

APPAH ZINGONI
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE 18 NOVEMBER 2014 & 19 JULY 2017

Criminal Appeal

S. Chikotora, for the appellant
Mrs S. Fero, for the respondent

BERE J: At the conclusion of hearing the appeal we unanimously agreed to have the conviction set aside and the sentence quashed. The following are the reasons that informed the upholding of the appeal.

The appellant was arraigned before the court sitting at Gutu Magistrates' Court charged with the offence of contravening section 67 (1) (a) of the Criminal Law (Codification and Reform) Act¹ (indecent assault). After a protracted trial, the appellant was convicted and sentenced to pay a fine of \$400,00 in default of payment 1 month imprisonment. In addition the appellant was sentenced to 12 months imprisonment wholly suspended for 3 years on the usual conditions of future good conduct. Dissatisfied by both the conviction and sentence, the appellant filed his appeal against both conviction and sentence.

The common thread running through the four grounds of appeal is to demonstrate that in all the probabilities of this case, there was no shred of evidence that supported the conviction. In other words, the argument was that a proper analysis of the evidence led called for the acquittal of the appellant in the court *a quo*.

1. Chapter 9:23

The respondent has indicated through its filed heads of argument that it does not support the conviction. We accept that the stance taken by the respondent is well made because of the following reasons:

As correctly observed by the respondent, the proper approach in sexual cases is guided by the leading case of *S v Banana*² which did away with the cautionary rule. Despite the abandonment of the cautioned rule, the court is still enjoined to carefully consider the nature and circumstances of the alleged case to avoid convicting on deceptive evidence. It is clear from the brief judgment of the court a quo that the learned magistrate did a cursory assessment of the evidence that was placed before him. It is quite visible in the record of proceedings that there were material inconsistencies in the evidence of the first and second state witness which could not have justified the conviction of the appellant.

The complainant's version as captured on record page 17 line 10 – 11 that the appellant held her by her waist for one hour whilst she was in a bending position without raising alarm despite her step-father being no more than 5 metres away sounded highly improbable and unconvincing to say the least.

It got worse when the step-father asked the complainant what she had been doing with the appellant when the complainant openly told the court that she lied to the step-father by saying they had done nothing except to “just sit on the bench and doing nothing”. It goes without saying that despite the opportunity having presented itself for the complainant to report the incident at the first opportunity, she failed to do so for no cogent reasons.

When the two witnesses gave evidence on the alleged act of indecent assault, their versions were clearly inconsistent with the complainant telling the court that she was held by the appellant by the waist whereas the step-father under cross-examination alleged that the complainant was held by the chest. The charge sheet made reference to the waist.

2. 2000 (1) ZLR 607 (s)

It is clear that such inconsistencies did not add value to the state case but created sufficient confusion which warranted the giving of doubt to the appellant as correctly submitted by *Mrs Fero* for the respondent.

Finally, and as correctly noted by both counsel, if indeed the complainant’s step-father had found the appellant in an uncompromising position, surely the step-father would have confronted or challenged him right on sight. This did not happen because the story told by the complainant and her father was not credible.

It is for these reasons that we upheld the appeal in this case.

Hungwe J I agree

Rubaya & Chatambudza, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners