CHIBUWE MUVENGWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA & KWENDA JJ
HARARE, 27 and 28 September 2021

CRIMINAL REVIEW

CHIRAWU- MUGOMBA J

[1] This matter was placed before me as a criminal review and it raises pertinent legal issues in relation to the evidence of a complainant who is said to be suffering from mental health challenges.

[2] The accused person was charged with contravening s 65 as read with s 64 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] i.e. rape. He was sentenced to 10 years imprisonment with 3 years suspended on the usual conditions, thus an effective jail term of 7 years.

[3] On the 6th day of May 2021, the complainant was subjected to a mental health assessment by a mental health nurse in terms of s 278 (3a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. On observations and comments, the mental health nurse stated as follows:

> "Stable, good interpersonal and social skills. Answer questions relevantly though there is evidence of mild intellectual; ability. According to history from mother, there was significant delayed developmental milestones. Started walking and talking at the age of 5 years. Went to school as far as grade 2 only. Nothing abnormal though was observed during examination. Memory is intact".

[4] The conclusion was that:

> 'As a result of the examination, I conclude that the patient is a case of mild mental sub normality' and 'she is incapable of giving sound evidence in court." (My emphasis).

[5] In assessing the evidence of the complainant, the trial Magistrate in reasons for judgment stated that the complainant gave evidence very well but going through the record, it still appeared that there were some traces of mild intellectual ability. Despite the observations

by the mental health psychiatric nurse that the complainant is incapable of giving sound evidence in court, it does not mean that the court will reject her evidence. It simply means that the court has to be diligent in dealing with her evidence. It also helps in the court accepting her evidence which if coming from a person with a normal mind, it cannot be accepted. The court thus accepted her evidence which was also corroborated by one Nyaradzo Chuma. She is the person who discovered the offence. A third witness one Joyce Mamina also corroborated the complainant's evidence. The court concluded that although the complainant had a mental challenge, she managed to testify well in court. The magistrate also stated that:

"Despite the threats that made her even want Simbarashe not to tell her confession to accused, which in normal circumstances would invalidate her evidence but because of her mental challenge the court will still take that evidence as the truth of what expired." (My emphasis).

On the issue of a voluntary report, the magistrate stated given the multiple developmental challenges and mental health challenges, she would not be expected to have made a voluntary report.

[6] Whilst the law has developed significantly in dealing with accused persons who suffer mental health challenges, the same cannot be said of complainants. As a result, there is a dearth of case law in Zimbabwe. In *State* vs. *Chamukwanda*, 1990(1) ZLR 172 (HC) , the medical report indicated that the complainant was known to be mentally subnormal and epileptic and on treatment and that there was no proper medical examination in regard to her mental condition. Reference was made to *State* vs. *Nyathi*, 1982(2) ZLR that the question of imbecility was a medical one and expert opinion should have been sought. The learned Judge sought the views of the Attorney-General who responded by citing the *Nyathi* case (*supra)* and *Mbizi* vs. *The State*, SC-184-89 in particular per GUBBAY JA (as he then was) that:

"Whether the requisite state of mental defectiveness has been reached in a particular case is a question of fact, to be determined after the reception of expert medical testimony".

The court held that the trial magistrate fell into error by not seeking medical evidence. The conviction and sentence were accordingly set aside.

[7] In *State* vs. *Matekuzimura*, 1995(2) ZLR 250, the accused person was charged with contravening the then s 3(d) of the Criminal Law Amendment Act [*Chapter 58*] the allegations being that he had sexual intercourse with an imbecile. MALABA J (as he then was) stated that there should have been medical evidence placed before the court to prove that the complainant was an imbecile.

[8] In *Machona* vs. *The State*, HH-450-15, the question of reliance on the evidence of a complainant in circumstances in which there was a medical report which expressed the view that the complainant was not capable of giving evidence in court took centre stage. HUNGWE J (as he then was) in *obiter dicta*, discussed the difficulties encountered in dealing with mentally accused persons whether as witnesses or accused. Discussing the evidence of an expert, he stated as follows:-

> "In essence, the function of an expert is to assist the court to reach a conclusion on a matter on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the court can decide without receiving expert opinion is in principle inadmissible because of its irrelevance. The rule was crisply stated in *Gentiruco A.G*. v *Firestone S.A. (Pty.) Ltd.* 1972 (1) SA 589 (A) at 616H.:
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> > "[T]he true and practical test of the admissibility of the opinion of a skilled witness is whether or not the Court can receive 'appreciable help' from that witness on the particular issue".
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> "Expert witness testimony on an ultimate issue will more readily tend to be relevant when the subject is one upon which the court is usually quite incapable of forming an unassisted conclusion. On the other hand the opinion of the witness is excluded not because of a need to preserve or protect the fact-finding duty of the court, but because the evidence makes no probative contribution."

He went on further on compellability to state as follows:-

> "In any event, every person not excluded from giving evidence in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*] shall be competent and compellable to give evidence in a criminal case in any court in Zimbabwe. (s. 245). However issues of competence of witnesses is specifically left to the discretion of the court before which a case is being tried. The Act then goes on to exclude certain class of witnesses from enjoying competence to testify in the following terms:
>
> **"246 Incompetency from mental disorder or defect and intoxication**
> No person appearing or proved to be afflicted with idiocy or mental disorder or defect or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability."

The issue that arises is whether a complainant victim of rape, by virtue of this provision, is excluded from testifying.

Incompetence is relative and only lasts as long as the mental illness lasts. Since 1851 the English law has been that a person who suffers delusions may give evidence on matters about which he is rational (*R* v *Hill* (1851) 2 Den 254, 169 ER 495; *R* v *Davies* 1925 AD 30 @p 32). The question whether a mentally disordered person was adjudged automatically incompetent was left open in *S* v *Thurston* 1968 (3) SA 284 (A). However, Hoffman & Zeffert 3rd ed @p 287 argue forcefully that in light of the present knowledge about mental conditions, there is no reason why a person who may be an imbecile should not be able to

testify as long as he or she has demonstrable ability to do so. Thus the learned writers commend the decision in *R* v *K* 1951 (4) SA 49 (O) where the evidence of an imbecile was admitted after the court found that the complainant showed surprising intelligence. For the reason that it would be impossible to prove a sexual offence charge without the evidence from the woman, I respectfully associate myself with the reasoning in that particular case.

[9] I however distinguish the present matter with the *Machona* one because the central issue in that matter was that the complainant had consented to the sexual intercourse. Hence the *ratio* that,

> "It therefore appears that once the fact that the complainant was mentally incompetent is established, the appellant had to establish that she had consented to the act of sexual intercourse. The appellant did not deny sexual intercourse. He claimed that it took place with the complainant's consent. The court a quo did not believe the appellant's defence. In my view that finding was entirely justified. These two were neighbours. It is high unlikely that the complainant's condition was not known to the appellant. Complainant's aunt who works together with the appellant specifically told him about the condition. The court observed the condition. It must have been pretty obvious to anyone that the complainant was mentally retarded."

[10] *In casu*, the mental health report itself provides more questions than answers. The conclusions reached on comments and observations is not consistent with the overall conclusion reached that the complainant is not capable of giving evidence. Whilst her mental capacity is a matter of fact as supported by the mental health report, the court went on a rationalising exercise. In other words, the magistrate carried out a 'reasoning' process to look at the evidence of the complainant in light of her mental capacity and then reach conclusions on the court's decision. The magistrate therefore erred in my view by failing to call the mental health nurse who carried out the examination to testify in court. S/he would have shed light on what questions were put to the complainant in relation to the rape and the nature of the examination of the complainant. See s 278 (12) of the Criminal Procedure and Evidence Act.

[11] The inescapable conclusion is that the conviction is unsafe. The accused person who is still serving his sentence is entitled to his freedom. Accordingly it is ordered as follows:-

1. The conviction and sentence are set aside.

2. A warrant of liberation for the immediate release of the accused is issued.

CHIRAWU-MUGOMBA J ……..

KWENDA J: Agrees ……