BENSON MATAMISE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHITAPI JJ
HARARE, 22 March 2021

Criminal appeal

T.Gombiro, for the appellant
Ms *K.H. Kunaka*, for the respondent

ZHOU J: This is an appeal against a judgment of the Magistrates Court in terms of which the appellant was convicted of kidnapping or unlawful detention as defined on s 93 (1) (a) of the Criminal Law(Codification and Reform) Act [*Chapter 9:23*]. The appellant was sentenced to 36 months imprisonment of which 12 months imprisonment was suspended for 5 years on condition that within that period he does not commit similar offence.

The appellant appealed against both conviction and sentence. However, at the hearing of the matter the appeal against sentence was abandoned. The heads of argument filed on his behalf had indicated that the appeal against sentence would not be persisted with. A concession which had been made by the state that the conviction was no supportable was abandoned during the hearing.

The following facts are commons ground. The appellant is the father-in-law of the complainant's brother in that the latter is married to the appellant's daughter. On 23 October 2018 there was a funeral of the mother of the complainant at Acturus. A misunderstanding arose after the complainant had whipped her sister-in-law (the appellant's daughter) using a switch in the performance of some traditional ritual. In the process of the ritual the complainant damaged appellant's spectacles. The appellant was not amused by the ritual and asked that the matter be taken to the police. The appellant drove the complainant and her brother, Bright Mudzori, in his car. They left Acturus homestead apparently under the pretext of going to Acturus Police Station.

However, the appellant ended up driving to his residence at Unit C, Seke, Chitungwiza. The complainant remained at the appellant's residence for two nights. It is common cause that the night that they arrived at the appellant's house the appellant instructed the brother of the complainant to pour buckets of water on the complainant. There is a dispute as to the number of buckets of water poured upon the complainant. Complainant alleges that four buckets of water were poured upon her. Appellant states that two buckets were poured. Nothing turns on the number of buckets of water poured upon the complainant, it not being in dispute that the pouring of water did take place.

Complainant alleges that she only got into the appellant's motor vehicle on the understanding that they were going to Acturus Police Station. She did not consent to being taken to Chitungwiza hence her complaint that she was kidnapped. She also did not consent to being kept at the appellant's house in Chitungwiza. She states that at Chitungwiza the appellant assaulted her using a button stick and instructed her brother to pour some water upon her using a bucket. He also verbally abused her.

The appellant denied kidnapping or detaining the complainant. His evidence was that he "took the perpetrator (of the assault upon his daughter) for questioning" as per African custom. In support of his defence he called Bright Mudzori as well as Rudo Matanise who is his wife.

The state relied only on the evidence of the complainant. The court *a quo* accepted the evidence of the complainant as credible and proceeded to convict the appellant based on it.

Three grounds of appeal were advanced in the notice of appeal. The first and second grounds of appeal overlap in so far as they raise the same issue of the single witness and the failure to call other witnesses to corroborate her testimony. The alleged contradictions in the complainant's evidence which are mentioned in the first ground of appeal were not highlighted either in the heads of argument or in the submissions made on behalf of the appellant. No such contradictions were established.

On the reliance on the evidence of a single witness the position of the law is settled. Section 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows:

> "It shall be lawful for the court by which any person prosecuted for any offence is tried to convict such person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness."

Thus if the court is satisfied that the witness is competent and credible it can convict on the evidence of that single witness. The appellant has not challenged the competence of the

complainant as a witness. Neither has he impugned her credibility. The court *a quo* clearly applied its mind to this aspect and came to the conclusion that she was a credible witness. The court *a quo* stated that she "was not moved when she gave her evidence in court."

In trying to impugn complainant's credibility the appellant merely referred to the failure by the prosecution to call the persons whom she alleged that she had telephoned to tell them about her detention at the appellant's house. These two were her sister and employer. But her evidence that she telephoned these two was never challenged by the appellant when she gave it. In any event that aspect does not affect her credibility but would only be relevant if there was need for corroboration. Given that her evidence about telephoning them was not disputed it remained intact even without corroboration. The allegation in the second ground of appeal that the learned magistrate did not interrogate the sufficiency of the evidence of the single witness is therefore false and misplaced.

The third ground of appeal alleges that the court *a quo* disregarded the evidence of the complainant's brother which exonerated the appellant. But the evidence of this witness was not different from that of the appellant himself. That evidence is clearly false and is contradicted by the totality of the circumstances in which the complainant ended up at the appellant's house at Chitungwiza and the treatment which she was subjected to. In the first instance, the said Bright Mudzori was himself complicit in the assault upon the complainant when they were at Chitungwiza. He is the one who poured the bucket of water upon the complainant. His evidence was that he did that "to reprimand her". The evidence of the complainant and the appellant's case as contained in the defence outline is that he was acting on instructions of the appellant. He should, at the very least have been a co-accused person. He would therefore not be expected to implicate the appellant.

There are features of the case which clearly show that the complainant never consented to being taken to Chitungwiza. Her consent was never sought. Her treatment at Chitungwiza – the torture and inhuman treatment of having water poured upon her – is not consistent with a friendly interaction as suggested by the appellant and his witnesses. After all, even the appellant's own witnesses testified that he had a knobkerrie with him when the complainant was being detained at his house in Chitungwiza. The appellant himself stated that he "took" the complainant "for questioning". What authority would he have to "take" or even "question" an alleged perpetrator of

a crime? It is clear that he took the law into his own hands; he resorted to self-help. The learned magistrate correctly found that the complainant had been driven to Chitungwiza against her will and was unlawfully detained there. She was misled into thinking that she was going to Acturus Police Station only to be driven to Chitungwiza without her consent.

In all the circumstances the appeal is without merit.

In the result the appeal is dismissed.

CHITAPI J: I agree .....