EFFORT MUTANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 1 October 2014 & 5 October 2016

Criminal Appeal

J Mutonono, for the appellant
E Mavuto, for the respondent

HUNGWE J: The appellant was convicted of rape as defined in s 65 (1) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] ("the Criminal Law Code"). He was sentenced to 12 years imprisonment of which 4 years were suspended on the usual condition of good behaviour. He appeals to this court against conviction. In his notice and grounds of appeal the appellant raises five grounds as follows:

(a) that the learned magistrate erred in accepting as credible the evidence of the complainant regarding her delays in making a report;
(b) that the learned magistrate erred in failing to dismiss as unreasonable complainant's explanation regarding her delay in reporting the offence early;
(c) that the learned magistrate erred in dismissing the evidence of the second State witness on the basis that she was related to the complainant although her evidence contradicted that of the complainant on material elements of the offence;
(d) that the learned magistrate erred in accepting that the State had managed to prove its case beyond a reasonable doubt without hearing the evidence of the complainant's husband regarding the disclosure of the matter;
(e) that the learned magistrate erred in convicting the appellant when the totality of the evidence adduced in court during both the State and the defence case favours the version of the appellant.

The first two grounds refer to one and the same ground; namely the delay in reporting rape by the complainant. I will treat them as such.

The third ground of appeal attacks the learned magistrates' dismissal of the second State witness' evidence yet that evidence was favourable to the appellant.

The fourth ground is that in holding that the State had proved its case beyond a reasonable doubt in the absence of the evidence of the complainant's husband, the court *a quo* erred since it cannot be said, without that evidence, that there has been proof beyond a reasonable doubt of the crime charged.

Finally, appellant contends that the evidence led at trial favours the version given by the appellant. In other words the appellant argues that on the evidence before it, the court ought not to have convicted the appellant.

> "*…the ambit for the interference by the appeal court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong. See S v Hadebe and Others* **1997 (2) SACR 641** *(SCA) t 645e- f. Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where he/she overlooks facts or improbabilities. Also, where the finding on fact is not dependent on the personal impression made by a witness' demeanour, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court".*

When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. As NUGENT J (as he then was) in ***S* v *Van der Meyden*** **1999 (1) SACR 447 (W)** stated at 450:

> "*What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.*"

The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. As was stated in ***S* v *Singh*** **1975 (1) SA 227 (N)** at **228:**

> "*The best indication that a court has applied its mind in the proper manner …is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses".*

I must, however, make it clear that by requiring the trial court to consider and weigh all evidence is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.

In order to apply the above-mentioned legal principles to the facts of this case, this court must determine, as regards the convictions in the first place, what the evidence of the State witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decisions/findings or judgment.

In other words, this court must consider whether the magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the convictions and sentences. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.

Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties mentioned above, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said judgment.

In my view, this means that if a court of appeal is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal.

The primary thrust of the appellant's attack against the conviction before us concerned the question whether the State had proved beyond reasonable doubt that there had been an absence of consent to the act of sexual intercourse sufficient to constitute the offence of rape. In this regard the appellant's counsel laid heavy emphasis on the fact that the complainant's initial report made to the second State witness was not confirmed during the trial when that

witness gave evidence. The same witness however did indeed confirm that complainant was pregnant. When she confronted her, complainant indicated that the appellant was responsible for the pregnancy. She then took the complainant to appellant's parents as she considered complainant their daughter-in-law. Such evidence coming from a close member of the family indicated to the court that Faith did not doubt that her brother the appellant was responsible for the pregnancy, yet she was, at the same time aware that both were dating different partners. If regard is had to the totality of the evidence, it is difficult to find any basis for attacking a finding of credibility on the part of the complainant as the trial court did. It is important to observe that this witness Faith Mutanda is the appellant's sister. She is married to complainant's brother. In other words, complainant is the witness' sister-in-law. The learned trial magistrate was alive to the relationship between the appellant and the complainant as well as this witness. In a well-reasoned judgment, the learned trial magistrate dealt with this issue in detail, setting out the reasons why she believed the complainant when she said she reported rape to Faith at the earliest possible opportunity, the next day. The evidence indicate that appellant and complainant had been left alone at the witness' residence overnight when the rape occurred. Upon receiving the report Faith told her husband, the complainant's brother. The matter was hushed up and complainant was forced into a "marriage" it being made clear to her that she was the cause of tension between the families of her brother and Faith's. She fell pregnant as a result of the rape.

The witness, Faith, played a crucial role in ensuring that her brother, the appellant was separated from his "wife" by taking complainant to appellant's family and finding a job for the appellant out of Harare where they had both been staying. In the end complainant had "lobola" paid for her and she was taken to her rural home under another pretext thereby effectively silencing her as she had to tender to her baby. Fortunately, she moved on with her life and found a real husband to whom she reported her abuse in the witness' home in Harare. He urged her to report to the police rather than to family members. The appellant contended that because this husband to whom the second report was made was not called, the possibility that the report of rape was made out of malice so as to get at appellant for disclosing the fact that she had had a child cannot be discounted. Further, the appellant contends that the effect of the discrepancies was such that the court could not safely have held the complainant a credible witness.

These contentions are devoid of merit. The trial court's findings that complainant was an honest, credible and trustworthy witness is, in my view, unassailable. But one must of

course be mindful of the fact that the complainant was a single witness in respect of the rape incident itself. Section 269 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], provides that a single witness' evidence is adequate to sustain a conviction, provided that it is satisfactory in all material respects. It is further trite that the evidence of complaint in sexual offences must be treated with circumspection. It would therefore not have been safe to convict on her evidence alone. Corroboration in this matter is to be found in the evidence given by Faith Mutanda in that while the learned magistrate disbelieved Faith Mutanda when she denied receiving a report from the complainant the day after the rape, she did not discount her evidence entirely. For example the learned magistrate accepted that Faith and other members of the family forced the complainant into a "marriage" with the appellant confirming that indeed sexual intercourse had occurred between the two notwithstanding their relationship. It is apparent from the magistrate's reasoning that she believed complainant when she said she had reported rape to Faith as soon as was practically possible, taking into account the circumstances of this case. Put differently, the fact that the family arranged a "marriage" between appellant and complainant indicates that the appellant had not denied sexual intercourse with the complainant to the witness otherwise it would have been the easiest thing for him to have done there and then. This explains, in my view, why even up to the hearing of the appeal, he does not contest the fact of sexual intercourse. His argument is that it was consensual. If it was consensual why then would complainant have reported it to her sister-in-law in light of their relationship? I am satisfied that the trial magistrate correctly disbelieved his version and accepted the version given by the complainant which indicated that she had been pressured into accepting the unacceptable by virtue of the pressure brought to bear on her by her family. Clearly, the family was concerned more of preserving Faith's marriage to complainant's brother than punishing her offending relative thereby vindicating the complainant.

The respondent's counsel filed a notice in terms of s 35 of the High Court Act, [*Chapter 7:06*] indicating that he did not support the conviction. We were, for the above reasons, unable to support the concession given by the respondent's counsel. In our view, Mr *Mavuto* failed to appreciate the evidence in its totality and cherry-picked portions of evidence which he then concentrated on in deciding whether to oppose the appeal. It is a patently wrong approach by which to assess a trial court's reasoning. The act of rape was committed the night on which the complainant indicated that Faith and her husband had gone to an overnight prayer session leaving appellant and complainant alone in the house. It is the events

of that night which must bear scrutiny in deciding whether or not the State had proven its case beyond a reasonable doubt. Subsequent events are relevant in the explanation of the delay in police action. Police were not given the report in time because the complainant's family as well as the appellant's forced her into a "marriage" with her abuser for their own reasons. Each case must be decided on its own merits. Admittedly, the actions by the complainant may appear unreasonable but that is taking an armchair approach to her evidence. She was a mere house maid in the household. It would appear this was the reason why she was unable to stand for her right as a victim. It took the courage of her policeman husband for her to gather enough courage and confidence to make a proper police report. She was let down by her sister–in-law, her brother, her mother and the rest of her family. Mr *Mavuto* ought to be alert to these factors when assessing evidence in cases of this nature. On this occasion he was not as alert as he should have been.

In light of the above we are of the view that there is no merit in the appeal against conviction. It is confirmed.

Although there was an appeal against sentence in the notice filed by the appellant, there was no submission in respect of the grounds of appeal against sentence made in both appellant's heads of argument as well as in submissions at the hearing. In light of that the appellant is taken to have abandoned his appeal against sentence which in our view is in line with the usual trends in cases of this nature.

In the result therefore the appeal is dismissed in its entirety.

CHIWESHE JP agrees _____

Chadyiwa & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners