Judgment No. HB 81/14
Case No. HCA 411/11
X REF HCB 06/12
CRB No. REG 124/11

FIDELIS DAVIRA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MUTEMA & KAMOCHA JJ
BULAWAYO9 AND 12 JUNE 2014

K. Ngwenya for appellant
T. Makoni for respondent

Criminal Appeal

KAMOCHA J: The 27 years appellant was charged with the crime of rape. It being alleged that on 17 September 2010 and at number 57052 Lobengula Extension, Bulawayo, the appellant being a male person unlawfully had sexual intercourse with a 3 year old girl. The appellant was 24 years at the time of the alleged crime. He tendered a plea of not guilty on arraignment. He was, however, found guilty at the end of the trial despite his protestations.

The trial court then sentenced him to undergo 18 years imprisonment of which 4 years imprisonment was suspended for a period of 5 years on the customary condition of future good behaviour.

Dissatisfied with the decision of the court, he noted an appeal against both conviction and sentence and assailed the court *a quo's* decision on the following grounds:-

"Ad conviction

(1) The trial court, with respect, erred and misdirected itself in convicting the appellant as the state did not prove beyond reasonable doubt that appellant raped the complainant, Plaxedes Mungofa.
(2) The evidence of the complainant did not at all, let alone suggest, that complainant was raped and there was thus no basis to convict appellant of rape. In any case, the presence and proximity of one of the material witnesses at the time of the alleged commission of the offence makes it highly improbably that complainant was raped by appellant in the manner alleged.
(3) The trial court erred and misdirected itself in that it failed to treat evidence of the complainant with special caution as demanded by the circumstances. Both the complainant and her grandmother's testimony had some material aspects which are unsatisfactory and unconvincing. It was thus unsafe to convict the appellant with this unsatisfactory evidence. The state failed to prove that the alleged injury to

complainant was a result of rape. In fact, complainant's evidence was that she was injured by a stone taken from outside and that after she was hit it was thrown to Linda's place.

(4) The trial court erred and misdirected itself by rejecting the appellant's defence and evidence of the defence witnesses without giving reasons for the rejection. In any event, no evidence was led to suggest that the appellant's testimony and/or defence witnesses' evidence was false or incorrect. There was thus no basis for the rejection of the appellant's evidence and/or defence witnesses' testimony.

(5) The trial court erred and misdirected itself in that it denied the appellant the right to address the court at the conclusion of the defence case. Address by an accused person at the conclusion of the defence case is appellant's right and it would have assisted the court a quo in arriving at its decision. Denial of that right is a procedural irregularity which has an effect on the outcome of the case.

Ad sentence

In the event that the appeal court rules that conviction of the appellant by the trial court was proper, the appellant will appeal against his sentence on the following grounds:-

(1) The learned magistrate in the court *a quo* erred at law in that he failed to take into account the appellant's personal circumstances and the mitigating factors advanced by the appellant and the sentence imposed by the magistrate in the court *a quo* is so excessive as to induce a sense of shock."

A report compiled by a doctor who examined the complainant was produced by consent. The doctor noted that the complainant's labia minora and vestibule were bruised but the hymen was still intact and concluded that penetration was probable. It, therefore, admits of no doubt that someone did penetrate the complainant's private parts causing the bruises observed by the doctor. The trial court was, therefore, entirely correct in holding as a fact that the complainant was raped by someone.

The next issue for determination was who was that person? The complainant then named the appellant.

Her evidence was a typical story of a very young child whose vocabulary was very limited. Her knowledge of what happens in life was equally limited. She had no knowledge of sexual intercourse.

She told the court that she had come to tell the court that "brother" had struck her with a stone on her private parts. He then took a piece of paper and wiped her private parts. He had poured some water on her private parts. Thereafter he gave her biscuits which she took to her grandmother who was in the lounge. The grandmother told her to put them on the table. It was her evidence that the "brother" brought the stone from outside and later threw it away. Her evidence was clearly confused at that stage. She, however, said she felt pain when he did it. The "brother's" actions caused injuries on her private parts. She was clear that he poured water on her vagina. She told the court that all this took place in his room.

The person the complainant referred to as "brother" was the appellant. She said he was in court on the day of the trial. It was her evidence at the time the matter came for trial that he was no longer staying at their place. Indeed appellant was no longer staying there.

The complainant's testimony was corroborated by medical evidence which confirmed that her labia minora and vestibule were bruised.

The grandmother also corroborated her story. She told the court that appellant was one of her lodgers at her house during that time but no longer lives there. The complainant is her son's daughter. On the fateful day as she lay on a sofa in the sitting room a door of one of the rooms was opened. She then overheard the accused asking the complainant what his name was. The complainant said, "You are brother" but the accused said, "No, Plaxedes I want you to say my name". The complainant then said, "You are brother Mungofa." The grandmother then burst into laughter. The accused and complainant also laughed. This piece of evidence was not challenged by appellant.

The complainant then emerged from the accused's room holding some loose biscuits. She asked her where she got them from then she said appellant had given them to her. She told her to put them in a plate on a coffee table.

The innocent little girl went outside the house to play quite unaware of the seriousness of what the appellant had done with what she believed was a black stone. It was only in the evening when she began to cry as she tried to urinate. When the grandmother asked her what the matter was she reported that the accused had hit her with a stone on her private parts. On examining the child the grandmother discovered that all was not well with her and conveyed her to Mpilo Hospital to be examined by a doctor. What sticks out like a sore thumb is the fact that the appellant was with the complainant in his room at the material time. When she emerged from there she had her labia minora and vestibule bruised.

The grandmother was clear on the identity of the appellant. Her evidence was not challenged on that point. She further stated that the appellant used to give complainant biscuits prior to the alleged rape. In the result, the court *a quo* cannot be faulted for the specific finding that it was the appellant who had injured the complainant in her private parts.

In my view, it would be idle to suggest that appellant used a "black stone" to inflict the injuries into the complainant's private parts. Why would he be so inhuman and cruel to push a stone into her private parts? The trial court was correct in finding that he used his male organ hence the pouring of water on the complainant's private part – (semen). It would be equally idle to think it is water from the tap.

The trial court found that the appellant and his defence witnesses were untruthful and not worth to be believed and *ipso facto* rejected their evidence. It also held that the witnesses were just hired to give false evidence. For instance their suggestion that on the day in question four of them spent the whole day in the appellant's room without being noticed by the grandmother was untenable. It is highly unlikely for four adults to spend the whole day in a small room for the whole day. They claimed to have been indulging in sexual intercourse in the

same room which had no toilet and no ablution facilities. Their story is clearly contrived and was correctly rejected by the trial court.

The appellant complained that he was not allowed to make closing submissions at the end of the trial. Such submissions do sometimes assist the court in arriving at a fair and informed decision. Closing addresses by both parties do sometimes clear some grey areas in the evidence.

There were no grey areas *in casu*. The appellant was alone with the complainant in his room. When she left the room her private parts had been penetrated. Closing submissions in the circumstances would not have taken the matter any further.

The appeal against conviction is clearly without any merit and the trial court cannot be faulted for convicting the appellant of rape.

The state counsel did not support the conviction. In my view, the concession was misplaced in the light of the foregoing. However, counsel for the state went further and stated that he would support the sentence imposed by the court a quo if this court holds that the conviction was proper.

The appellant's conduct was despicable and disgusting. He raped a 3 year old child. He is completely depraved. Society does not need such people. He is the type of people who should be removed from society for life. He must consider himself very lucky to have escaped a sentence much higher than the one he got. His wicked behaviour deserved more than what he got. There is no merit in the appeal against sentence.

In the result the appeal is dismissed in its entirety.

Mutema J …….. I agree

Mabhikwa, Hikwa & Nyathi, appellant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners