *alibi*, this does not mean that an accused person should not adduce sufficient evidence on his part to elaborate and explain his *alibi* so as to defeat the allegations levelled against him. The failure by a trial court to separate the issue of identification of the perpetrator and disproving an *alibi* is not fatal where the court eventually rejects the *alibi* based on good identification and credibility of witnesses because good identification on its own needs no further corroboration or support. See *Panganai* v *The State* HMT 40-19 at pp 2 and 3 of the cyclostyled judgment.

16. In this case, there is no reason why the appellant who was legally represented throughout the trial failed to call any witnesses to support his version that he was in class at his work station at the time of the alleged offence. Where there is strong evidence of identification of an accused person, the *alibi* can be disproved without any further evidence of its investigation especially where sufficient particulars of the *alibi* have not been provided. In *Kufakwemba and Others* v *The State* SC 29-24 at pp 15 to 16 of the cyclostyled judgment, CHITAKUNYE JA articulated as follows:

> *"An alibi is a statement of defence to the effect that a person accused of a crime was at a specific place different from the scene of crime at the time the crime was committed. In the case of Hlabangana & Others v S HB 101/22 the court aptly stated that:*
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> > *'While there is no onus upon the applicants to prove their alibi, an accused who raises the defence of alibi must of necessity fully disclose its details to enable the State to fully investigate it.'*
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> *In the court a quo, in his defence outline, the first appellant averred that on the day the crime was committed he was at home with his uncle, Vongai Kufakwemba. He indicated that he would call that uncle as his witness.* ***However, when the time came for him to call the witness, he declined alleging fear of victimization by the police. He did not explain what fear had suddenly engulfed him when all along he had indicated that he would call the witness. Thus, his defence on this aspect remained a bare statement that 'I was at home with my uncle, Vongai Kufakwemba' and nothing else in substance.*** *The first appellant's circumstances are similar to those in Madya v S SC 88/23 wherein at p 13 this Court held that:*

> ***'It can also be said that the appellant's failure, in the particular circumstances of this case, to call his brother to testify as a witness in support of his alibi, tends to negate his defence in the face of the cogent evidence adduced by the State against him. The appellant dismally failed in his evidence before the court a quo, to give a clear account of where he was on that particular day. In addition, he did not call his brother to testify or lead any further evidence to substantiate his defence that he was with his brother on that fateful day. The court a quo was thus left with no other option but to consider the evidence placed before it and finally coming to the conclusion that culminated in the conviction of the appellant. In the court's view, the court a quo did not misdirect itself in any way.***'" (My emphasis)

17. The circumstances of this case are different from those in *S v Musakwa* 1995 (1) ZLR 1 (S) where the complainant had been conned by people who were complete strangers to her and whom she had seen only once. In such a case, the evidence of her identification and credibility could not stand without an investigation of the appellant's *alibi*. The rest of the cases cited by the appellant go no further than simply stating the fact that the state bears the onus to disprove an accused person's *alibi*.

18. For the reasons articulated above, we did not find any misdirection on the part of the court *a quo.* We concluded that the state's concession to the appeal was not properly made. We were unable to interfere with the court *a quo*'s decision and we were therefore constrained to conclude that the instant appeal has no merit and accordingly dismissed it.

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MUZENDA J agrees

Mugadza, Chinzamba & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners