

EDMORE MARIGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 19 November 2015 & 18 May 2016

Criminal Appeal

J Ndomene, for the appellant
T Mapfuwa, for the respondent

HUNGWE J: This appeal is all about what weight is to be accorded the testimony of children.

The appellant was charged with the crime of rape as defined in s 65 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. He strenuously denied the charges but after a contested trial, he was convicted of rape and sentenced to 14 years imprisonment. The trial court heard testimony relating to the allegations. The complainant did not report any abuse. She is a cousin of the appellant. They stay under the same roof. He has a separate bedroom. On the day, around 4:00pm, the house maid was at home with the appellant and the complainant. The maid was attending to her chores. She needed to fetch something from the appellant's bed-room. Upon gaining entry, she was surprised to see the complainant with her clothes lowered such as to expose her bottom. The appellant was behind her facing the same direction. She concluded that there was some foul play and immediately asked the appellant what he was doing with the child. He responded by denying having done anything. He explained that he was looking for his pencil. The maid reported the matter to the complainant's female relative who later questioned the appellant. A report was later made to police. The appellant was arrested and charged with rape.

The appellant denied that he had raped his cousin. Despite his denial, he was convicted of rape and sentenced to 14 years imprisonment. He appeals against both conviction and sentence.

The appellant relied on several grounds of appeal. The grounds are neither clear nor specific as required by r 22 (1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979. However, my reading of the grounds, in their vagueness, leads me to conclude that the general complaint relates to the treatment and assessment of the evidence in the matter and the consequent findings of fact by the trial magistrate. I will deal with the matter on the basis of that understanding.

The net effect of the grounds raised by the appellant is an attack on the factual findings by the trial court. For example, in the second ground the appellant states that the court erred at law in convicting him of rape when the evidence adduced from the complainant was at variance with the medical examination findings. It is said that there was no evidence of penetration, actual or legal. The appellant pointed to the various contradictions within the State case as justification for an order quashing his conviction.

In a well-reasoned judgment, the learned trial magistrate analysed the evidence carefully. He assessed the demeanour of each of the three State witnesses and considered where the probabilities in the case lay. He accepted that their testimony was reliable and found the witnesses credible. The learned trial magistrate carefully considered the submissions by counsel alerting the court to the possibility of witnesses rushing to draw conclusion on matters for which there was no concrete proof. The magistrate carefully examined each witness' evidence and gave reasons why he still believed them in spite of the attack on their credibility by the defence.

The defence argue that the medical report does not corroborate or support a claim of penetrative non-consensual sexual intercourse. The reason given for this submission is that the medical doctor who conducted the examination indicated that penetration was probable. In other words the defence urges the court to read that finding as an indication of lack of certainty with respect to penetration. Whilst the argument sounds ingenious, it only reinforces the fact that there is evidence of abuse of the child. Taken together with what the child herself says, the findings by the doctor tend to corroborate complainant's assertion that the appellant had removed her underwear, laid her by the stomach before coming on top of her directing his penis into her buttocks.

When analysing the evidence of children one ought to appreciate and understand, in respect of the child before the court, her level of maturity and the level of development of her language on the subject under discussion. From the reading of the record it is apparent that

the prosecutor faced a challenge to get her to express herself verbally the anatomical terms required in rape matters hence the use of anatomically correct dolls. When the cultural background make it taboo to call by name the opposite sex private parts, a court must not unduly draw adverse inference from the reluctance shown by a child to speak on those issues. It follows, in my respectful view that the magistrate correctly found that there was sufficient evidence of penetration justifying a conviction for rape. I am unable to accept the contention by Mr *Mapfuwa* for the State that there was no evidence of legal penetration. If it is accepted that a day after the abuse, an examination of the complainant indicated that she exhibited tale-tale signs of what is termed hyperpigmentation in medical terms, it seems to me that that qualifies as legal penetration sufficient to find a conviction for rape.

I therefore do not find any misdirection regarding his findings of fact and conclusions of law.

In the result the appeal against conviction is dismissed.

The appellant also appealed against the sentence imposed for the crime charged. I do not find that the sentence imposed induces any sense of shock by virtue of it being unduly excessive. In fact it is in line with the general trend in sentencing for this type of crime. There is no basis to interfere with it. In the result the appeal against sentence is similarly dismissed.

I therefore make the following order:

“The appeal is dismissed in its entirety.”

CHIWESHE JP agrees.

Maposa Ndomene Maramba, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners