OBADIAH MANGISI

versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J. & ZISENGWE J
MASVINGO 24 JUNE, 2020 & 9 SEPTEMBER, 2020

Criminal Appeal

Mr C. Ndlovu, for the appellant
Ms M. Mutumhe, for the respondents

ZISENGWE J: This is an appeal emanating from the Regional Magistrates Court sitting at Masvingo where appellant was convicted of the offence of having sexual intercourse with a young person below the age of sixteen years in contravention of section 70(1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] ("the criminal code").

On arraignment before the court below, the appellant faced two charges. The first being that of rape (i.e. contravening section 65(1) (a) of the Criminal Code), the nub of the charge being that he had forcible non-consensual sexual intercourse with one Pashel Chihororo (the complainant). In count 2 (which also related to the same complainant) he was charged with contravening section 70(1) of the Code as earlier stated.

At the conclusion of the trial, the court *a quo* was not satisfied that the State had managed to prove the rape charge and accordingly acquitted the appellant of that charge. Regarding the second charge, however, the court *a quo* was satisfied that the appellant had engaged in consensual

sexual intercourse with the complainant who at the time was below the age of sixteen years. The court was also satisfied that when he did so he had knowledge (actual or constructive) that the complainant was below the age of sixteen years. Appellant was subsequently sentenced to 10 years imprisonment of which 3 years were conditionally suspended for 5 years.

Dissatisfied with the propriety of the conviction and stung by the severity of the resultant sentence he appealed to this court against both.

Regarding conviction

In respect of conviction the appellant itemised 6 grounds of appeal the upshot of which is that the evidence taken as a whole does not support the conviction. These grounds of appeal were couched in the following terms:-

1. *The trial Magistrate erred in convicting the appellant when it was apparent that the complainant only made the report against the appellant after she had fallen pregnant, been chased away from home and appellant had refused to acknowledge responsibility of her pregnancy. Put differently the risk of false incrimination was very high.*

2. *The trial Magistrate erred in accepting the complainant's evidence relating to the date the sexual intercourse took place notwithstanding that she had found that the complainant was not credible on material issues in respect of the first count (rape).*

3. *The trial Magistrate erred in rejecting the appellant's version to the effect that he started having sexual intercourse with the complainant in March 2018 when such version was corroborated by the medical report which showed that in May 2019 complainant was 8 weeks pregnant.*

4. *The trial court erred in finding that Precious Simon and Frank Manyewe's evidence was irrelevant notwithstanding that their evidence proved that in 2018 the complainant was in love with Jabulani Jecherere and not the appellant.*

5. *The trial Magistrate erred in finding that the appellant knew the complainant's age notwithstanding that the complainant testified that she never told appellant her age.*

6. *The court erred in finding that the mere fact that she was going to school meant that she was under the age of 16 years.*

The appeal against was strenuously opposed by the State who stressed that the Magistrate's findings of fact can hardly be faulted in light of the evidence adduced and that in any event the court *a quo* being steeped in the atmosphere of the trial is best placed to make findings of

credibility. In a word, therefore, the State urged this court to caution itself against hastily interfering with the court *a quo's* conclusions on matters of fact as these remain essentially the domain of that court save where there is evidence of gross misapprehension of same.

Three witnesses testified for the State, the same number as those for the defence. The prosecution witnesses comprised the complainant, her mother Sandra Chingwa and one Jabulani Jecherere (hereinafter simply referred to as "Jabulani"). Jabulani occupies a very interesting position in this case. He was not only employed by the appellant as a taxi driver (although appellant insisted that he was in fact employed by his wife) and in that capacity he would run errands for the appellant and became somewhat of a confidante to the latter, but also because the appellant appeared to steadfastly maintain that he (i.e. Jabulani) is the real culprit in respect of the charge he was convicted of. The defence witnesses on the other hand comprised the appellant himself who also roped in his wife Precious Simon and one acquaintance of his (and fellow Mashava resident) Frank Manyewu.

During the trial several factual disputes of varying degrees of importance emerged. However, the evidence reveals that the following facts are undisputed; the events which culminated in the aforementioned charges being levelled against the appellant took place in the small mining town of Mashava. The complainant resided with her parents in a residential area called Gaths, Mine the same suburb where appellant also resided, albeit in a different section thereof.

It is common cause that at the material time in February 2018, whereas the complainant had just turned fifteen years (she was born on 26 January, 2003) and was doing her forth form at a local secondary school. The appellant on the other hand was approximately 32 years old, he was married, stayed with his family and was self-employed.

As stated earlier, the third State witness, Jabulani, was employed by either the appellant or his wife as a taxi driver. He would on certain occasions ferry the complainant to school.

Most importantly, however, it is undisputed that at some point, either in February 2018 (as per the complainant's version) or in March 2019 (as per the appellant's avowed position) the appellant and the complainant commenced to engage in sexual relations. The affair remained largely a secret until it was blown open in 2019 when a pregnancy test was conducted on the

complainant at her mother's behest. The pregnancy test revealed that the complainant was in fact several weeks pregnant.

No doubt alarmed by this development, complainant's mother demanded to know from her the person who was responsible for it. Although the complainant initially refused to divulge the author of the pregnancy, upon being cajoled and manhandled by her mother she would relent and let the cat out of the bag. She disclosed that it was the appellant who was responsible for it. She would subsequently disclose the circumstances under which their first sexual encounter had unfolded (suggestive of forcible non-consensual sexual intercourse) and how the subsequent sexual trysts took place on several occasions.

These revelations then led to the appellant's arrest and his subsequent arraignment before the Regional Magistrate on the earlier mentioned charges.

For the sake of completeness I interpose here to refer to the rape charge. The court a quo acquitted (correctly in my view) the appellant on that charge given the entire set of circumstances surrounding it. The Regional Magistrate was correct in finding that the rape report was neither timeously nor voluntarily made thereby casting serious doubt on the reliability of the evidence in this regard. Further it is to stretch the grounds of credulity to suggest that the complainant would later proceed to engage in repeated consensual sexual encounters with the same person who had not only supposedly raped her but had also threatened her with death should she dare to divulge that supposed rape.

Reverting to the chronology of events as they unfolded leading to the charges being preferred against the appellant: upon the complainant's pregnancy coming to light, she (i.e. complainant) was banished from home by her irate mother (although there was some ambivalence on the part of the latter in this respect: she claims that she was not angry as such). Following her banishment from home, the complainant sought and obtained the assistance of Jabulani in contacting and meeting up with the appellant and informing him of the fate that had befallen her.

When appellant was contacted in respect of the allegations he was less than co-operative. It would appear he did not readily accept responsibility of the pregnancy. Instead he proceeded to enlist the intervention third defence witness Frank Manyewu. The latter would then quickly assume the role of intermediator as he proceeded to interview the complainant ostensibly with a

view to establishing the true authorship of the pregnancy. In a nutshell, however, there was no immediate resolution of the issue of the complainant's quandary brought about by her pregnancy.

Several of the appellant's grounds of appeal are capable of immediate disposal merely against the backdrop of the facts that are common cause as outlined above.

Grounds 1 and 2 are inter-related and dovetail into each other. It is contended therein that the Magistrate erred in failing to appreciate the risk of the complainant falsely incriminating the appellant given the circumstances that led to the police report being made. In particular it was argued that the report was only made upon the complainant falling pregnant and being banished from home.

Implicit in this argument is the suggestion that the report was not voluntarily made. Evidently, there has been in this regard an unfortunate conflation of legal principles in that there was an importation of principles applicable to rape to a charge of contravening section 70 of the Code. With the latter, the complainant is invariably a willing participant in the sexual encounter(s) (otherwise the offender would be charged with rape). The twin questions of the timeous and voluntary reporting of the same logically fall away. Unlike situations of rape force, coercion or fraud vitiating consent (which would then require a timeous and voluntary report to be made) do not arise. As a matter of fact it is not uncommon (without necessarily suggesting that this is what occurred *in casu*) to find that the child which the law seeks to protect under Section 70 of the Code may be the initiator of the sexual contact.

It is therefore untenable to suggest, as the appellant does, that the child would willingly and timeously report the sexual intercourse when she was an eager, willing and consenting participant.

The facts of the present case portray the classical scenario of how such cases usually come to light. Almost without exception the illicit sexual liaison only surfaces when something goes horribly wrong. In the majority of such cases this relationship only gets to be known when the complainant either falls pregnant or when the two paramours are caught in the act. Ground 1 therefore cannot be sustained.

In ground 2 of the notice of appeal it was contended that the court *a quo* should have also rejected the complainant's version regarding the period when the sexual intercourse took place because the same court had rejected her version on the rape charge. Reliance was placed in this

regard on a passage extracted from the case of *S* v *Nyirenda* HB 68/03 (and cases cited therein) which passage is to the effect that where a witness lies in respect of a material aspect of her evidence, then the court should be circumspect in accepting the rest of her evidence.

All things being equal, the *ratio* in that passage may probably have availed the appellant had the issue of sexual intercourse between him and the complainant not been common cause. To put this in perspective, even though the court *a quo* disbelieved the complainant's version regarding the rape incident it did not necessarily imply that it disbelieved her on the question of the sexual intercourse itself. What I understood the learned Regional Magistrate to mean was that she was not convinced about the absence of consent with regard to the rape charge and not necessarily that the sexual encounter did not take place. In any event the appellant himself confirmed that indeed sexual intercourse between him and the complainant took place on several occasions. The only point of divergence as between the parties relates to the period such sexual intercourse commenced to take place. The dictum in *Nyirenda* therefore finds scant application *in casu*.

Thirdly, much ado was made about (and considerable time and effort were expanded on) the complainant's supposed promiscuity in general and her alleged sexual relationship with Jabulani in particular.

Quite clearly that issue was introduced to unnecessarily obfuscate issues. It finds only peripheral relevance in the context of the issues at hand except otherwise to send everyone on a wild goose chase. The Magistrate quite rightly refused to be led down the garden path wherein she would have been asked to interrogate an issue which had remote bearing on the real issue before it. Even if one were to accept that complainant and Jabulani at some point during the period in question had had a romantic relationship and had indulged in sexual intercourse with the complainant (something which they both vehemently denied) that does not in any way absolve the appellant of liability. The appellant regrettably treated the matter as if the issue that was before the court was the question of authorship of the pregnancy which, of course, it was not. There was a half-hearted attempt made on behalf of the appellant to suggest that the debacle over her supposed romantic liaison with Jabulani irredeemably taints her credibility as a witness. That argument cannot be sustained for the simple reason of appellant's confirmation of his sexual relationship with the complainant. He cannot in one breath confirm complainant's assertions of their repeated

sexual encounters and in the next breath charge that the complainant is a completely incredible witness in respect of the rest of her evidence. Ground 4, therefore which hinges on these aforemetioned aspects also finds no real or meaningful traction and is hereby rejected.

The only issue of real substance that was before the court was whether sexual relations between the appellant and the complainant commenced in February 2018 when she was still fifteen years old or in March 2019 after the attainment of her sixteenth birthday. If it was the latter*, cadit quaestio*, if it was the former, the question then becomes whether or not appellant had knowledge (actual or constructive) that complainant was below the age of sixteen. This is the essence of what is captured in grounds 3, 5 and 6 of the grounds of appeal.

Ground 3 is however afflicted by a serious want of logic and is hard to sustain. In that ground the appellant contends that the very fact that complainant fell pregnant in March 2019 is corroborative of appellant's version of sexual intercourse in that month to the exclusion of any other prior date. To accept that argument necessarily amounts to propagating the notion that every sexual encounter leads to conception. This is not only absurd but also does not accord with biology and well known human experience. Not to mention that there is also contradiction that inheres in adopting that position vis-à-vis appellant's insistence that it was Jabulani who had all along been having sexual relations with complainant (she would have fallen pregnant on her very first sexual encounter with Jabulani if appellant's argument is extrapolated to its logical conclusion!).

Regarding the twin material issues of the period of sexual intercourse and his knowledge of lack thereof of complainant's age, the appellant is disgruntled with the court a quo's rejection of his version and the acceptance of that of the complainant and other state witnesses. It must be stressed right from the onset that it is trite that an appellate court will not lightly interfere with findings of credibility by a lower court unless such findings are clearly unreasonable and not supported by the facts; see *Bakari* v *Total Zimbabwe (Pvt) Ltd* SC 226/16; *R* v *Dhlumayo & Anor* 1948 (2) SA 677 (A).

This is because having been steeped in the atmosphere of the trial, the trial court will have had the opportunity to observe the witnesses and assess their candour and demeanour. Thus in the absence of any irregularity or misdirection either proved or apparent *ex facie* the record, the appeal court will not usually reject findings of credibility by the trial court and will usually proceed on

the factual basis as found by the trial court. The function to decide the acceptance or rejection of the evidence falls primarily within the province of the trial court.

In any event a perusal of the evidence as a whole does not in the least point to any misdirection or irregularity on the part of the court *a quo.*

The complainant was steadfast and unyielding in her evidence regarding when she commenced her sexual relations with the appellant. She indicated that the first sexual encounter was in February 2018 and this was the first of many to follow. She indicated that these encounters persisted with regularity until she fell pregnant which pregnancy was discovered in May 2019. I find it highly improbable that having only commenced this sexual relationship in March 2019, as contended by the appellant, she would maliciously backdate the same to February 2018. Complainant maintained that on most occasions these trysts would take place when the appellant ferried her to school. It is critical to note that it was when she fell pregnant in 2019 that she revealed that she had started being intimate with appellant back in early 2018. These revelations were made before the matter was reported to the police. All she wanted was for the appellant to accept responsibility for the pregnancy and hopefully marry her. She would have had no motive at that stage to "backdate" the commencement of the sexual intercourse. It would have been of no benefit to her then to falsely indicate that sexual relations between her and appellant started in early 2018.

Complainant's evidence with regard to when the relationship between her and the appellant started was corroborated (albeit indirectly) by Jabulani who indicated that he was aware of the romantic relationship between the two in 2018. This was not only because appellant had told him so in 2018 but also because he would on many occasions see the two of them together as he drove along the road to the school where complainant was a student.

It is clear that the appellant during the trial sought to do two things in a vain bid muddle issues and escape liability. Firstly he sought to deflect attention away from himself to Jabulani and secondly he conveniently suggested that his sexual relationship with the complainant only commenced in March 2019 when the complainant had attained her sixteenth birthday. Ultimately therefore, I am of the view that from the evidence as a whole that the court below was correct in accepting the evidence of the prosecution witnesses in this regard and rejecting that of the appellant.

I am equally satisfied that the court a quo was correct in concluding as it did that the appellant had either actual or constructive knowledge of the fact that the complainant was below the age of 16 years. Reference was made by the Regional Magistrate in her judgment to three key indicators leading to that conclusion. Briefly these pointers are; firstly evidence to the effect that the complainant's family and that of the accused were friends since 2017 and that they used to visit each other implying that appellant knew the complainant for an appreciable period of time to be able to know or suspect her true age. Secondly, that these two families used to attend the same church. This piece of evidence actually came Frank Manyewu (contrary to the position adopted by counsel during oral arguments in this appeal that no such evidence was led before the court a quo). The import of that evidence is to further cement the fact that appellant had actual knowledge (or subjectively foresaw) that complainant was below the age of sixteen. Thirdly, the evidence shows that appellant knew that complainant was still attending school. Several pieces of evidence indubitably point to this fact; most significantly being the very fact that he used to ferry her to school practically each day as testified by the complainant.

Appellant's contention in ground 6 of his appeal can hardly carry the day for him. In this regard he argued that knowledge that one is attending school does not *ipso facto* lead to conclusion of knowledge of age. In my view, however, it is a significant piece of evidence which when taken together with the rest of the evidence shows that at the very least he had constructive knowledge that she was below the age of 16. In other words he subjectively foresaw the possibility of her being below the age of 16 and proceeded to indulge in sexual intercourse with her reckless as to whether or not that was the case. It is trite that in the evaluation of the evidence it is required of the court to view the evidence as a whole instead of focusing too intently on individual aspects thereof to the exclusion of the rest. Doubt may indeed arise when one piece of evidence is viewed in isolation but such doubt is set to rest when the evidence is viewed as a whole. In the context of this case knowledge by the appellant that the complainant was still attending secondary school should not be viewed in isolation but together with the rest of the evidence.

Further in this regard, s 70(3) of the Criminal Code casts the onus on an accused charged with this offence to show that he believed that the young person was 16 years or above at the time of the sexual intercourse. It provides as follows:-

"70. Sexual intercourse or performing indecent acts with young persons

(1) ....
(2) ...
(3) It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he or she had reasonable cause to believe that the young person concerned was of or over the age of sixteen years at the time of the alleged crime."

In this regard see the case of *Tshuma* v *State* SC 86/84 where Gubbay JA (as he then was) stated the position in the following terms:

"It was incumbent upon the appellant to prove (i) that he bona fide believed the complainant to be above the age of (16) years: and (ii) that he had reasonable cause for such belief. (See R v Carmody *1969 (2) RLR (AD) at 527 E)."*

In rejecting the appellant's defence that he believed that the complainant in that case was above the age of sixteen the court remarked as follows:

"The most significant feature to my mind is that for a year and half the appellant the appellant was well acquainted with the complainant. It was not just a question of observing her from afar or of meeting her on the odd occasion. He knew that she was a form II pupil and he must have appreciated that the average age of the children in that class was 15 years"

The court after analyzing the pertinent features concluded on page 4 of the cyclostyled judgment as follows:

"The applicant's attitude was simply close his eyes to the possibility that that the complainant might be under 16 years of age. He took a calculated risk"

The accused dismally failed to show (on a balance of probabilities) that he held such *bona fide* belief that complainant was above 16 years. His attempt to suggest that the complainant informed him she was 17years old was completely denied by her.

Ultimately therefore, I am of the firm view that the appellant was correctly convicted.

REGARDING SENTENCE

Although in his appeal against sentence the appellant enumerates several grounds, he essentially complains that the sentence imposed by the court *a quo* is excessive in view of the mitigating factors and in light of the peculiar set of facts of the case. He pleads for a substitution of that sentence with a fine (whether or not coupled with a wholly suspended prison term) or community service.

The State while conceding that the sentence of 10 years imprisonment (with 3 suspended) imposed by the court a quo was rather excessive (and should be interfered with) nonetheless maintained that a custodial sentence was not only appropriate but inescapable. In this regard the Stated proposed a sentence of 5 years imprisonment with 2 years suspended and 1 agree.

This offence was designed to protect young children from lascivious sexual predators who often prey on young and often naïve and impressionable children. Young persons often engage in consensual sexual intercourse with older persons without fully appreciating the social, physical and psychological implications attendant thereto.

Because of their immaturity and lack of experience in life they may be easily lured into such illicit sexual intercourse by older persons who use trinkets or small sums of money as bait. As such they are exposed to potentially life altering experiences such as unplanned and unwanted pregnancies, the risk of contracting sexually transmitted diseases (including HIV and AIDS).

Further, premature exposure to sexual intercourse may result in anti-social behaviour such as recalcitrance and the premature dropping out of school, social stigmatization and being ostracized.

The fact that some of these consequences did not eventuate in this present matter is only fortuitous (and fortunate) but does not in the least imply the absence of the risk. It is cold comfort to the complainant and her family that her pregnancy only came about upon her attainment of her sixteenth birthday when that is juxtaposed against the fact that the appellant took advantage of her ever since her attainment of her fifteenth birthday.

The sentence proposed by the state is in my view appropriate and is in line with cases of a similar decided by the courts in the recent past.

In the final analysis therefore the following order be and is hereby given:

1. The appeal against conviction is hereby dismissed.

2. The appeal against sentence partially succeeds as follows:-
   (a) The sentence imposed by the court a quo of "10 years imprisonment of which 3 years suspended for 5 years on condition accused does not within that period commit any offence of a sexual nature for which upon conviction accused is sentence to imprisonment without the option of a fine" is hereby set aside and substituted with the following:-
   (b) 5 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition accused does not within that period commit any offence of a sexual nature for which upon conviction accused is sentenced to imprisonment without the option of a fine.

Zisengwe J.

Mawadze J. agrees ……

Ndlovu and Hwacha legal practitioners; Appellant's legal practitioners
National Prosecuting Authority; for the Respondent