KUFA BENEDICT MAFUWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 18 May 2017 & 4 October 2017

Criminal Appeal

W. Chagwiza, for the appellant
F. I. Nyahunzvi, for the respondent

MUSHORE J: Appellant was charged with one count of rape in terms of section 65 of the Criminal (Codification and Reform) Act [*Chapter 9:23*]. He pleaded not guilty. However after a trial had been conducted, he was found guilty of rape and sentenced to 12 years imprisonment of which 3 years imprisonment were suspended for 5 years, on condition that accused did not convict an offence of a sexual nature for which he is imprisoned without the option of a fine.

At the time of the commission of the offence, appellant was 40 years old of age, and a teacher at Masiyarwa Primary School, Chief Zvimba, where complainant was a pre-school pupil aged 4 years. According to the State, on the 6th February 2016 between 1400 – 1600 hours, appellant saw complainant playing on a swing, whereupon he lured complainant into his office and raped her. After raping the complainant, appellant threatened to cut her head off with a knife if she disclosed the offence to anyone. He also told her that if asked by anyone she should say she was raped by school pupils. It was the State's case that after the rape, complainant went home and reported to her mother that she was in pain, after which her mother examined her private parts and noticed bruising on her genitals. Complainant was reluctant to identify her abuser out of fear. It was only when her mother told her a white lie that the perpetrator had been arrested and had had his head cut-off, that complainant freely identified appellant as being the culprit. Thereafter complainant's mother made a report to the Police, leading to the arrest of the appellant. Complainant was also medically examined at Father 'O' Hea hospital.

Appellant is challenging the conviction on the basis that:

1. Complainant's evidence was inadmissible because she had been unduly influenced in making her report; and
2. The court *a quo* misdirected itself by not treating the evidence of the child with caution in the circumstances of the case.

The law has dispensed with the application of the cautionary rule as being necessary in cases dealing with child complaints. See *S* v *Banana* 2000 (1) ZLR 607. That does not, however, dispense with the need to be careful whilst examining the allegations made against an accused person when a child complainant is a victim. It is well settled law that the court should only convict in circumstances where the court is satisfied that the report was made voluntarily, "*not as a result of questions of a leading and inducing or intimidating nature' The report should also have been made without undue delay, and at in the circumstances the earliest opportunity to the first person the complainant could reasonably be expected to have made it".* See *R* v *Petros* 1967 RLR 35*: R v C* 1955 (4) SA (N) pp 242G to 243C.

It is my considered view that in the present matter the above stated principle must be applied very carefully in the context of the victim, the circumstances, the status of the offender and the threat made against the victim, given the fact that complainant is very young. The complainant is 4 years old. Four year old children are not expected to be conversant with matters of a sexual nature. They cannot be assumed to have the capacity to deal adequately with such an assault on their person and should never be made to feel that they are partly culpable for such an assault, or if indeed its occurring being regarded as a usual or expected experience. The fact that consent is vitiated by virtue of their tender years, in my view, magnifies the duty of care owed to such children by persons in a position of authority over such children such as the appellant enjoyed at the time of the commission of the offence. To ascribe the type of comprehension which an older person could have of such a traumatic assault such as that which complainant experienced is unrealistic.

The complainant *in casu* was not old enough to count, and to know what day of the week it was or the time of day. How could she comprehend the nature of the attack upon her body? Her grasp of the incident was that 'she had been pricked by a stick'. When she was asked what stick, she described appellant as having a stick hanging on his body. When she was asked to demonstrate with the use of anatomical dolls, she did not hesitate to demonstrate the graphics of what had happened with a simulation of sexual intercourse.

Complainant made the report immediately to her mother. As soon as she came from school she told her mother whilst crying that she was in pain. She told her mother that she had fallen down. As I mentioned earlier appellant had threatened to cut off her head with a knife and appellant had coached her to say if asked that she had been abused by school pupils.

The report of rape was made immediately by complainant, save for identifying the appellant as the perpetrator. The report itself was not induced by threats and it was made to the person to whom complainant could reasonably have made it to. The complainant's mother gave a very honest impression when she testified that she had to persuade complainant to identify the actual perpetrator by promising her sweets and then finally by making complainant feel safe to disclose the name of the perpetrator whom she told complainant had been killed by the Police. There is nothing sinister in the methods devised by complainant's mother. She would have appreciated that complainant was traumatised from the bad experience and very fearful of appellant and also that complainant's comprehension of what had actually occurred was stilted by innocence and immaturity and marred by a lack of appreciation that a criminal act had been perpetrated upon her person.

The Crown Prosecution Service in the United Kingdom has devised a set of guidelines given the propensity of sexual abuses perpetrator on very young and vulnerable victims in that country. The resource paper is entitled "The Crown Prosecution Service- Guidelines for Prosecuting Cases of Child Sexual abuse" issued on the 17th October 2013 and revised most recently on the 26th July 2017. One of the recommendations in that paper is that when investigating and prosecuting sexual offences involving very young children the focus should be on the *"credibility of the allegation; rather than focusing solely on the victim [48]"*

The logic behind such an approach is that usually very young victims have a lack of understanding of what would have taken place. The event would be traumatic and wrong to them but a lack of appreciation would impair their ability to explain the offence perpetrated upon them. The guideline seems to me to have been suggested to prevent the instigation of a criminal prosecution being impeded by a qualitatively poor statement given by a victim far too young to make a good impression in providing the statement. Focusing on the credibility of the allegation would be less intrusive and less intimidating upon the victim and thus a statement showing the likelihood of such a crime having taken place, would provide good corroboration. In the present matter the complainant describes an injury having been inflicted on her private parts. She said she fell down, and then that she was poked; and then that she was poked on her

private parts and then that she was poked by a tree hanging from the appellant. All in her efforts to explain the unlawful assault on her person even when she was afraid of being killed by the perpetrator. She could not conceal the fact that she was in pain and had suffered an injury. The medical report corroborated that she had been raped. Complainant's father corroborated her evidence and also the evidence of complainant's mother.

The appellant is proposing that the complainant was not a credible witness solely because she was unable to describe what had taken place with consistency. It may be true that she was inconsistent about the details surrounding the event. However she did establish that there had been an event. The credibility of the allegation in the present matter is of sufficient weight and value to persuade me that her account was true, especially given the fact that she continued to complain in the face of the threat of harm to her life.

The guidelines also suggest that there are some behavioural signs shown by the victim which instead of undermining an allegation of sexual abuse, may actually suggest that sexual abuse has taken place.

Paragraph 49 of the CPS Guidelines reads:-

> "49. A number of factors have previously militated against some children and young people being regarded as credible witnesses:-
>
> These include:-
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> - The offence was not reported immediately after its commission;
> - The account given was inconsistent;
> - The victim voluntarily returned to the offender; (in cases of where the victims disabled or mentally deficient);
> - The victim is perceived as consenting to sexual activity;
> - The victim has previously told untruths about other matters-e.g. drug abuse etc.
>
> These factors have tended to be seen as undermining the credibility of the victim's account. However these factors may, in fact, point the other way and be seen as supporting the allegation of sexual abuse; not least because the behaviour set out above are often seen in victims of abuse."

In the same paper, prosecutors are guided to pay regard to whether there is any credible third party evidence suggests that the complainant has malicious intent to make a false allegation. Appellant has suggested that complainant's parent's manipulated her to make a false report. In my view it would hardly seems possible that any parent would resort to such extremes such as engaging their 4 year old child in a malicious prosecution. In fact, complainant's father was particularly shocked and pained at the reality that he had trusted appellant, who at the relevant time was his best friend, and thus exposed his own child to the abuse.

On the aspect of credibility it is trite in cases where the reliability and credibility of a witness is challenged, *"the findings of credibility cannot be judged in isolation but require to be considered in the light of proven facts and probabilities under consideration*" *E and Munster (Pty) Ltd* v *Killian Hills (Pty) Ltd* 1979 (1) SA 621 (A) 623H to 624A. See also: *Moses Chimbwanda* v *Irene Chimbwanda* SC 28/02: *Hughes* v *Graniteside* SC 13/84: *R* v *Dhlumayo & Anor* 1948 (2) SA 677 (A) 706.

An appellate court should not easily interfere with credibility findings of a lower court unless there are strong reasons not to do so. The facts of record simply do not invite this court to find that the court *a quo* erred in its conclusions on the evidence, especially considering the State witnesses testimony, the medical evidence and the appellant's faltering testimony in which he could not challenge that he was at the school yard when the offence was committed have properly caused appellant to have been convicted.

In the matter at hand appellant told the complainant (without any sense of shame), to point the blame for such a horrible crime at unsuspecting innocent school pupils.

I feel it necessary to mention in passing, that although there is a growing sense of alarm as to the prevalence of these child abuse cases, I sense that society as a whole is also becoming de-sensitised as to the gravity of these offences. In a recent article published in Vol. 1 of the *Zimbabwe Electronic Journal* 1/2016, Professor Geoff Feltoe aptly refers to the pandemic of sexual offences perpetrated upon children as the "*evil of abuse*". He repeats the call for an urgent need to establish stricter measures to curb the scourge upon vulnerable minors including the possibility of establishing a National Register of Sex Offenders requiring accused persons who are convicted of such offences to be registered in a data base. Other countries have adopted this measure with significant results. Such a database would serve to:-

> "..monitor sex offenders upon release of prisoners to ensure that they are not employed in institutions where they are children' such as schools; and to keep them under surveillance to try to prevent them from re-offending".

It seems to me that such measures are now necessary when looking at the worrying prevalence of cases such as the present matter where older men in positions of authority behave in predatory ways wreaking untold physical, psychological and emotional damage on very young person's thinking that they get away with such crimes.

It appears that offenders are not getting the message that there are serious consequences for committing sexual assaults on young persons.

In the present matter, appellant's appeal is wholly without merit.

In all of the above circumstances there is no reason to find that the court *a quo* erred in its findings. In the result:-

"*The Appeal is dismissed*"

HUNGWE J agrees…….