ITAI CHIKOWORE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZOFA AND CHIKOWERO JJ
HARARE, 28 September 2020

Criminal appeal

Appellant in person
A. Muziwi, for the respondent

CHIKOWERO J: We dismissed this appeal in its entirety after hearing oral argument, giving *ex tempore* reasons for doing so. That was on 28 September 2020.

On 1 November 2021 we received a request for written reasons for purposes of appeal.

These are those reasons.

This is an appeal against both conviction and sentence pursuant to the magistrate court's judgment convicting the appellant of one count of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant was sentenced to twenty years imprisonment.

The Court below found that the appellant, aged forty-eight years, had raped an eleven year old girl at her parents' home at a certain farm in Chegutu. The following facts were found to be common cause:

- the complainant and the appellant were staying on the same farm with their respective homes being a kilometre apart.
- since her parents were away, the complainant had been placed in the custody of her mother's brother and his wife.
- the offence was committed when the complainant's parents were still away from home.
- there was no bad blood between the complainant's parents and the appellant.

- the complainant was raped. The medical report contained definite evidence of penetration since the complainant's hymen was attenuated and stretched.

The only issue at trial was whether it was the appellant who had committed the offence.

In addition to the facts which were common cause, the trial court accepted the material testimony of the complainant and her mother, all of which stood unchallenged. The former gave a detailed account of how the offence was committed. Her parents were in Harare to attend to her ill aunt. She was sent on an errand to collect vegetables from the garden. She passed through her parents' home. That is where the appellant was. He asked her to give him a burning piece of firewood to light his cigarette. Her response was that he should serve himself, from the fireplace. The parties were in a makeshift house. The complainant sat on the floor. The appellant lit his cigarette. He advanced towards the complainant. He pulled up her skirt, removed her pant and raped her. He threatened to kill her if she were to reveal the offence to anyone.

After collecting the vegetables, she proceeded to her uncle's place, limping. The aunt asked why she was limping. Straight-away, she disclosed that she had been raped by the appellant, mentioning him by name. The matter was reported to the police. The appellant was arrested.

The mother returned on receiving a telephonic report of the offence. She also testified. Her evidence was on all fours with that of the complainant. She recounted the circumstances of the offence as narrated to her by the complainant. This witness also knew the appellant as a local person.

The doctor who examined the complainant also testified. He explained his findings which had led him to conclude that penetration had been effected. The hymen had been perforated. The medical report reflected that the hymen was attenuated and stretched. He did not indicate any tears on the medical report because the complainant's vagina was still very small such that the tears on the hymen were not easy to observe. The complainant was still bleeding from the vagina although he did not examine her on the day of the commission of the offence.

The uncle did not testify because he had since been arrested for stocktheft. The aunt had gone back to her maiden home. She also did not give evidence.

The appellants' defence outline was three sentences long. This is what he said:

> "I know nothing about the offence. In fact I do not even know the complainant in this matter. That is all."

The appellant did not conduct any meaningful cross-examination of the State's witnesses. He did not put his defence to the complainant to enable her to comment thereon. He did not challenge the complainant's evidence. He neither directly denied committing the offence nor appearing at her residence on the day in question. His questions traversed the periphery. He asked six questions, all in the nature of an enquiry. This is how the cross-examination of the complainant proceeded:

> "Q. Did you ever see me close to you in your life?
>
> A. Yes.
>
> Q. Did I ever visit your place or did you see me at your place and what did I want?
>
> A. You came to our place looking for fire.
>
> Q. Prior to the day you allege I came looking for fire had you seen me at your place?
>
> A. No.
>
> Q. What did I need the fire for?
>
> A. To light your cigarette.
>
> Q. What did I use when I slept with you?
>
> A. You used your penis.
>
> Q. Did you see me with the cigarette?
>
> A. Yes.
>
> N.F.Q"

Similarly, the appellant did not meaningfully cross examine the complainant's mother. To the contrary, he elicited some incriminating responses, which he did not go on to dispute. In this vein, the mother confirmed the complainant's evidence that a kilometre separated the complainant's residence from that of the appellant. Further, the complainant had not physically recovered from the effect of the offence when the mother returned from Harare. The former still had difficulties in walking. She was moving with legs apart.

The evidence of the medical doctor was brief and to the point. After confirming that he was the author of the medical report which was already before the Court, the evidence in chief of the doctor, in material part, proceeded as follows:

> "…..On the external genitalia there were no injuries. The examining of the internal vaginal was done, the hymen was torn. She was bleeding. I concluded that there was definite penetration. The hymen had been perforated and I concluded that she had been raped. It was a late presentation there

were no fresh wounds. She is still a young child and the vagina is still very small and even if she had sustained injuries they had healed and was very difficult to appreciate them."

The appellant posed a single question to the doctor. True to fashion, it came more in the nature of an enquiry. It is this.

"Q. Did you test complainant's blood and what were the results?
A. I tested her for HIV and syphilis and was negative."

As already indicated, the sole issue at trial was whether it was the appellant who had committed the offence. That the offence was committed was not in issue.

On opening the defence case, the appellant completely changed his defence. He did this by raising an *alibi* that he was not in Chegutu but in Bindura at the time that the offence was committed. He returned on the day that he was arrested. Under cross-examination, he said he had not told the police about the defence of *alibi*. Still under cross-examination, he changed again by stating that he had infact told the police upon his arrest that at the time of the commission of the offence he was in Bindura but did not know why the police did not record that defence in his warned and cautioned statement. He admitted that there was no bad blood between the complainant's parents and himself but still went further to say the complainant was coached by her parents to finger him as the offender. He admitted that he did not challenge the evidence of the complainant, her mother and the doctor. The medical report had been produced by consent.

After a thorough assessment of the evidence the court below found credence in the testimony of the State's witnesses, most of which was either common cause or unchallenged. At the same time the magistrate took cognizance of the fact that the appellant had tendered one defence in his outline and had gone on to raise a completely different defence the moment he took to the witness stand. Even then, he had proceeded to contradict himself on the fundamental aspect of when, if at all, he had raised the latter defence at the police station. It became common cause that the police were never afforded the opportunity, by the appellant, to investigate the *alibi*.

The magistrate rejected the appellants defence as being beyond reasonable doubt false.

As the first ground of appeal the appellant contends that the court erred by failing to properly explain to him, since he was unrepresented, the essential elements of the charge and the material facts relied upon by the respondent.

The record reflects that the charge was put to the appellant and he understood it. Thereafter, he pleaded not guilty. That is the plea which was recorded. The State outline was read to him and he understood its contents.

The provisions of s 188 and 189 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] were explained to the appellant. He understood the explanation.

That he understood the charge and essential elements is not only borne out by the relevant portions of the record but by the further fact that the appellant proceeded to give a succinct defence outline the full terms of which we have already set out. We wonder what offence it was that he said he knew nothing about if he did not understand the charge. We equally wonder who the complainant was that he said he did not even know if the material facts were not understandingly explained. Indeed, it would not have been possible for the appellant to tender a defence outline, let alone to change that defence, if he did not understand the charge and the material facts. Finally, the length and breadth of the record speaks to the fact that the appellant knew that he was on trial on the charge that on a date unknown to the prosecutor but sometime in August 2015 at a given plot and farm in Chegutu he had raped the named female juvenile.

In the circumstances, the first ground of appeal is without merit.

The second ground of appeal reads as follows:

> "ii. The learned magistrate erred and misdirected himself in relying on clearly inclusive and defective medical report, in that the medical report based on a finding of perforation of the heyman (*sic*) but failed to indicate the position."

The medical report was produced by consent. Its contents were not challenged at the trial. The medical doctor who examined the complainant testified. He explained the contents of the medical report. His evidence went unchallenged. It was common cause at the trial that the complainant was raped, partly on the basis of the medical evidence. The court did not err in relying on the contents of the medical report particularly where the examining medical doctor testified and when it was in any event accepted by the appellant himself that the complainant had been raped. In short, the contents of the medical report cannot be an issue on appeal without having been an issue at the trial. There is no merit in the second ground of appeal.

As for the third ground of appeal, the magistrate rightly rejected the alibi defence as manifestly false. The appellant could not give a defence of a bare denial in his outline and, after the prosecution had closed its case, suddenly spring a surprise by raising an alibi as a defence and

still expect the court to accept the new defence as reasonably possibly true. That alibi had not been put to any of the witnesses, either by the prosecutor or by the appellant himself, for comment. The prosecutor could not do that because that was not the defence tendered in the defence outline. He had asked the State witnesses to comment on the defence given in the outline. For his part, the appellant had also not put the alibi defence to the State witnesses to solicit their comments. Above all, even the defence of an *alibi*, besides having been raised after the prosecution had closed its case, was in itself incoherent. The appellant continued to twist and turn. The trial ended without the appellant making it clear whether he told the police that he was in Bindura at the time that the complainant was raped in Chegutu. The court had no option but to reject the defence of an *alibi* as being beyond reasonable doubt false.

That defence, raised in the unsatisfactory circumstances that it was, could not stand scrutiny when regard is had to the common cause and unchallenged testimony that was placed before the court below by the respondent.

We find no merit in the third ground of appeal.

Lastly, as regards the appeal against conviction, ground number four does not make sense. It reads as follows:

> "iv. The learned magistrate erred and misdirected himself in considering irrelevant matter inferences as to the conduct of the appellant's defence despite the fact that the appellants was unrepresented."

We observe that the magistrate appears to have failed to make sense out of this ground. He did not comment on it at all.

To the extent that it may be a repetition of the third ground of appeal, we adopt what we have already said in analyzing the third ground of appeal.

Two grounds are relied upon in attacking the sentence.

First, the appellant contends that the sentence is so severe as to induce a sense of shock.

Second, he takes the view that the court did not take into account all the mitigatory factors and, in respect of those considered, insufficient weight was accorded the same. In particular, the appellant contends that the following factors were not considered:

- his status as a first offender
- that he is married, a breadwinner and has a child.
- that no violence was perpetrated in the commission of the offence.

- that the appellant harboured superstitious beliefs.
- that the complainant did not contract any sexually transmitted diseases.

We start with the second ground of appeal. It is a natural consequence of a breadwinner committing a serious offence such as rape that the offender's dependents would suffer on the conviction and incarceration of the former. That the appellant is married and has a child were considered in assessing sentence.

His status as a first offender was also taken into account.

The other factors listed in the notice of appeal are actually aggravatory.

The definition of the offence of rape demonstrates that it is a violent crime. The mere fact that the court convicted the appellant of the offence means that the respondent had proven that the sexual intercourse was without the complainant's consent. That is violence, quite apart from the fact that the court was enjoined to consider the degree of force or violence used in committing the offence.

The appellant knew that he was HIV positive. In aggravation the prosecutor had submitted at p 15 of the record:

> "It cannot be ruled out that he was labouring under the belief that if he engaged sexually with the young girl he was going to be cured of the disease."

The appellant argues that because he harboured this superstitious belief, that should count as mitigatory. The magistrate was clear that the belief was not mitigatory. Instead, it was aggravatory. This comes out on p 18 of the record, as part of the reasons for sentence, in these words:

> "… I am of the belief that he raped the complainant on the belief that if he was to deflower a young girl he was going to be cleansed of the virus. He was very cruel in doing so and it is by God's grace that the girl did not contract the virus. If she had contracted the virus her life span was going to be shortened because of accused's cruel conduct."

The court considered that the complainant did not contract HIV.

Our view is that the sentence is not so severe and shocking as to induce a sense of shock. The aggravating factors outweighed the mitigation. The former consisted of:

- rape is a grave offence which attracts long custodial sentences.
- it is a gross violation of the victim's body, rights and dignity.

- the appellant was HIV positive, to his knowledge, at the time that he committed the offence.
- it was cruel of him to act on his superstitious belief that he could be cured by deflowering the young complainant since he was placing the latter's health and life at risk/
- he breached the duty to protect the complainant, a neighbour.
- Courts must endeavour by all means to protect young girls from sexual predators by imposing stiffer sentences.
- there was a thirty-six year age difference between the appellant and the complainant.

In terms of s 65(1) of the Criminal Law Code a person convicted of rape is liable to imprisonment for life or any definite period of imprisonment.

The magistrate, in exercising his discretion, settled for the stiff sentence of twenty years imprisonment. The sentence is fully justified. It is not shocking. The sentence of five years imprisonment proposed by the appellant in his notice of appeal is out of the question.

In all the circumstances, there is no merit in the appeal against both conviction and sentence.

The appeal be and is hereby dismissed in its entirety.

MUZOFA J agrees ……..

The National Prosecuting Authority, respondent's legal practitioners