EDWIN TUMBARE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & ZISENGWE J
MASVINGO, 19 & 17 June 2020

Criminal Appeal

O. Mafa for the appellant
B.E. Mathose for the respondent

MAWADZE J: Initially this appeal was in respect of both conviction and sentence. However at the commencement of the hearing of the appeal *Mr Mafa* for the appellant withdrew the appeal in respect of the sentence and thus abandoned the grounds of appeal in relation to the sentence. This appeal now solely relates to the conviction.

The 40 year old appellant was convicted after trial by the learned Regional Magistrate sitting at Beitbridge of contravening section 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to rape. The appellant was sentenced to 15 years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions of good behaviour thus leaving an effective prison term of 12 years.

The appellant is married and is a businessman with business in the retail sector in Beitbridge, Lundi business centre and Masvingo. At the material time the 25 year old complainant and mother of two kids aged 6 years and 3 years was employed as a house maid by the appellant staying at the appellant's homestead with her two children. Prior to the alleged rape she had been

employed for about a month from 7 December 2017 or 17 December 2017 upto 11 January 2018 when the rape allegedly occurred.

It is common cause that on date of the alleged rape on the night of 11th to 12th January 2018 the appellant's wife was not present.

The facts alleged giving rise to this charge are briefly as follows:-

It is alleged that on 11 January 2018 at about 2300 hrs or midnight the appellant arrived home from Lutumba business centre where he owns some shops driving his motor vehicle. The complainant and her two young children had long retired to bed. The appellant is said to have sounded the horn for the gate to be opened for him. It is said the complainant obliged, woke up and opened the gate which she closed after the appellant had drove in. Thereafter while inside the house it is alleged the appellant invited the complainant into his bed room on the pretext that he wanted to discuss some unspecified issues with her. The complainant obliged.

It is alleged that after the complainant had entered the bedroom, the appellant closed the door and stood by the door. The appellant is said to have started to fondle the complainant's breasts indicting that since his wife was away he wanted to have sexual intercourse with the complainant. The complainant was unwilling and is said to have pushed him away at the same time trying to leave the bedroom but the appellant blocked the entrance or exit.

It is alleged that as the two struggled the appellant removed the complainant's skirt and pants, overpowered while still blocking the door. The appellant is said to have put on a condom, forcibly pushed the complainant on to the bed and raped her once as the complainant screamed in vain for help. The dogs outside started to bark and it said the appellant later released the complainant and instructed her to check outside as the dogs were barking. This was after 5 minutes or so of the alleged sexual act. The complainant instead is alleged to have proceeded to her room where she retired to bed with her two children who were still fast asleep.

It is alleged that the following day on the 12th January 2018 the complainant around midday telephoned her elder sister who resides at No. 2024 Mashavire, Beitbridge ad reported the rape. A police report was then made the following day on 13 January 2018 and the appellant was subsequently arrested.

The appellant vehemently denied the charge and indicated that he never had sexual intercourse with the complainant on that day or on any other occasion. The appellant stated that

the rape charge was simply fabricated by the complainant who was hell bent to fix the appellant after some work related misunderstanding.

The appellant's version is that when he arrived home on the night in question and sounded the horn of his motor vehicle the complainant was not at home. She had left her two kids alone. This forced the appellant to sleep in his motor vehicle at the gate. The appellant said the complainant only returned at about 0345 hrs now on the 12th of January 2018 towards dawn. The appellant angrily confronted her for abandoning her work station putting appellant's property at risk which included his chickens. The appellant said even before this incident the appellant had threatened to cause complainant's arrest after she failed to account for the money from the sale of chickens.

The appellant said as he angrily confronted the complainant that early morning the complainant retorted that she was being under paid compared to other employees and that she would fix the appellant.

The appellant said later that morning at about 0500 hrs the complainant probably realising the errors of her ways apologised to the appellant for her conduct. The appellant however said he told her that he would nonetheless advise his wife.

The appellant said he was surprised to be arrested on these allegations. The appellant thus believes the complainant simply made a malicious report of rape against him as a way of fixing him and to simply tarnish his otherwise impeccable reputation.

During the trial the State led evidence from the complainant Rosemary Ncube and her elder sister Doreen Ncube. The appellant gave evidence and called one Justin Chauke as a defence witness.

The grounds of appeal in respect of conviction are couched as follows:-

"*Against conviction*

1. *The inference of sexual intercourse drawn by the court a quo was inconsistent with the surrounding circumstances of the offence particularly the complainant's conduct before, during and after the alleged rape.*

2. *The court erred and indeed fell into error by convicting appellant without having eroded the danger of false incrimination which was apparent from the appellant's defence outline.*

3. *The court a quo misdirected itself by convicting the appellant despite it being apparent that the rape had not been reported at the earliest possible opportunity*."

It is however difficult to appreciate the concerns raised by the appellant in all the three grounds of appeal. A brief summary of the evidence placed before the court is illustrative.

It is not in dispute that the complainant had worked for the appellant for hardly a month. It is also clear that her contract of employment abruptly ended as a result of these allegations.

An important factor which was analysed by the court *a quo* in a bid to exclude the alleged danger of false incrimination relates to how complainant was recruited as appellant's maid. Besides being recently employed the complainant had been recruited on account of the close friendship between the appellant and the husband of Doreen Ncube complainant's elder sister. Unrefuted evidence placed before the court was that it is complainant's brother in law (Doreen Ncube's husband) who requested the appellant to employ the complainant who was struggling to fend for herself and her two minor children in rural Mberengwa. The appellant, like a Good Samaritan did not only offer the complainant the job but agreed to stay with her together with her two young children whom appellant said he provided food and even clothes. In her evidence the complainant made it clear that she was indeed grateful for all such help. The complainant was well aware not only of what the appellant meant to herself and children's well-being but of the close friendship existing between appellant and the family of complainant's elder sister. The question therefore begs as to why the complainant would literally bite the hand which was feeding her and her children, moreso hardly a month after being employed. Further why would she want to ruin the friendship between her sister's family and that of the appellant by fabricating rape allegations? Given these objective facts the court *a quo* rightly found that it was inconceivable that the complainant would fabricate the report of rape.

In her evidence in chief the complainant addressed the other possible reasons stated as to why she would fabricate the rape allegations as suggested by the appellant.

The complainant made it clear that she never deserted her work station on the night in question and even rhetorically asked where it is said she had gone. The appellant shed no light as to where complainant could have possibly gone literally for the whole night while leaving her two very young children alone and possible aware that appellant would come home. She made it clear

that she was always at her work place and dismissed as false appellant's suggestion that she was away and returned late.

In relation to the alleged salary dispute the complainant explained that she never raised any complaint about her salary which she had already been paid. She said she even did not know what other employees at appellant's businesses earned. Indeed she had hardly been employed for a month and it is inconceivable she would have such information. To the contrary she said she was even happy that appellant had not only offered her employment but allowed her to stay with her children at appellant's homestead. She was grateful for that. The complainant refuted that she stole or misappropriated any money. She pointed out that it was not even her duty to handle any cash from chicken sales but that it was the domain of appellant's child. The appellant did not lead any evidence to controvert this.

The complainant's cross examination on her possible motive to falsely implicate the appellant was understandably lukewarm. She in fact stood her ground pointing out that the appellant's story that he had had an altercation with her either a day before or on the night in question prior to the alleged rape was simply a fabrication as nothing of that sort happened. She indicated that she never exchanged any harsh words with the appellant and had no issues with him prior to the alleged rape.

The appellant did not fare any better in trying to convince the court *a quo* that he was being falsely incriminated. In his defence outline he made reference to missing cash after the sale of chickens. In is evidence in chief he shifted goal posts now saying what was missing were the chickens which appellant allegedly threw into a toilet. The trial prosecutor rightly took appellant to task over this prevarication and the appellant conceded that his story of missing cash from chicken sale was incorrect. The complainant was adamant that no such issue arose and she was consistent.

What I also find intriguing is that the following day after the alleged rape, now on 12 January 2018 appellant visited the complainant's sister Doreen Ncube looking for Doreen Ncube's husband in order to be assisted to get fuel. If indeed the appellant had quarrelled with the complainant as he alleges both on 11 January 2018 over some missing chickens or cash and the absence of complainant at her work place throughout the night, why would appellant fail to raise all this with the appellant's sister Doreen Ncube moreso considering that it is Doreen Ncube and

her husband who had asked the appellant to employ the complainant. Again the court *a quo* was correct in rejecting the appellant's allegations of false incrimination. A proper assessment of the evidence placed before the court *a quo* shows that there is absolutely no such danger of false incrimination.

The other ground of appeal relates basically to the complainant's credibility as regards the events preceding the alleged sexual act, the alleged sexual act itself and events thereafter.

I find nothing inherently improbable in how the complainant said she was sexually molested. She explained how appellant lured her into his bedroom. His wife was away. It was late at night. She explained that as an employee and without knowing appellant's intentions she could not have refused to going to his bedroom believing that appellant genuinely required her help or to discuss something with her. I find that simple and clear explanation to be plausible.

The complainant gave a lucid account of how the sexual act took place. After she entered the bedroom the door was closed. The appellant stood by the door way. He demanded to be intimate with her. She protested. A struggle ensued. She was overpowered, undressed and raped on the bed. She did not consent. She screamed. The sexual act as per her estimation lasted for about 5 minutes. The appellant had put on a condom. She could not tell if he ejaculated. She said she was then released and asked to check on the barking dogs. She proceeded to her bedroom to sleep.

The appellant does not allege consensual sexual act, but argues that no sexual act took place. As pointed out there is virtually nothing incredible, let alone impossible in how the complainant said the sexual act took place. The complainant's young children were understandably fast asleep at almost midnight. She explained clearly how the appellant prevailed upon her despite her resistance. The appellant suggested that complainant's conduct after the alleged rape does not show that she had been sexually abused. However the doctor who examined her on 16 January 2018 observed that she was still traumatised as per the medical report. Is it possible that even after 4 days or so after the alleged rape she would fake such emotional state?

I find it not conceivable that the complainant should have simply fled at night soon after the rape. Her explanation is that she was afraid the appellant could harm her. They were the only adults at home. Further she had two young children who were fast asleep. The next day the appellant himself agrees with her that it is the appellant who told the complainant to get into his

motor vehicle in order to proceed to Rutenga as per prior arrangements. The complainant complied. I find no basis therefore as to why one would seek to attack her conduct after the alleged rape.

The last ground of appeal is that the appellant did not make a timeous report of rape. I really find no merit in this submission.

As already pointed out the complainant made the report of rape the following day on 12 January 2018 to her elder sister Doreen Ncube telephonically around midday. Doreen Ncube her elder sister is the person to whom she would reasonably be expected to make a report of this nature. Again it is inconceivable that she should have been expected to make a report of rape to every stranger she met.

The assessment of whether a report of rape has been made timeously is a factual issue which depends on the circumstances of each case. The victim's explanation, if there is any perceived delay, is also relevant. I find that there was no delay at all in making the report of rape by the complainant to the person she would reasonably be expected to make the report. The complainant clearly explains the sequence of events the next day culminating in her report.

A proper analysis of the complainant's evidence shows that she clearly explained how the forced sexual intercourse took place. She also dismissed as false appellant's suggestion that she had a motive to falsely incriminate him. Lastly she made the report of rape timeously the following day.

The court *a quo* rightly rejected the appellant's evidence.

Indeed it is trite that in any criminal matter no onus rests on an accused person to prove his innocence. The case of *S* v *Mupatsi* 2010 (1) ZLR 529 (H) is illustrative. In that case MAVHANGIRA J (as she then was) at pp 533 H – 534 A had this to say when she referred also to the case of *R* v *Difford* 1937 AD 370 at 373;

> "*No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."*

The learned Judge continued however at pp 534B to make these pertinent remarks:

> "*The trial court, having found appellant's story to be false and unacceptable, was justified in convicting the appellant. The appellant's contention to the contrary in this regard is*

based on an erroneous appreciation of the dictum in Difford case. The conviction is properly justified and supported by the evidence on record. The court's judgment is clear and based on sound grounds ----------"

The complainant's evidence on how the alleged rape took place is corroborated in all material respect by the testimony of her elder sister Doreen Ncube and it shows consistency on the part of the complainant. It has not been suggested at all that Doreen Ncube has the motive to team up with the complainant and falsely incriminate the appellant. The appellant is the best friend of her husband. It is Doreen Ncube who upon receiving the report of rape who told the complainant to remain at appellant's homestead until the 13th of January 2018 to allow Doreen Ncube and her husband to consult appellant's relatives and to collect the appellant (*see page 20 of the record*). She also said she also wanted to avoid false allegations of theft of appellant's property being made against complainant if complainant decided on her own to leave appellant's homestead in the absence of any adult person.

The appellant's evidence was righty rejected as false. This should not be confused with thrusting any onus on the appellant to prove his innocence.

The complainant in her evidence (*which evidence was not challenged*) was that the appellant had his own spare keys to the gate attached to his bunch of car keys. If that was the case and assuming the complainant was away all night as he said, is it conceivable that he would sleep in his motor vehicle all night instead of just opening the gate. It was only in his defence case that he belatedly denied having his own set of keys to the gate.

As already pointed out the appellant was not consistent on the nature of the dispute he had with the complainant in relation to the chickens. Was it about missing cash or missing chickens? Again the appellant conceded that he had not been truthful. The question is why would he lie on such a simple issue? He lied, in my view, because no such dispute ever arose.

Under cross examination the appellant conceded that his relations with the complainant were good as he looked after her and her children. He regarded her as his daughter. Infact he said he had promised to pay school fees for complainant's children. Why then, one may ask, would complainant decide to falsely implicate the appellant. Again the so called motive given by the appellant is false.

The last nail in the appellant's coffin was his decision to call Justin Chauke as a defence witness. Even *Mr Mafa* for the appellant conceded that Justin Chauke was not a truthful witness. No wonder why the so called presence of Justin Chauke on the night in question is not part of appellant's defence outline.

It is clear that Justin Chauke was a hired gun as it were. He was called to buttress appellant's false narrative that on the night in question complainant was not at the homestead, that appellant and complainant exchanged harsh words and that appellant could not have possibly raped the complainant in the presence of Justin Chauke. Whilst Justin Chauke narrated all these issues with admirable clarity he was terribly exposed during cross examination on other issues he could possibly not have rehearsed. The court *a quo* rightly pointed out that the appellant should have cursed his decision to call Justin Chauke as a witness (*see page 56 – 57 of the record*).

A few examples suffice.

Justin Chauke said he only became aware of the rape allegations against the appellant through a text message sent to him by the appellant 4 or 5 days from the 12th of January, 2018. This was a fatal lie. The appellant himself said he only became aware of these rape allegations some 2 to 3 months later in March 2018 as he was away from 13 January 2018 until March 2018 at his businesses in Lundi and Masvingo. Justin Chauke could not reconcile his evidence with that of the appellant (*see page 34 of the record*).

Justin Chauke in his statement to the police said it was on 12 April 2018 that some taxi driver told him that he, Justin Chauke, was wanted by the accused. He said this prompted him to go and see the appellant in April 2018 and that the appellant then verbally advised Justin Chauke about the complainant's report of rape against the appellant (*see pp 34 – 35 of the record*). After being questioned to reconcile his evidence on how he learnt of the rape allegations [whether by a text message or verbally being advised by the appellant], all Justin Chauke said that he had lied to the police. The question is why would he lie to the police?

It is therefore incredible that Justin Chauke could not give a truthful account on seemingly simple issues of how and when he learnt of the rape allegations, worse still to lie about it. The inescapable conclusion is that Justin Chauke's calling as a defence witness was a calculated lie by the appellant to mislead the court that Justin Chauke was present at appellant's homestead on the night of the alleged rape. This was meant to dovetail with the appellant's narrative. It is false. The

question begs as to why the appellant would plant a witness at the alleged scene of crime if appellant was being honest? This is precisely why the court *a quo* rejected appellant's version of events.

I find no misdirection on the part of the trial court in the manner it assessed the totality of the evidence pointing to the appellant's guilt.

There is no misdirection in which the court *a quo* applied the principles enunciated in the case of *S* v *Banana* 2000 (1) ZLR 607 (S). In that case the CHIEF JUSTICE GUBBAY discarded the cautionary rule in sexual cases on the basis that it was not only irrational but an outdated perception which had long outlived its usefulness. There is no rational and objective basis upon which victims of sexual abuse should be treated as suspect witnesses as if it is a crime to be a victim of sexual abuse. However it should be borne in mind that it was emphasised in the *Banana* case *supra* that the trial court was still enjoined to consider carefully the nature and circumstances of the alleged sexual offence and to a adopt a common sense approach.

In my respectful view there is no need to stereotype victims of sexual abuse and decree that they should behave in a particular specified manner or fashion lest they are not believed. The proper approach is that each case should be assessed on its own peculiar circumstances. Put differently, the simple question to be answered or asked is whether the complainant or victim in a sexual case is credible.

In conclusion, I am satisfied that the court *a quo* did not misdirect itself in any manner. The conclusion made by the court *a quo* both on the facts and the law cannot be impugned. The appeal against conviction totally lacks merit and should be dismissed.

Accordingly, it is ordered that the appeal be and is hereby dismissed.

Mutendi, Mudisi & Shumba, counsel for the appellant
National Prosecuting Authority, counsel for the respondent