VENGAI NYAMAKATO
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 5 July 2018 & 25 September 2018

Criminal Appeal

Ms N Maboyi for the Appellant
Ms W Badalane for the Respondent

HUNGWE J: The appellant was convicted of indecent assault as defined in s 67 of the Criminal Law (Codification and Reform) Act, [*Chapter* 9:23], that he perpetrated on his sister-in-law. The facts upon which the conviction was based on can be summarized as follows:

Complainant was coming from a borehole where she had gone to fetch water. She met the appellant who asked her to wait for her. Considering such a request coming from a brother-in-law inappropriate, she ignored him and went on. He caught up with her, grabbed her by the hand and then fondled her breasts without her consent and against her wish. She freed herself from his grip whilst screaming for help. This prompted the appellant to release her and run away from the scene. When she arrived at her residence, she reported the incident to her husband. Complainant reported the matter to the village Headman who summoned all parties to a hearing. Appellant ignored the summons. The matter was then referred to Police for processing.

In denying the allegations, the appellant stated that this never happened as he was on the day away in Harare. He was surprised, upon being summoned by the Police to be confronted with these allegations.

The court rejected his version pointing to the fact that he had failed to establish his *alibi* and was literally clutching at straws by, for example, claiming that no fingerprints were uplifted from the complainant's breasts to confirm the report. The Court also pointed out that this failure

to put his *alibi* to his brother points to the fact that his claim was false. The court found that the state had proved its case against the appellant beyond a reasonable doubt.

In his three grounds of appeal the appellant contended firstly, that the court erred in relying on the evidence of a single witness. Secondly he argued that the court failed to correctly assess the circumstantial evidence upon which the case turned. Finally he believed that the court erred by disregarding his evidence which was reasonably probably true since his *alibi* defence was corroborated by his witness.

Dealing with the last ground first, it is trite that there is no onus resting upon an accused person to prove an alibi. See *S v Mutandi* 1996 (1) ZLR 367 (HC). In the present case, however, the appellant's defence of *alibi* was destroyed by his own witness, his wife. She told the court that when the appellant arrived home on that day around 21h00, she was already asleep. This was in sharp contradiction to his claim that his wife had waited for him and indeed received him at the bus stop. The court therefore correctly rejected the *alibi* defence.

As for the second ground, which is that the court a quo failed to correctly assess circumstantial evidence, it is important for counsel to first understand such concepts before throwing them in without any effort at appreciating their applicability in a case. It appears to that clearly, *Ms Maboyi* either does not appreciate what amounts to circumstantial evidence or she carelessly believed that by arguing the matter on the basis of circumstantial evidence, this court will be moved to agree with her. Otherwise how does she invoke such a concept in a case such as this one?

I will relate in simple terms what circumstantial evidence is. It is evidence that tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact at issue. This, usually, takes the form of indirect evidence which is used to prove a fact in issue in the absence of direct evidence. In this case it can hardly be said the occasion for the invocation of the application of circumstantial evidence arose. The complainant told the court what it is the appellant did to her that she found indecent and offensive. Her husband confirmed that upon her arrival home, she had reported to him what his brother, the appellant, had done to her. Both she and her husband took offense. He reported the matter to their village Headman.

Although the evidence of the husband was not relied upon for the truthfulness of its content, his testimony is relevant in so far as it establishes consistency in the story which the complainant was telling. She was offended by appellant's conduct which was sexually suggestive and obscene. She reported, the matter to the first person who she was reasonably expected to report.

These two grounds of appeal therefore fail.

As for the first ground, which impugns the appellant's conviction on the basis that it was based on the evidence of a single witness, it trite that a court can convict a person on the strength of evidence tendered by a single witness in a criminal prosecution, provided that the witness is a competent and credible witness. Section 269 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. See also *S v Ngara* 1987 (1) ZLR 91 (SC). However in the present matter the State relied on the evidence of two witnesses, the complainant and her husband, the latter providing vital corroboration to the former. See *S v Chitiyo* 1989 (2) ZLR 144 (SC), *S* v *Sibanda* 1994 (1) ZLR 394 (SC).

In light of the above, I am therefore am unable to find any basis for relying on failure to apply circumstantial evidence as a ground in criticizing the propriety of the conviction. In the result, the appeal against conviction is therefore dismissed.

There is some merit in the criticism by the appellant of the harshness of the 12 months custodial sentence imposed on the appellant. When we took the State to task on the propriety of such a sentence and any such precedent as would support the sentence of this magnitude, *Ms Badalane,* for the State, fairly conceded to the severity of the sentence.

Case law indicates that it is in cases of aggravated indecent assault and attempted rape that a custodial sentence is invariably imposed. See *S v Muvhaki* 1985 (1) ZLR 252 (HC). In cases where the indecency was only limited to fondling of a female's breasts or buttocks invariably a fine was indicated. This is however not an indication that the court condone this indignity being perpetrated on the womenfolk. Societal attitudes, in my view tend to view this type of assault as less demeaning or less grave that aggravated indecent assault.

Consequently the sentence imposed in the court *a quo* is set aside and in its place the following is imposed.

"$100 or in default of payment, 30 days imprisonment."

WAMAMBO J agrees……

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