SIMBARASHE MUTSINDIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 6 & 7 SEPTEMBER 2021

Criminal Appeal

S Kufandada, for the appellant
Ms *S Maunganidze,* for the respondent

ZHOU J: This is an appeal against the judgment of the Magistrates Court in terms of which the appellant was convicted of rape as defined in s 65 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], and sentenced to 15 years imprisonment of which 3 years imprisonment was suspended. The appeal is against both conviction and sentence. The respondent opposes the appeal.

The allegations on which the appellant was convicted are that on 22 September 2020 and at house number 18301 New Zengeza 5, the appellant unlawfully had sexual intercourse with the complainant without her consent knowing that she had not consented to it or realising that there was a real risk or possibility that she may not have consented to it. The appellant pleaded not guilty to the charge and denied being at the complainant's address stated earlier on. His defence, as presented in his defence outline, was that the complainant was his girlfriend from 2 September 2020. The complainant gave him a false name, Tatenda, as well as false telephone numbers. However on 23 September complainant invited him to her residence but he did not go there. She phoned him on the same day extending the same invitation but he turned it down. He was surprised when the police arrested him while he was at his shrine on allegations of having raped the complainant. He denied the charge and told the police that he had a drug resistant sexually transmitted illness (STI).

The court *a quo* came to a conclusion that the state had proved its case, and that the two witnesses who gave evidence on behalf of the state were credible. The court a quo disbelieved the evidence of the appellant and his two witnesses. It also rejected the appellant's allegation

that the complainant was motivated to allege rape because he had refused to visit her at her residence or was incited by a rival "prophet" who had a shrine close to that of the appellant to falsely implicate him. He postulated a third explanation, that when the complainant telephoned the appellant she was answered by his sister whom she may have believed to be his wife and therefore became bitter about that. All these were rejected, after the court found the appellant "to be a poor witness … who would grope at some possible reason for false incrimination."

The appellant, in the first four grounds of appeal against conviction submits that the evidence tendered did not prove sexual intercourse, his *alibi* was not disproved, there was no proof of a torn skirt, and that the medical report ought not to have been relied upon because it contained contradictory material. The fifth ground of appeal alleges that the court a quo erred in convicting the appellant without fulfilling its obligations in relation to an undefended accused. The sixth ground of appeal challenges the court *a quo* for not accepting appellant's version of an affair that had created animosity with the complainant.

In regard to the sentence the appellant contends that the court *a quo* erred in failing to consider the mitigating factors contained in s 65 (2) of the Criminal Law (Codification and Reform) Act, and in emphasising moral and possible risks to the complainant. The third ground of appeal alleges over- emphasis on diterence at the expense of the other relevant considerations.

Conviction

The matter turned on the credibility of the witnesses. It is trite that an appellate court does not readily interfere with findings of credibility made by the trial court in the absence of evidence of a misdirection. No such misdirection was established *in casu*. The appellant, through his legal practitioner, suggested that the case against him was dramatized during the trial. There was no evidence of the alleged drama. The withdrawal of the bail by the Magistrate after hearing the evidence of the complainant and the use of the term "ravaged" or "ravished" in relation to the sexual assault, which are the only two issues pointed to as constituting the drama, do not dramatize the case at all. The appeal is not against the withdrawal of bail. Further, the description of how the sexual assault took place was apt when regard is had to the manner in which it was said to have been committed.

On the evidence of the sexual intercourse, which the appellant flatly disputed, the court heard and believed the evidence of the complainant. The appellant' *alibi* was disproved firstly

by the evidence of the complainant and, secondly, by the evidence of Servious Antonio, the owner of the property where the complainant rented a room. Antonio testified, and was believed, that he opened the gate for the appellant when he got to his residence, and the appellant was introduced by the complainant as a prophet who had come to assist her. This was on 21 September 2020. When on 22 September 2020, the complainant screamed, the witness went out of his room and met the complainant in the corridor. Complainant told him that she had been raped by the appellant. He advised her to go to the police to make a report. This evidence was intact. Appellant did not suggest any probable reason why Antonio would fabricate such a story. In fact, this witness was clearly honest in that he did not seek to embellish his evidence by claiming to have seen the appellant after the rape. It was none of his business to go beyond advising the complainant to make a police report. There was independent evidence of penetration provided by the medical report. Thus the evidence of the complainant which was corroborated by that of Servious Antonio proved the presence of the appellant at the scene of the crime. The *alibi* was disproved. The evidence of the medical doctor corroborated that of the complainant in relation to penetration. The immediate raising of the hue and cry by the complainant, which was confirmed by the evidence of Antonio, confirmed that the intercourse was without the consent of the complainant. There was also the evidence of the bruises which is consistent with the use of force in the commission of the sexual assault. The alleged affair between the appellant and the complainant was correctly rejected by the learned Magistrate. It has no ring of truth. It is inconceivable that the complainant would allege rape merely because a phone call had been answered by a female voice without inquiring from the alleged boyfriend as to who would have answered the phone. The alleged link between the complainant and the alleged rival "prophet" was not established by evidence. The suggestion that complainant alleged that the appellant had raped her because he had refused to visit her was correctly rejected. In fact, as noted earlier on, the appellant actually visited the complainant's place and performed the dramatic rituals detailed in the evidence of the complainant.

Sentence

The appellant did not point to any of the factors listed in s 65 (2) of the code which was not considered to his detriment. It is not enough to expect the trial court to merely recite factors which have no relevance to the proved facts merely because they are listed in s 65 (2). The court *a quo* noted the violence used, evidenced by injuries and psychological and emotional

trauma to which the complainant was exposed in light of her vulnerability. She was a faithful person who thought that she was receiving some form of faith healing from her assailant whom she believed to be a prophet. The age of the appellant was noted to his credit as a mitigating factor. The exposure to STIs was correctly considered given the appellant's own evidence that he had such an illness which was drug resistant. There was no evidence of infection of the complainant, hence this factor, was of no relevance. There was also no weapon used hence s 65 (2) (f) was irrelevant. But s 65 (2) (g) and (h) were considered as the court *a quo* noted the authority which the appellant wielded over the complainant by reason of her being his "patient" who needed assistance and protection from alleged goblins. The deterence aspect is certainly relevant given the prevalence of cases involving victims and church leaders or prophets. The court requires no statistical evidence of these as it can take judicial notice of their prevalence as reported or as they were brought to the court concerned. One does not need to go beyond the borders to get evidence of these cases. All the grounds of appeal against sentence are therefore without merit. Even overally, the effective sentence of 12 years imprisonment for rape involving the use of duplicity and force is not excessive. It is actually a lenient sentence.

Conclusion

In the result, the appeal against conviction and sentence is dismissed.

CHIKOWERO J: agrees ……

Charamba & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners