GEORGE PHIRI
Versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA AND DUBE-BANDA JJ
BULAWAYO 29 MARCH AND 17 JUNE 2021

Criminal Appeal

T Kamwemba, for the appellant
E Chavarika, for the respondent

TAKUVA J: The 71 year old accused appeared before a Regional Magistrate at Gweru on 10 October 2019 facing a charge of rape in contravention of section 65 of the Criminal Law (Codification and Reform) Act (Chapter 9:23) (the Code). The State's case was that on the 10th of March 2019 at around 1600 hours, the complainant an eleven (11) year old girl was walking in the company of her aunt one Atrona Zhou when the appellant called her into his shop namely shop No. 5 Kandodo Business Centre, Zvishavane. Upon entering the shop the appellant closed the door and ordered the complainant to undress. When she refused, appellant forcibly undressed her and ordered her to lie on her back. Appellant then mounted her and raped her once. After the rape, appellant ordered complainant to dress up and "go home." She complied and left the appellant's shop.

Whilst walking home she caught up with Atrona (whose age was not given) but despite being asked why appellant had called her, complainant did not make a report to her. She arrived home where she found her grandparents present but again failed to report the rape to them. Complainant made a report to her Guidance and Counselling teacher one Ruwadzano Gloria Dube following a visit from ZRP Victim Friendly Unit's campaign against child abuse four (4) days later on 14 March 2019. Complainant was referred to hospital for medical examination. The appellant was arrested on 19 March 2021.

Despite his plea of not guilty, appellant was convicted after a full trial and sentenced to 12 years imprisonment of which 2 years imprisonment was suspended for 5 years on condition appellant does not within that period commit the crime of rape for which when convicted he is sentenced to imprisonment without an option of a fine.

Appellant is aggrieved by both conviction and sentence and has noted an appeal in this court. The state concedes that the conviction is unsafe. The grounds of appeal are that:

> **"A. AS AGAINST CONVICTION**
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> 1. The evidence before the court was not sufficient to prove beyond reasonable doubt that the appellant committed rape in that the complainant did not make hue and cry and also tell someone soon after the offence considering she was in the company of someone.
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> 2. The court *a quo* erred by disregarding the evidence that at cross-examination the complainant stated that she felt nothing and not even pain during the alleged act.
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> 3. The court *a quo* erred by convicting the accused person in the absence of the evidence of Atrona Zhou who is said to have been together with the complainant when the alleged rape took place.
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> 4. The court *a quo* erred to convict (sic) the accused person when the medical report was inconclusive that rape took place and that the hymenal wounds were healed and not fresh for someone raped within 7 days.
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> **B. AS AGAINST SENTENCE**
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> 1. The court *a quo* erred by imposing a long custodial sentence on the appellant without taking into account the mitigatory factors of the appellant."

THE LAW:

It is a trite principle that in criminal proceedings the prosecution must prove its case beyond a reasonable doubt and that a mere pre ponderance of probabilities is not enough. Equally trite, is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent improbabilities if it can be said to be so improbable that it cannot reasonably possibly be true – See *S* v *V* 2000 (1) SACR 453.

In *S* v *Makanyanga* 1996 (2) ZLR 231, it was held that;

> "A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of the criminal complaint, but the fact that such credence is given to the testimony does not mean that a conviction must necessarily ensue. Similarly, the mere

> failure of the accused to win the faith of the bench does not disqualify him from acquittal. Proof beyond reasonable doubt demands more than that the complainant be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true."

While the cautionary rule has been abandoned, the courts still have a duty to carefully consider the nature and circumstances of alleged sexually offences – see *S* v *Banana* 2001 (1) ZLR 77 and *Kaisiru* v *S* HH 36-2007 where BHUNU J (as he then was) had this to say;

> "the abandonment of the cautionary rule did not mean a wholesale relaxation of the court's ordinary standard of proof beyond reasonable doubt which is meant to safeguard against condemning the innocent together with the guilty. On the contrary, courts must exercise special care and diligence when presiding over sexual cases."

It is trite that a report of a complaint in a sexual case is admissible to show consistency of the complainant's evidence and the absence of consent. For the report to be admissible it must meet the following requirements;

i) The complaint must have been made voluntarily, not as a result of questions of a leading and inducing or intimidating nature, *R* v *Osborne* (1905) IKB 51 ALLER 54, and

ii) The complaint must have been made without undue delay at what is in the circumstances the earliest opportunity, to the 1st person to whom the complainant could reasonably be expected to have made it – *S* v *Banana* 2000 (1) ZLR 607 (S) 614 (E-F), *S* v *Makanyanga supra* and *S* v *Mukuku* HB 337-16.

I now turn to the grounds of appeal. The 1st and 3rd grounds can be consolidated as they deal with the failure by the complainant to report the rape to her aunt Atrona who was in her company when she was allegedly called by the appellant and raped. Implicit in these grounds is the contention that the state did not place sufficient evidence before the court to prove the offence of rape beyond a reasonable doubt. It is part of the state case that after the rape, the complainant met Atrona who asked her why the appellant had called her. Complainant did not disclose her ordeal to her nor did she report the incident to anyone else, on arrival home where her grandparents were. Complainant was not asked why she did not reveal this horrendous conduct to Atrona, or to her grandmother. She did not herself proffer any reason for her silence.

In view of the nature of this ground of appeal, it is necessary to closely examine the totality of the evidence led by the state. By way of *viva voce* evidence, the state relied on the testimony of two witnesses namely; the complainant Rutendo Hove and Ruwadzano Gloria Dube a Guidance and Counselling teacher at Kandodo Primary School.

COMPLAINANT'S EVIDENCE

At the time of the offence, the complainant was eleven (11) years old. It is not clear from the state case what grade the complainant was in because the state outline says she was a "grade seven student" while in her evidence in chief it is stated that she was in grade 5 – see page 33 of the record of proceedings. Be that as it may her narration of the events of the 10th of March 2019 is as follows;

She knows the appellant as a barber owning a shop at Kandodo business centre. Sometime in 2019 on a Sunday she visited the shopping centre in the company of her aunt Atrona. Their grandmother had given them money for a haircut. After the hair cut at "Ray's father's barbershop", the two walked past appellant's barbershop where they saw him seated outside.

According to the complainant, the appellant then called her and she went to him after which he invited her to enter his shop which was empty, and she did. Appellant followed her and closed the door. He then ordered her to remove her pants and she refused. Appellant then removed her pants and ordered her to lie down. Appellant then inserted his penis into her vagina. After he finished, he then ordered her to go home and she left proceeding home.

Under cross examination, the following exchange occurred;

Q - You confirm the shop next was open?

A - Yes

Q - Other shops were open?

A - Yes all these other shops were open except Baba Keith's shop.

Q - When accused called you what happened

A - He called me, ordered me to remove my pants.

Q - Did he tell you why he had called you?

A - No he said nothing.

Q - When he ordered you to remove your pant, where was he?

A - He was outside sitted. He called me inside the shop. He then followed me when I got in.

Q - What happened when you got in?

A - He advised me to remove my pants, I just remained standing. He then removed my pants, then ordered me to lie down.

Q - When he put his penis into your vagina what happened?

A - Nothing happened.

Q - What do you mean nothing happened?

A - He just inserted, nothing happened.

Q - You said he raped you after he finished, he told you to go home. What do you mean?

A - After finishing he told me to put on my pants, I then left, I met Atrona along the way ……

Q - What happened to your private parts?

A - Nothing

Q - What do you mean?

A - Nothing happened to my private parts.

Q - You saw Atrona standing outside when you left?

A - She was gone – she was far, met her where carpentry is done.

Q - Are there doors and windows at accused's shop?

A - There is 1 door, there is 1 window, an opening where he normally calls people from.

Q - What kind of an opening is it?

A - Its just an opening and there are some metal rods there.

Q - When he called you what happened to the door and window?

A - The door was closed but the window was open.

Q - Did you make any noise.

A - No I didn't make any noise.

Q - Did you tell Atrona?

A - I didn't tell her, she asked me why accused had called me but I did not tell her.

Q - Accused raped you, told you to go home and you didn't tell anyone?

A - Yes ….

Q - Has anyone ever touched you?

A - No.

Q - How were you feeling when he was on top you?

A - I didn't feel anything when I got home I had stomach ache and got into the toilet." (my emphasis)

RUWADZANO DUBE'S EVIDENCE

She is employed by the Ministry of Education as a teacher at Kandodo Primary School where she teaches Guidance and Counselling. She knows the complainant as a pupil at the school. On 14 March 2019, a team from V.F.U Police had a campaign on child abuse at the school. They encouraged children to report if ever their private parts are touched by anyone.

After the campaign, the complainant made a report to her that the appellant had raped her. She narrated the rape ordeal to her and the witness took her to the Head of the school. Complainant's grandmother one Etina Dube was informed and eventually the matter was reported to the police.

Under cross-examination, she confirmed that she teaches ”Progress/Special” class and the complainant is in Grade 5 (b). She also said she is not the complainant’s class teacher. As regards the complainant’s demeanour, she said she was “not happy” and in “a state of shock.” When asked why she so concluded, she said the complainant was shocked by what had been done to her. The witness said she was also shocked by what the complainant had told her.

A medical report was produced showing that a medical examination was carried out on the 15th of March 2019 on the complainant. The doctor under “Female external genitalia” noted that there were tears on the vestibule and urethra. Under “Details of hymen”, the doctor observed a hymenal tear at 7 o’clock which was “not fresh or healed.” Finally the doctor noted that penetration was “very likely.”

The doctor was not called to give *viva voce* evidence to explain his conclusions. The state closed its case.

THE DEFENCE CASE

The appellant testified on his behalf denying the allegations. He confirmed owning a shop at Kandodo Business Centre that he rents out to one Tapiwa who is a barber. On the 10th day of March 2019 at around 5 pm he went to his shop in order to collect daily rentals from Tapiwa. Commenting on the events of the 10th March 2019, the appellant said;

> “I arrived at the shop at around 5 pm. When I got there, the barber man was doing his business, he was busy and asked me to wait a while, not more than an hour, he gave me my money and I went back home.”

He denied being at the business centre at his shop around 4 pm. He also denied having met the complainant on the 10th of March 2019 at or near his shop. Further, he denied raping the complainant inside his shop. When asked how he knows the complainant he said;

> “I have known her since 2018, she had her uncle who used to do business in my shop who was a barber. She would visit him. That’s how I came to know her.
>
> Q - Is the uncle at the shop?
>
> A - No because he was not paying his rentals in time.”

The appellant denied seeing Atrona on that day at his shop. It was further his evidence that he never used to give complainant and Atrona “pocket money.” He said he last saw

complainant in May 2018 when her uncle stopped operating from his shop. He does not stay in the same neighbourhood as complainant.

Under cross-examination, the Prosecutor took the appellant to task about why he did not mention to the police that he had not seen the complainant at his shop on the day in question. It was also suggested to him that his failure to inform the Police that Tapiwa was in the shop throughout means this evidence is a recent fabrication. It was further put to him that his lawyer's failure to ask certain questions meant that he was not a truthful witness.

More significantly, the appellant was asked to supply reasons why the complainant would give false evidence against him and he said he knew of no reason. That the Prosecutor focused entirely on the "why" is demonstrated by the following exchange from the record of proceedings;

"Q - Why would complainant be motivated to lie on this issue? (that Tapiwa was not in the shop)

A - I wouldn't know, but I am telling what I know…

Q - She cannot be giving false evidence against you?

A - She lied

Q - Why would a girl of her age falsify her testimony after you had last seen her closer to a year?

A - I wouldn't know.

Q - Why would complainant testify that you would give her money if this was not true?

A - She was lying against me. I do not know the motive of someone who lies.

Q - Paragraph 5 of your defence outline you say complainant's uncle used to rent a chair but failed to pay his rentals and left. Why do you give this information to the court?

A - The reason is that I wanted the court to know how I got to know the complainant …. that it was through her uncle.

Q - So how does her uncle's non-payment of rent have anything to do with this case?

A - So that court knows that this is the last time I saw the complainant when I parted ways with the uncle for failure to pay rentals." (my emphasis)

The appellant insisted that his shop was busy on that Sunday with people milling around the complex whose shops were open to the public. Finally, it was appellant's evidence that he never raped the complainant because he never saw her on that day.

Appellant called Tapiwa Saungweme (Tapiwa) to take the witness stand. His testimony was that he is a barber man who rents a chair in appellant's shop. He operates daily and appellant collects his rentals everyday. When asked about his whereabouts on 10 March 2019, he said;

"On the 10th March 2019 I was present at the shop, the accused came to the shop at around 5 pm. I also wanted to go and watch a match between Manchester United. I did not know the complainant on this day. I only came to know her when she came with Police." He knocked off at 7 pm because the shop was very busy which made him miss a soccer match between Manchester United and Arsenal.

According to Tapiwa Mrs Masawi's shop was open and she was there operating her tuckshop. The shops are very close to each other and the complex is located in the high density area which is always busy. Tapiwa said it was impossible for the accused to have raped the complainant inside the shop when he and his clients were present. He denied that his evidence was designed to exonerate the accused since his "livelihood is based on him." He also could not provide any reason why the complainant said there were no "employees" in the shop when he was there throughout.

In his own words he, in answer to a question said "No I am telling the court at 5 pm at that time, I was in the shop. I am telling the truth."

The defence closed its case after the evidence of Tapiwa.

Analysis

In my view, the court *a quo* although not questioning the complainant's failure to make a report first to Atrona and secondly to her grandparents, nevertheless made a proper finding that the complaint made to the teacher was admissible. It is unfortunate that the state did not see it fit to call Atrona and at least one of the grandparents to testify. Be that as it may, the court's approach as regards the requirements for admissibility of a complaint was proper.

Equally proper are the findings the court made about the fact that the complainant was sexually abused. However the crux of the matter is the identity of the perpetrator of this heinous crime. I take the view that in concluding that it is the appellant who raped the complainant, the court *a quo* regrettably fell into error by simply believing the complainant and disbelieve the appellant. In answering this question, the court *a quo* did not proceed cautiously as required by law. It did not consider that a defence succeeds wherever it appears to be reasonably possible that it might be true – see *S* v *Makanyanga* supra.

In dismissing the appellant's defence, the court *a quo* reasoned as follows;

> "On the other hand accused denies the crime and says he never saw the complainant on that day, the place is said to be a busy place and as such he could not have raped the complainant as alleged. He further states that this is a fabrication because the complainant's uncle who used to rent the accused's shop and because of the fall-out between them, she has decided to fabricate the charges:
>
> I have failed to see the link between the accused's assertion and the allegations raised against him.
>
> Accused told the court that the complainant fabricated the charges against him because he had a fallout with the complainant's uncle and yet he claims he had last seen her close to a year before the alleged crime. Surely why would the complainant come up with these allegations after a year. There is no indication that there was bad blood between the accused and the complainant. Complainant told the court that all was well between himself (sic) and the accused. At times he would even give them money to spend. Surely if accused was being good to her why would she then turn around and fabricate the charges.
>
> In any event there is no indication from the evidence of the accused that there was bad blood between the accused and the complainant's uncle. My views are that if at all complainant's uncle was not happy they would not have waited for close to a year to come up with these charges against the accused.
>
> Evidence of penetration is said to be very likely. This therefore means that complainant was indeed sexually abused and the evidence before the record all points to the accused as the perpetrator. Coincidentally, the accused places himself at the crime scene on the said date. It is indeed confirmed that he was at the shops on the day in question and the complainant was also at the same place.

My views are that the state was able to place sufficient evidence before the court and accordingly accused is found guilty as charged." (my emphasis)

I have quoted from the judgment in extenso to reveal the court *a quo's* entire thought – process. It is apparent from a reading of the evidence that the appellant never at any stage allege that the complainant or her uncle had fabricated the rape allegations against him. See record page 54. The reason why appellant's defence was dismissed is not supported by the evidence as the court *a quo* completely misunderstood the appellant's evidence on that point. This is a misdirection.

Another misdirection relates to the court *a quo's* finding that the fact that the appellant and the complainant were at the same place on the same date cannot be mere coincidence. This is inaccurate because the issue was never about placing the two at the same place and date but the two of them being present at the same time. Time was of the essence as the appellant and Tapiwa strongly disputed the time frame put forward by the complainant.

I now turn to the shortcomings in the state case which should have placed the court *a quo* on its guard since they raise alarm bells. It is complainant's contention that the rape took place inside shop No. 5 Kandodo Business Centre at around 1600 hours. Appellant is the owner of that shop which he leases to barbers. This shop is situated on a single block that is divided into several shops owned by different people. It was the complainant's evidence that the shops in their order belong to (1) Mrs Masawi, (2) Mr Phiri (appellant), (3) Keith's father, and (4) Roy's father. Complainant said at the time of the incident all the shops on the block were open except Keith's father's. Appellant is alleged to have closed the door to the shop but left the window open.

After the rape, complainant met her aunt Atrona. Surprisingly, she does not tell her that appellant had raped her. The two proceed home and again complainant did not reveal her ordeal to her grandparents. At the very least, the complainant should have been asked why she did not tell these people who are all close to her that appellant had raped her in his shop. Despite the appellant's defence that he did not meet complainant at his shop on that day at that time and that he never gave complainant and Atrona money in the past, the state in its wisdom did not see it necessary to call Atrona. Further the state's failure to call the grandparent who was alleged to have asked the complainant why she looked sad is puzzling. Evidence of a complainant's demeanour in offences of a sexual nature is always relevant. If it was true that

one of the grandparents noticed something untoward about the complainant's demeanour, why did the Prosecutor ignore such evidence, which according to the complainant was readily available?

All this, coupled with appellant's alibi and its confirmation by the Barber Tapiwa calls for an even more cautious approach in the analysis of the complainant's evidence. The fact that Atrona was not called by the state to shore up the complainant's version that she was present when appellant called the complainant and that she later asked the complainant why the appellant had called her shortly after the rape leaves key questions unanswered: Was the complainant a truthful witness? Why was such a material witness not called to rebut the appellant's defence? Can it be said that the state proved its case beyond a reasonable doubt in these circumstances? The answer is in the negative. See *Katsiru* v *S* HH 36-2007.

The setting or context in which the rape took place calls for a judicial officer to adopt a more cautious approach when assessing the evidence. Owing to the number of shops on the block, its location and the variety of services offered, it is likely that it is a busy place as contended by the appellant and Tapiwa.

Turning to grounds of appeal 2 and 4, what is also puzzling and should have attracted the court *a quo's* attention is the complainant's rendition of what happened during the rape ordeal. For a child so young, who could not have been sexually active at that time, even the slightest degree of penetration (legal penetration) would have occasioned considerable pain on her private parts. Her evidence that she did not feel anything at all when the appellant inserted his penis into her vagina raises the question whether the incident she narrated indeed took place.

Where sexual intercourse is non-consensual, medical evidence usually provides invaluable proof of forced intercourse. *In casu* Exhibit 1 the medical report is of minimal if any assistance at all in proving sexual intercourse. The doctor observed bruises on the vestibule/introitus and urethra. However, it is not clear whether these injuries were consistent with the complainant's version of events. The doctor further recorded that he observed a healed hymenal tear at 7 o'clock. If the tear was inflicted during the rape ordeal attested to by the complainant, could it have healed within 4 days? For these reasons it was necessary to call the doctor to clarify these issues – see *S* v *Melrose* 1984 (2) ZLR 217 (S).

Proof beyond a reasonable doubt demands that a defence succeeds whenever it appears to be reasonably possible that it might be true. *In casu*, the appellant's defence was not rebutted and there is a reasonable possibility that it might be true. The state failed to prove its case beyond a reasonable doubt. This doubt lingers and it must be resolved in favour of the appellant.

DISPOSITION

(1) The appeal against conviction be and is hereby upheld.

(2) The conviction and sentence are hereby set aside.

(3) The accused is found not guilty and acquitted.

Dube-Banda J……. I agree

Tavenhave & Machingauta c/o Tanaka Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners