HB 116-18
HCA 430/12
XREF HCA 70/17
XREF REG 373/11

CLIFFORD MASUKU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 14 MAY 2018 AND 17 MAY 2018

Criminal Appeal

B Madziba for the appellant
T Muduma for the respondent

MATHONSI J: The then 42 year old appellant was convicted by the regional court at Bulawayo on 12 September 2012 of one count of rape as defined in section 65 of the Criminal Code [Chapter 9:23] and sentenced to 15 years imprisonment of which 5 years imprisonment was suspended for 5 years on condition of future good behaviour. He has appealed to this court against both conviction and sentence.

The essence of his attack on the conviction is that the complainant was not a competent witness and therefore should not have been allowed to testify in a court of law by reason of mental incapacity. The other two state witnesses who corroborated the complainant's evidence could not have been credible as they narrated only what was said to them by the incompetent complainant. The court *a quo* also erred in dismissing the appellant's defence which was corroborated by her 14 year old daughter, namely that at the time of the alleged offence he had been soundly sleeping in his bedroom while his daughter stood sentinel by the sitting room watching television. He therefore could not have raped the complainant on the same sofas and in the same room occupied by his daughter.

Regarding sentence, the appellant takes the view that it is unduly harsh considering his personal circumstances. It should be substituted with one of an effective 4 years imprisonment. The appeal is contested by the state which supports both the conviction and sentence.

The facts are that the 27 year old complainant was a neighbour of the appellant who resided at house number 2253 while the appellant lived at house number 2260 Emganwini Bulawayo. On 28 August 2011 at about 11:30 hours the complainant had gone to the appellant's house, as she used to do, looking for the appellant's wife. Unfortunately the wife and her four children had gone to church, it being a Sunday, leaving the appellant alone in the house. When the complainant arrived, the appellant is said to have dragged her to the sitting room and forced her to lie on a sofa before stripping her naked. He had sexual intercourse with her once without her consent. After the sexual attack the complainant immediately exited the house distressed and crying.

She went straight to another neighbour's house, Otilia Ncube and reported the rape. Otilia Ncube also immediately called Alice Khumalo who also received the report of the rape contemporaneously. The two advised the complainant not to take a bath and a police report was subsequently made leading to the arrest of the appellant. The appellant's defence was a complete denial of the allegations, including that the complainant had ever visited his house on the day in question.

At the trial, the complainant testified at the commencement of the trial on 11 April 2012 before the matter was remanded to 23 April 2012 for continuation of trial. In fact the trial dragged on until 13 September 2012 when the appellant was sentenced aforesaid. It was not until 26 June 2012, after both the complainant and Otilia Ncube had testified, that a psychiatric report compiled by Dr E Poskotchinova, a consultant psychiatrist at Ingutsheni Hospital on 14 June 2012, was produced.

In that report, the doctor noted that she had only examined the complainant on 3 May 2012 (paragraph 3). It is therefore not clear why it took her more than a month to compile a report of her findings. She observed that due to the complainant's mental subnormality she was not able to consent to sexual intercourse and also stated, unhelpfully in my view, at paragraph 7 that the complainant was not fit to stand trial. It is that short sentence which the appellant has lurched on to in the hope of overturning the conviction.

Unfortunately for the appellant the complainant had already testified when the report was compiled. The trial court dealt with the issues arising from that very extensively in its judgment which is well reasoned and sound. I am unable to find any misdirection whatsoever in the court's findings in that regard. Briefly, it would be noted that when the complainant was brought to court, she was brought on the strength of another medical report compiled by Dr D P Matutu, another medical expert based at United Bulawayo Hospital who recorded that she was "mentally impaired."

That doctor had also observed evidence of sexual abuse on the body of the complainant including a "white-cream substance (which) could be seamen" on her upper thighs and vulva. He concluded that penetration was probable.

Apart from that there was the evidence of Otilia Ncube and Alice Khumalo who received the report of rape immediately after it occurred from the vicinity of the scene of crime. The complainant had rushed to Otilia sobbing after the attack. Therefore all the essentials of rape were present including the corroborative evidence of not only the contemporaneous report to Otilia and Alice but also the medical findings of the doctor who examined her less than 24 hours after the offence at 0500 hours on 29 August 2011.

It is against that background that the significance of the opinion of the psychiatrist who conducted an examination 9 months later and compiled a report 10 months after the offence, paled. In terms of section 245 of the Criminal Procedure and Evidence Act [Chapter 9:07] the court *a quo,* which tried the case, had jurisdiction and authority to decide upon all questions concerning the competency of the complainant to give evidence. It did.

In terms of section 245;

> "It shall be competent for the court in which any criminal case is depending (*sic)* to decide upon all questions concerning the competency and compellability of any witness to give evidence."

The complainant testified before the trial court before the psychiatrist condemned her as being unfit to stand trial, a trial she had already stood and passed with flying colours. In fact looking at the report of the psychiatrist it is not apparent therefrom why the said doctor added the sentence;

"7. She is unfit to stand trial."

I say so because in paragraph 4 of the same report the doctor noted that at her home the complainant was able to do simple household chores like sweeping and fetching water under supervision. The court *a quo* was very much alive to the attendant dangers in the complainant's evidence. It stated at p14 of the judgment:

> "In determining whether the complainant was capable of testifying the court relied on the case of *Langton Mendisi* v *The State* HH-128-02. In that case the accused was being charged with the crime of rape. The complainant in that case was a woman aged 35 years who was found to be moderately retarded and who was said by a specialist psychologist to fall into the category of imbecile gave evidence. She was capable only of giving minimal verbal response, was unable to understand basic commands, had a very poor fund of general knowledge and needed daily personal care and supervision. She was not capable of understanding simple daily chores on her own without care and supervision. She was not capable of understanding the nature and consequences of her actions. In contrast the complainant in that case was worse off than the complainant in the present case. In the present case the complainant was able to do some simple household chores. She could be sent to accused's house to borrow items. She recalled the events that took place. Almost 90% of what she told the court --- was common cause."

As I have said, I am unable to discern any misdirection in that regard. In terms of section 246 of the Act, it is only a person who "is deprived of the proper use of reason" who is precluded from giving evidence. That should be considered against the back drop of the fact that a court of law will generally accept expert evidence and give it due consideration. However the onus remains on the court to come to a determination of its own. It cannot substitute the expert's opinion for its own judgment nor will it blindly accept and act upon the evidence of an expert. See *R* v *Nksatlala* 1960 (3) SA 543. That is what the court *a quo* did and correctly concluded that the complainant was competent especially regard being had that most of her testimony was corroborated by other mentally sound witnesses including the medical report.

Regarding sentence, *Mr Madziba* for the appellant did not advance any meaningful submissions. It cannot be seriously argued that an effective imprisonment term, for imprisonment it should be for such rape cases, of 10 years "is too harsh and clearly serves no much purpose as submitted by *Mr Madziba*." In my view, the sentence falls within the

sentencing discretion of the court *a quo* and is in line with sentences for such rape offences. I therefore find no justification for disturbing it.

In the result the appeal is hereby dismissed in its entirety.

Takuva J agrees…….

Messrs T Hara and Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners