OLIVER KANDIYADO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 30 January 2019 and 6 June 2019

Criminal Appeal

Ms *F Maroko*, for the Appellant
J Chingwinyiso, for the State

MWAYERA J: On 30 January 2019 we outlined reasons for our disposition wherein we dismissed an appeal against both conviction and sentence. We indicated that written reasons would be availed in due course. These are they.

The appellant was arraigned before a Regional Magistrate facing one count of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state contented that on 29 December 2017 and at a public toilet in Sakubva, Mutare the accused person unlawfully and intentionally had sexual intercourse with Priviledge Bonde a female juvenile aged 5 years who at law is incapable of consenting to sexual intercourse. The accused's defence was basically to the effect that he did not rape the complainant as alleged. He recalled he drank a lot of alcohol and was too drunk. He strayed into the female toilet and was directed to the male toilet. He recalled being attacked and only waking up in the Police cells.

After a protracted trial the accused was convicted and sentenced to 20 years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions of good behaviour. Irked by the court *a quo's* decision, the accused approached this court appealing against both conviction and sentence. The grounds of appeal as discerned from the record and as propagated orally by counsel are as follows:

> "1. The Learned Magistrate erred by accepting the evidence of the young complainant on aspect of sexual engagement when it was clear from her evidence in chief and earlier evidence during cross-examination that she was emphatic in her denial of any contact between her sexual organs and those of the appellant. The suggestion that appellant rubbed his penis against her vagina was only made at a later date after the court had adjourned. This new evidence was obviously suggested to her by someone.
> 2. The Learned Magistrate also erred by not attaching appropriate weight to the evidence of Emily Brakufesi, a state witness who was adamant that she saw appellant's penis

and it was never in or near complainant's vagina and that the way complainant behaved or walked was not consistent with being raped at her age.

3. The Learned Magistrate also erred by assuming that the complainant had not been abused sexually prior to the fateful date and that led her to wrongly conclude that the complainant's hymen could only have been stretched by the appellant.
4. The Learned Magistrate erred by not concluding that the totality of the evidence led in court and the fact that the appellant was HIV positive whilst complainant was not, created doubt as to the guilt of the appellant.
5. The Learned Magistrate thus erred by convicting the appellant.

AD SENTENCE

1. The Learned Magistrate erred and misdirected herself by sentencing the accused to such a lengthy period given the mitigatory features in this case."

We raised disquiet with the formulation of some of the grounds of appeal but counsel who was highly argumentative insisted on all grounds. The first ground of appeal attacked the court *a quo's* decision to accept the evidence of the young complainant on the aspect of sexual engagement. A reading of the record reveals that the court *a quo* placed weight on complainant's evidence and assessed the complainant's evidence as credible. The complainant testified at the age of 5 and the fact that she did not give graphic details and nitty gritties of the sexual encounter cannot be held against her. As correctly observed by HUNGWE J in *Edmore Mariga vs The State* HH 295-16 when he made pertinent remarks on the weight to be accorded to the testimony of children he reasoned:

> "When analysing the evidence of children one ought to appreciate and understand, in respect of the child before the court, the level of maturity and level of development of her language on the subject under discussion….. When the cultural background make it a taboo to call by name the opposite sex private parts, a court must not unduly draw adverse inference from the reluctance of a child to speak on those issues."

In the present case the Magistrate properly assessed the totality of evidence and concluded that there was unlawful penetration of the complainant by the accused person. All that is required is for the court to be satisfied that the complainant is a credible and reliable wintess.

The complainant's evidence was clear that she had a good recollection of the surrounding and central events of the day in question. It was apparent from the complainant's evidence that she was carried to the public toilet by the accused. Her pant was removed and she was made to sit on the accused's stomach and accused's private parts rubbed onto her private parts.

The defence counsel seemed to take issue with the lack of detail of the sexual intercourse as she argued complainant did not mention that the appellant's penis was inserted into her vagina. Defence counsel further argued that the complainant did not give detail of the nature of movement of the male organ in the female organ. It was argued that the lack of vivid description of the sexual encounter ought to have been held against the complainant. The expectation of such detail from a 5 year old's tantamount to saying no sexual complaints from young children who cannot describe in detail private parts and related movements should find a day in court and see the light of justice.

The evidence of the complainant in narrating events of the day in question was satisfactory and the trial court ruled the complainant credible. It is settled credibility of a witness's a domain of the trial court which has the opportunity to hear and see witnesses testify. The trial court has the opportunity to consider whether or not the witness is worth believing. It follows therefore that the appeal court should not be too quick to interfere with the decision of the trial court unless there is a misdirection. See *S v Mpetha and others* 1983 (4) SA 262, *S v Mlambo* 1994 (2) ZLR 410 (S) and also *Lovemore Dewa v S* HH 206/14. It is clear from the record that in assessing evidence the Trial court alerted itself of the need to approach the evidence with caution in the positive manner also formulated in *S v Banana* ZLR (1) 607 (S) 2000 wherein it was held:

> "…..further that evidence of a complainant in a sexual case is admissible to show the consistency of the complainant's evidence and absence of consent. The requirements for admissibility are that
> (a) the complaint must have been made voluntarily not as a result of questions of a leading and inducing or intimidating nature, and
> (b) must have been made without undue delay at what is in the circumstances the earliest opportunity to the first person to whom the complainant could reasonably be expected to have made it."

In this case the question of consent did not even arise as it was common cause complainant was aged 5 and thus incapable of consenting. Further the issue of making a timeous voluntary report to a person to whom complainant would ordinarily be expected to make a report did not arise as the appellant was caught pants down in a public toilet with complainant undressed and on top of him. Given that obvious evidence and the complainant's evidence one cannot find fault in the court a quo's assessment of the complainant's evidence. That the complainant is young is not basis for ruling the evidence inadmissible. The first ground of appeal simply has no merit.

The second ground of appeal was not seriously taken. The appellant argued that the fact that the state witness Emily Brakufesi did not see the appellant's male organ in or near the complainant's female part or genitalia meant that there was no sexual intercourse which took place. The appellant's counsel went to town absurdly arguing that if the complainant had been raped then the witness should have spoken to coitus movements and seeing the private parts in contact. The appellant sought to impugn the trial court's decision on that basis. This is despite the fact that Emily Brakufesi rushed to the scene on hearing that the appellant was with the victim in the toilet. She peeped through and saw the complainant together with the appellant while the complainant was mounting on the appellant who was lying on the floor facing upwards. Both were semi-nude while the appellant was instructing complainant to open her legs wider. This evidence on its own is corroborative of complainant's evidence. That the witness did not witness the actual insertion of the male organ into the female organ does not taint the analysis of evidence by the court *a quo* for it is not a requirement that one should make carnal clinical coital observation for rape to be proved. More so given the witness gave evidence that she did not know how long the complainant and appellant had been in the toilet and in that position. Besides the assessment of evidence by the court *a quo* is not piecemeal but holistic. The court *a quo* rightly considered the totality of the evidence. There was medical evidence which confirmed penetration as having been effected. The evidence of the witness was clearly supportive of abuse. That she did not witness the actual penetration is no basis for discarding the witness's testimony. To that extent, there was no misdirection on the part of the court *a quo* in accepting the witness's evidence as corroborative.

The third ground of appeal that the court erred in assuming that complainant had not been previously abused simply has no merit. The appellant's counsel suggested the complainant's hymen could have been stretched by sporting activities. The trial court surely was not to speculate and conclude on assumptions given the clear evidence before the court. The facts presented before the court *a quo* spoke for themselves. It is *res ipsa loquitur* that appellant carried complainant to the public toilet, took off his trousers and undressed complainant and then made her mount on him. After being caught in that position both appellant and complainant were taken to the police station and complainant was medically examined revealing the stretched hymen. The conclusion by the court *a quo* cannot be faulted given evidence by complainant that what appellant to her on that fateful day had never been done to her before. It is unacceptable stereotype to be dismissive of children's evidence simply

because they are children. Research has shown (and indeed experience) that children do not fantasise over things that are beyond their own direct and indirect experience.

The fourth ground of appeal again crumbles on its face. The appellant argued that the fact that the appellant was HIV positive while the complainant was HIV negative created doubt as regards to sexual molestation. It is not in dispute that even married couples or couples who are intimately sexually interactive can have different HIV status. That factor on its own cannot exonerate the appellant more so when one considers the totality of the evidence presented before the court. Further there is no evidence that the complainant was re-examined for her HIV status after the window period.

The appellant was caught *infragrante delicto* with the complainant. Complainant, a 5 year old, was in a nude state mounting on the appellant who did not have any trousers. Further the appellant instructed the complainant to spread wider her legs and the medical report concluded that the complainant's private parts had been tempered with. The factual scenario is highly suggestive of sexual encounter with a child aged 5 at law deemed incapable of consenting to sexual intercourse. The appellant himself did not explain what he was doing with the complainant in the nude state. His defence was he was intoxicated. It is not in dispute the appellant was voluntarily intoxicated and that after being caught by members of the public he was ordered to dress up and walk to the police station. There is no evidence that he was assisted to dress up and walk hence the court *a quo's* finding that the appellant's degree of intoxication was not such as to vitiate intention, knowledge on realisation to commit the offence changed.

The argument that no eye witness observed the male organ in motion in the female organ was properly dismissed by the court *a quo*. What matters in offences of sexual nature like in this case is whether or not there was non-consensual penetration of the female genitalia. Legal penetration has been aptly defined in cases. See *Knowledge Mhanje v S* 2000 (2) ZLR 20 and *S v Tirivanhu* 2010 (2) 361. The court has explained legal penetration to have been effected when the male organ is in slightest degree of the female orifice. The Supreme Court in *S v Mhlanga* 1987 (1) ZLR 70 had this t say about penetration:

> "There must be penetration but it suffices if the male organ is in the slightest degree within the female. It is not necessary in this case <u>of a virgin that</u> the hymen should be raptured."

See also *S v Banda* HB 13/02. Even the slightest degree of penetration constitutes rape as long as the preparatory stage is complete then the essential ingredients of rape will have been satisfied. In the present case the court *a quo* properly treated with special care and due

diligence all evidence presented before it and came up with a verdict of guilty. The conviction of rape was well anchored on facts and evidence adduced before the court *a quo* and as such there is no misdirection warranting interference with the findings of the court *a quo*.

In respect of sentence, not much argument was presented by the appellant. The ground of appeal against sentence was that no due weight was not given to mitigatory factors. A reading of the reasons for sentence reveals otherwise. The appellant a 54 year old HIV positive unmarried man lured to the toilet and sexually molested a 5 year old. He was sentenced to 20 years of which 3 years imprisonment was suspended on conditions of good behaviour. Such a sentence is in sync with sentences imposed for offences of similar nature. The reasons for sentence are well balanced taking into consideration mitigatory, aggravatory factors and principles of sentence of seeking to match the sentence to the offender and offence. Again there is no basis for interfering with the sentence imposed by the court *a quo* which properly exercised its sentencing discretion.

Accordingly the appeal against both sentence and conviction is hereby dismissed.

MUZENDA J agrees _____

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