TAKUDZWA GAVA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 13 September 2018 & 30 January 2019

Criminal Appeal

G Shumba, for the appellant
K H Kunaka, for the respondent

WAMAMBO J: After a trial appellant was convicted of rape as defined in s 65 (1) of the Criminal Law Codification and Reform Act (*Chapter 9:23*). He was sentenced to 11 years imprisonment of which 4 years imprisonment were suspended for 5 years on condition of good behavior. He now appeals only against conviction. The main attack against conviction is that the Court a *quo* erred fundamentally in finding that accused penetrated victim's vagina when there was no evidence to support this finding.

The other grounds attack the alleged inconsistences in the state case and complainant's credibility and the finding by the trial Court that there was no reason for fabrication of the offence against the appellant.

In the heads of argument and in his address to us, defence counsel emphasized on the main ground as enunciated above. The State defended the conviction.

It is the main ground that turns directly and specifically on the evidence adduced before the trial court. Issues of credibility and allegations of fabrications are rather broader than the narrow confines of the main ground.

Essentially the defence argues that penetration was not proven by the State. Further that it is not clear on evidence whether what was interfered with is the anus or the vagina. The basis for this allegation is the charge as framed and put to the appellant and the complainant's evidence on what exactly transpired between her and the appellant.

The charge reads in part as follows:-

> "…… a male adult unlawfully had sexual intercourse with X a female juvenile who was aged 11 years who at law was deemed incapable of consenting"

Sexual intercourse is defined under s 61 (1) of the Criminal Law Codification and Reform Act as follows:-

> "sexual intercourse means vaginal sexual intercourse between a male person and a female person involving the total penetration or penetration to the slightest degree of the vagina by the penis"

"anal sexual intercourse" is also defined in s 61 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] as "penetration of the anus by the penis"

It is important to note that s 64 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] reads as follows:

> "64 (1) A person accused of engaging in sexual intercourse and sexual intercourse or other sexual conduct with a young person of or under the age of twelve years shall be charged with rape aggravated indecent assault and indecent assault, as the case may be and not with sexual intercourse or performing an indecent act with a young person or sodomy."

According to both the charge sheet and the State outline the complainant's age is given as 11 years old and 13 years old respectively. This may be explained by the fact that the offence allegedly occurred in December 2015 while the trial took place in 2017. The birth certificate tendered as evidence without objection reflects that complainant was born on 20 August 2004 meaning that when the offence was allegedly committed she was 11 years and 4 months old. Because of the issues of penetration and whether the unlawful sexual conduct targeted the vagina or the anus it is imperative to closely examine the complainant's evidence first.

At the time of giving evidence complainant was attending grade seven at a Harare primary school. She testified that in December 2015 between 11a.m and 12 p.m she went to see her friend Tino at her home who told her to wait for her in the sitting room while she cleaned the house. She was seated on the sofa in the sitting room when appellant came in and closed the door. She enquired of him, why he was closing the door but he did not respond. Instead he told her to sit on his lap and raped her. When asked what she meant by rape she said "I do not know what he really did but I just know that he raped me"

Complaint testified that appellant lifted her and placed her on his legs. When she tried to scream and flee appellant told her to keep quiet and got hold of her hands. She was wearing a dress and panties. While she was still on appellant's lap she continued as follows:

> "—I do not know as to whether he opened his fly or not, but he then produced his urinating organ and I believe it was his urinating organ which I believe also was placed on my buttock and I then felt a certain coldness and started crying since it had never happened to me."

This occurred while both were seated on the sofa.

She testified that appellant raped her and by that she means he "inserted his urinating thing into my buttocks."

How he managed to do that she does not know but she felt a certain coldness over her whole body.

Her friend Tino called out to her and appellant let go of her but not before he told her he would cut off her head if she reported the matter to anyone including Tino. She did not tell Tino of her ordeal. The offence came to light in July 2017 when her teacher told the pupils including her that if any of them were raped. Even if the rapist makes threats they should report to the police and thereafter the rapist would not be able to do anything.

It appears that the teacher was addressing the pupils in liason with the police and the topic was to do with child abuse.

Apparently fortified by the teacher's address, complainant wrote a letter and placed it in a suggestion box.

The letter complainant wrote was produced as an exhibit. It is titled "Reporting to the police and reads as follows:

> "I was raped while I visited my friend. While she was cleaning the passage his brother raped me. When I wanted to scream or to shout he would touch my mouth. When I wanted to open the door he would touch my hand. He raped me when we were watching television. His name is Takudzwa. He lives near our house."

The headmaster proceeded to summon the complainant's mother and told her of the rape. Effectively complainant's mother came to know of the rape from the headmaster and not the complainant.

The trial magistrate asked complainant if she saw Appellant's penis on the day when she was raped and she said she did not. Asked how appellant inserted his penis into her buttocks she said she did not know how.

In cross examination complainant was asked specifically where appellant inserted the thing he uses to urinate and she answered that it was into her buttocks, between the buttocks. She also mentioned that she does not know what rape is.

In an apparent new twist complainant testified that the tear on her vagina was caused by the appellant.

Apparently appellant inserted his erect penis into her vagina as her statement to the police reflected.

Asked why her statement differed with her testimony in that in her testimony she said appellant inserted his penis between her buttocks she said the truth was what she told the police.

In re-examination questions were posed to the complainant which she answered as follows:

"Clarify what is it that accused did to you which you say is rape.
He inserted his urinating organ into my vagina.
What caused the tear noted by the medical practitioner on your vagina – the abuse"

The State called complainant's teacher. She testified as follows:

Complainant is one of her pupils. She is also the pupil's counselor. She identified the letter written and placed in a suggestion box by the complainant. After reading the letter she spoke to the complainant who told her what transpired between her and appellant. Her evidence on this reads as follows:

"what do you mean by his thing – she indicated to me that he took his penis and inserted it into her vagina. So I kept on asking on that and she was reiterated that"

The rest of her evidence appears to dovetail with that of the complainant. The appellant testified and confirmed that complainant is his sister Tinotenda's friend who would often visit appellant's home.

In his evidence in chief appellant alluded to a possible explanation why complainant would falsely accuse him of rape. He raised a number of issues. Firstly that Tinotenda abused complainant at school in a composition. Secondly that complainant's mother once alleged that he had stolen her son's cellphone and thirdly, that complainant's mother resided in Mai Simba's house and when she (Mai Simba) wanted to reoccupy the house complainant's mother refused. Mai Simba is appellant's mother's friend.

The reasons or possible reasons given for the false implication do not with respect make sense. They do not explain why a 13 year old would report rape against appellant through a school suggestion box only after a lecture on abuse. They do not explain why complainant had a tear on her vagina. They do not explain why these reasons were only brought up at the defence case stage.

Granted the complainant's evidence-in-chief was rather vague as has been highlighted earlier. Her evidence in cross examination appeared to illuminate the issues. Sight should not be lost of the surrounding circumstances of the case and the relationship between complainant and her friend Tinotenda who is appellant's sister, the young age of the complainant and the apparent shyness which most people have when mentioning the names of sexual organs directly. Particulary so in young girls like the complainant.

Complainant appears to have taken shelter in words like between the buttocks, or into the buttocks among others.

A holistic consideration of the full evidence and the probabilities however reflects that there was a lot more to what happened to complainant than what she initially testified about.

Whether it was fear of the court and / or lack of preparation by the Prosecution the complainant appeared not keen to answer simple questions. She is clearly cleverer than how she came out in her initial testimony if one considers she was one of the top five performers in her class and considering the letter she placed in the suggestion box which is written in proper English (for that age and grade) except for the reference to Tino as "he" as opposed to a "she."

In cross examination and re-examination complainant opened up and confirmed that appellant inserted his penis into her vagina. This is supported by her report to the teacher, and her statement to the police as put to her by defence counsel.

The medical report compiled after an examination of complainant reflects that she had a healed hymeneal tear and also that evidence of penetration was definite.

The above considered along with the poor evidence given by appellant and the outrageous allegations of a possible false report of rape, support the complainant's version.

Sight should not be lost that the rape only came to light through a suggestion box after a lesson on abuse. The complainant's mother actually came to know of the rape through the school and not the complainant. This certainly displaces the suggestion that, the mother may have been complicit in the institution of a fake rape report.

The oft quoted case of *S* v *Banana* 2000 (1) ZLR 607 is a case that is directly relevant to this case. The Supreme Court traversed the emergence, development and death of the cautionary rule which is landmarked in the matter of *S* v *Mupfudza* 1982 (1) ZLR 271 (S).

GUBBAY J in the Banana case (supra) said at page 614 E – G

> "It is my opinion that the time has now come for our court to move away from the application of the two pronged test in sexual cases and proceed in conformity with the approach advocated in South Africa. In so holding I have not overlooked the well researched judgment of Gillespie J in *S* v *Magaya* 1997 (2) ZLR 139 (H). But having regard to the abrogation of the obligatory nature of the rule in such countries as Canada, the United Kingdom, New Zealand and Australia, as well as by the State of Califonia.
> See Chaskalson etal, Constitutional law of South Africa at 14-62 Hatchard 1993 Journal of African Law 97 at 98 (1983) 4 Canadian Journal of Family Law 173. I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted yet I would emphasize that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully."

In tandem with the above and other guidelines given in the Banana case (supra) we find that complainant's evidence is credible.

We find corroboration for complainant's evidence in the evidence of her teacher, the medical affidavit and appellant's own evidence.

The totality of the circumstances are such that we find that the conviction is proper in the circumstances.

In the result we order as follows:-

The appeal is dismissed in its entirety.

HUNGWE J agrees:…….

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