HH 535-17
CRB NO R644-14
CRB NO R674-14

NIGEL CHIRIMUUTA
and
SIFISO MTHOMBENI
and
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND BERE JJ
HARARE 7 JULY 2015 AND 23 AUGUST 2017

Criminal Appeal

Mr M Tshuma, for the first appellant
Mrs R Maposa for second appellant
Mrs S Fero for the respondent

BERE J: The two appellants who were police officers stationed at Southerton Police Station, Harare, were jointly charged with the offence of contravening section 65 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. After a protracted trial both appellants were convicted. The first appellant was sentenced to 18 years imprisonment and the second appellant to 16 years. Both had each 4 years of the prison term suspended on the usual conditions of future good conduct leaving them with effective prison terms of 14 years and 12 years respectively.

Aggrieved by both conviction and sentence both appellants filed this appeal. I propose to deal with their grounds of appeals one after the other.

In his amended notice of appeal the first appellant has attacked his conviction and sentence on the following grounds.

<u>*Ad* conviction</u>

The first appellant attacked the decision of the court *a quo* in the following manner;

"1) that the court erred in that it did not wholistically address itself with the background of this case.

2) that the court erred in finding that the state proved its case beyond a reasonable doubt when in fact the report of sexual assault was not made timeously and voluntarily.
3) that the court erred in failing to guard against wrongly convicting the appellant taking into account glaring and unexplained inconsistencies in the evidence of the complainant.
4) that the court erred in not considering the possibility of the complainant using the court process to settle her own failures in her love and marriage.
5) that the court erred in just accepting the evidence of the two state witnesses and the complainant without any evidence from the scene of the place.
6) that the court erred in convicting the appellant when the evidence of torn clothes was not produced in court as the medical affidavit was irrelevant.
7) that the court grossly erred in proceeding with trial in the absence of the appellant's defence counsel.
8) that the court grossly erred in unprocedurally proceeding with the trial of appellant without the required certificate for prosecution from the Prosecutor General.

Ad Sentence

The sentence imposed was said to be unduly severe and out of line with sentences imposed on similar cases and that it induces a sense of shock in the circumstances, specifically the court was said to have erred in failing to take into account the following factors in arriving at an appropriate sentence;

a) that the matter was once withdrawn by the complainant at her own volition.

b) that the prosecution of the appellant was declined at the instance of the complainant

c) that the appellant is a first offender who at the alleged time of the commission of this offence was still a youthful person.

d) that as a family man he had the responsibility of looking after his wife who was seven months pregnant,

e) that at the time of reporting this offence and the subsequent conviction the appellant and the complainant were husband and wife.

As regards the second appellant the following issues were highlighted:

Ad conviction

1. that the court misdirected itself when it convicted appellant on the basis that the state had proved its case beyond a reasonable doubt against appellant when such was not done by the state at all.

2. that the court erred in convicting appellant when it is clear that appellant was not included in the initial report of rape which was made in January 2012 as per the evidence of Antony Machokota who indicated that at the time of the withdrawal, appellant was not actually an accused person.

3. that the court erred in convicting appellant when complainant was not so sure of the role played by the appellant in the alleged rape, the complainant having told the court during cross examination that appellant closed her eyes and that she was not sure of the same time alleging he locked the door.

4. that the court erred in convicting appellant when it was not established that appellant knew that the sexual intercourse between first appellant and complainant was not consensual as appellant had been advised by first appellant that the two were in a relationship.

5. that the court misdirected itself when it discarded the appellant's defence that he was only awaken by the sound of the first appellant and the complainant as they were having sexual intercourse, whereupon he advised the two to stop what they were doing.

6. that the court erred when it concluded that appellant acted in connivance with first appellant to commit the offence when the complainant in the initial report never mentioned his name.

7. that the court did not consider that the complainant deposed to an affidavit that she was in love with first appellant, anticipating to get married to him, so complainant has every reason to lie that she was raped to fix appellants as she is not a reliable witness.

Ad Sentence

The sentence imposed was said to be too harsh as to induce a sense of shock in the circumstances.

Conviction of the two appellants

I propose to deal first with the conviction of the two appellants. The critical issue which the court *a quo* had to deal with was to determine whether or not the complainant had been raped in circumstances she narrated in court.

The court *a quo*'s task was made easier by the position taken by the two appellants that sexual intercourse was consensual. Sexual intercourse having been conceded to, the task of the court was merely to determine whether or not the complainant had consented to it.

The legal position in sexual cases was eloquently laid down by GUBBAY CJ in *S* v *Banana* when he advocated for a paradym shift from the orthodox approach which insisted on the application of the cautionary rule in sexual matters. The learned former Chief Justice of the republic summed up the current position of our law in the following words:

> ""--- There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence a common sense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respect unsatisfactory. See also *S* v *Nathoo Supermarket (Pvt) Ltd* 1987 (2) ZLR 136 (s) at 138 D-F."
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> Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.
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> Complaints made in sexual cases.
> Evidence that a complainant in an alleged sexual offence made a complaint soon after its occurrence, and the terms of that complaint, are admissible to show the consistency of the complainant's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant has fabricated the allegations.
> The requirements for admissibility of a complaint are:

> "1. It must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature. See *R* v *Petros* 1967 RLR 3S (G) 39 G-H.
> 2. It must have been made without undue delay and at the earliest opportunity, in all the circumstances, to the first person to whom the complainant could reasonably be expected to make it. See *R* v *C* 1955 (4) SA 40 (N) at 40 G-H; *S* v *Makanyanga* 1996 (2) ZLR 231 at 242 G – 243 C.""[1].

In this appeal before us, the court *a quo* was very much alive to the fact that when it came to the specific allegations on the rape itself the complainant was a single witness whose credibility it found to have been beyond reproach. It has been stated for times without number that when it comes to issues of credibility the trier of facts is most strategically placed to effectively deal with that and that the appeal court must be slow to interfere with such findings unless there are compelling reasons to do so. See *S* v *Mpetha and others*[2] and *S* v *Katsiru*[3]. Nothing has been demonstrated in this appeal to warrant us as the appeal court to interfere with the court *a quo's* findings on the credibility of the complainant.

The court *a quo* made a specific finding that indeed the complainant was raped as confirmed by the immediate and unsolicited report she made to Emilia Mukura and to the then officer in charge at Southetorn Police station, officer Shine Kaneta. Both witnesses confirmed the report. In his judgment the learned Magistrate in the court *a quo* summarized his findings as follows:

> "Complainant went back to Southerton Police Station where she made the first complaint of rape to Emily (this is the same person referred to as Emilia). She claimed that Emily had seen the tell-tell signs to the effect that she had been ravished.
> She and Emily went to see the officer in charge to whom the two accused persons reported to. That's common cause because that officer in charge, Kaneta was called by this court and he confirmed that indeed he had received an indication that accused number two (should be accused one) had ravished the complainant the night before."[4]

I must mention in passing that the evidence of both Emilia and Shine Kaneta resonated well with the evidence of the complainant and in my view this helped to completely destroy the notion that the complainant's story was concocted.

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[1]. 2000 ZLR 607 at 615 E-H and 616 A-C
[2]. 1988 (2) SA 262
[3]. 2007 (1) ZLR 364 (H)
[4]. Record p. 24

There was overwhelming evidence placed before the court *a quo* that until the first appellant was introduced to the complainant by Emilia on the very same day the rape occurred first appellant and the complainant were total strangers to each other so the second appellant must not be believed when he tried to argue that he had known the first appellant and the complainant to be lovers.

In fact, the second appellant projected himself as an accomplished lier in this regard if one accepts, as the second appellant confirmed himself in his own testimony the story told by the complainant that on the morning that followed the rape evening she did not even know the first appellant's name and that it was in fact the second appellant who actually supplied her with the first appellant's particulars. Read correctly in its correct context, this piece of evidence completely destroyed the myth told about by both appellants that the first appellant and the complainant were in love and had consensual sexual intercourse.

So much noise has been made in this court by the second appellant's counsel about the alleged innocence of the second appellant in this case. Let me deal with this issue once and for all.

Through her well given testimony the complainant was able to demonstrate to the satisfaction of the court *a quo* of the role played by the second appellant. Where she was not quite certain, the complainant did not commit herself-that is the mark of credibility.

Because what is under attack in this appeal is the judgment of the court *a quo,* I prefer to go back to the judgment of the lower court and see how it dealt with the evidence linking the second appellant to this offence. This is how the lower court dealt with the evidence linking the second appellant to the charge.

> "She (complainant) went to Southerton in a bid to meet Gatsi but discovered that he had already gone and was no longer able to hire her after all. His mother passed on from thereafter (*sic*). This is when she then first met the first accused person who had overheard that she was looking for a job and suggested that he takes her to his aunt. Arrangements were made for accused number one and complainant to go to Kuwadzana and at that address she refused to enter the house insisting that the aunt comes out and they will talk (*sic).*

She said that accused number one made a call. Accused number two arrived soon thereafter .

She implicated accused two by saying that he was there. Accused number one embraced her from behind and carried her into the house while she was not sure of what role accused number two played at that stage. She saw accused number 2 when she got into the room.

I am aware of the submission by Mr Chishiri on this part of the evidence, but I have already, rather, rudely remarked that accused number one cannot be regarded as an octopus. If he had only two hands, they were on the complainant, any additional hands that were on the complainant at that time had to belong to some other people who could have been included accused number two (*sic*). I believe there would be no danger in inferring that the other person was accused number two. Accused number two was there when she was lifted up. She saw accused two inside the room when she managed to open her eyes. There was no third person. Thereafter, accused number two closed the door and locked as accused number one closed the window and drew the curtains"[5]

In my view, this analysis of the evidence demonstrating the active role played by the second appellant cannot be faulted by any fair-minded person. It properly fits into the involvement of accomplices as envisaged in section 197 to 204 of the Code.[6].

Secondly, the very idea that the second appellant would be there not only in the same room but on the same bed where the complainant was being ravaged by the first appellant whilst the second appellant enjoyed the day's ordeal is repugnant to normal human expectations. The whole arrangement does not project the second appellant in good light. The complainant said it was like this because she was being raped by the first appellant in the presence of the second appellant. It make sense.

If there is any doubt as regards the involvement of the second appellant in this case, one must further look at the comments which he made and directed at the complainant when she was crying during the act of forced sexual intercourse. The complainant said the second appellant remarked that she was not supposed to cry because she was not a virgin and that after all she was enjoying it. Surely such utterances cannot possibly be consistent with the innocence of the

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[5]. Record pp 22-23

[6] . Criminal Law (Codification and Reform) Act [Chapter 9:23]

second appellant. These utterances were confirmed by Shine Kareta *via* the report given to him by the complainant. Even the second appellant confirmed having made such utterances.

Thirdly, the whole narrative given by the second appellant about taking the complainant to his sister in Glen View was at variance with the story told by the complainant as regards the involvement of the second appellant. Surprisingly, the second appellant through his counsel did not put his narrative to the complainant. It is safe to infer that the second appellant was concocting his story.

It will be noted that even when the second appellant gave evidence he was far from being impressive. He was not forthright when asked simple questions like where he was staying in 2012. The second appellant had to be reminded that he had been persistently referring to Kuwadzana (the scene of crime) as his residence. (see record p 158).

When the court sought clarification from the second appellant as to why the complainant was incriminating him, the second appellant came up with a stunning explanation that his co-accused, the first appellant had threatened or forced her to implicate him. Again, this position was not put to either the complainant or to the first appellant during cross-examination. My view is such is the conduct of someone determined to mislead the court- he will clutch on anything out of desperation.

Even with his own witness Melody Zhou, the second appellant could not even agree on whether the witness's husband was home or away when the second appellant and the complainant allegedly visited Melody Zhou, something which was never suggested to the complainant in cross-examination. The second appellant was simply a bad witness, he had much to hide to try and keep himself out of trouble.

In her heads of argument which she amplified in court the second appellant's counsel argued that the absence of the complainant's soiled clothes was indicative of rape not having taken place in the manner described by the complainant or at all. With respect, what counsel failed to appreciate was the evidently obstructive role played by officer Shine Kaneta to whom the complainant timeously made a report of rape. Under normal circumstances it was this officer who would have demanded and secured these exhibits. But the record of proceedings clearly shows that from the very beginning this officer was determined to obstruct the prosecution of the

appellants by giving toxic advise that the complainant should stay with the first appellant as his "wife." Clearly, an opportunity to recover and secure the exhibits was lost through the conduct of officer Shine Kaneta. In any event, given the convincing manner in which the complainant narrated her ordeal, the appellants' conviction was still secured without such exhibits. As correctly argued by *Mrs Fero,* for the respondent, given the circumstances of this case "the non-production of the torn clothes as evidence during proceedings in the lower court was not so fatal to the prosecution case as to vitiate the conviction. The complainant gave a reasonable and plausible explanation for the non-availability of such clothes. In fact the court *a quo* properly observed that the police, and in particular Kaneta failed to properly handle the report which led to among other things, loss of vital evidence. Even in the absence of the torn clothes, the state case remained intact as to result in a conviction." I agree.

The court *a quo* was able to see through the evidence and to properly conclude that all the gymnastics about the first appellant appearing to be married to the complainant and at one stage purporting to withdraw the case were issues which were stage-managed by the first appellant assisted by Kaneta in an effort to deflate the rape allegations whose consequences both appellants were fully aware of. The appellants were conscious of the need to now handle the complainant with extreme care in order to manage her in the mistaken belief that they would be able to kill this heinous offence.

This takes me to focus on another point in this appeal which was raised by counsel for the first appellant that because the first appellant and the complainant were "husband and wife", there was need for the "Prosecutor General to provide the requisite certificate" before the first appellant could be prosecuted.

With respect, this submission is not sustainable. Counsel failed to properly read the evidence in this case. There was no marriage to talk about. What the first appellant tried to create was no more than a "bogus marriage" to try and shoot down the offence of rape that he and the second appellant had committed against the complainant. The certificate referred to can only be issued where there is a genuine marriage relationship not where such a relationship is panickly and hurriedly created to obstruct the natural course of justice as what happened in this case.

I now propose to deal with the alleged violations of first appellant's constitutional right to legal representation. The argument raised by the first appellant's counsel was that the first appellant was denied his right to legal representation by the court *a quo* both at the time he presented his defence outline and also at the time he presented his mitigation.

Let me state from the outset that the right to legal representation is one of the fundamental human rights enshrined in the constitution of this country. In full recognition of this, section 69 of the constitution with particular reference to his fundamental right is framed as follows;

> "69 Right to a fair haring
> 4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum."

This is an absolute right conferred on every citizen of this country and the court must frown at any violation of such a right.

However, one needs to accept that criminal proceedings are not driven by the individuals who appear before it but by the presiding Magistrate or Judge. The chosen legal practitioners cannot, in the absence of any cogent explanation expect to hold court proceedings to ranson by appearing at court at the time of his or her choice. If a lawyer is unable to attend court with his or her client at the designated time, such a legal practitioner has an obligation to communicate with the state counsel or to make a formal request in advance to the presiding magistrate or Judge so that proper arrangement for his/her accommodation can be made.

The scenario painted in these proceedings is that when the trial commenced the legal practitioner concerned had not communicated with the court or the state counsel, even with his own client. The same thing again happened when the first appellant was supposed to make submissions in mitigation of sentence. The legal practitioner just did not appear.

But of important to note is that when the legal practitioner subsequently appeared on behalf of the first appellant after trial had commenced he did not protest or raise an issue with the court *a quo* as regards the now alleged violations. The legal practitioner just appeared in court, and happily continued with the representation of the first appellant which in my view is a clear sign that he knew he had erred in failing to communicate with the court and that given what had

been covered his client's rights had not been compromised. If such rights had been compromised the legal practitioner concerned would have registered such concerns with the lower court.

I think it is an exaggeration to suggest that the legal practitioner who is given the task to file and argue an appeal is better positioned to deal with the alleged violations more than the legal practitioner who was involved in the trial itself. Such a scenario does not make sense to me. The bottom line is that there would be chaos in our courts if legal practitioners were to be allowed to present themselves at courts at times convenient to themselves and without giving any explanation to the court.

In conclusion, a careful reading of the court a quo's judgment shows beyond any shadow of doubt that this was a carefully written judgment and that the conviction of the two appellants was well anchored on the evidence presented to it. The convictions cannot be disturbed.

I now proceed to briefly deal with the sentence.

The reasons which informed the court *a quo's* sentence are well covered on page 40 of the record of proceedings. Given the extent to which the appellants, in particle the first appellant went in trying to deflate the prosecution of this matter, coupled with the current national outcry on the increase in rape cases and the alleged inadequacy of our penal provisions, the court *a quo*'s sentence cannot in all fairness be said to induce a sense of shock.

The evidence tendered show that the complainant was a rural give born and bred in the rural areas of Gokwe and that she lost both parents at a very tender age.

This is one of the most brutal forms of rape where the assailant pretence to go into a marriage relationship in a desperate effort to ward off the consequences of the heinous act. This is aggravatory.

It gets worse when one accepts that the conduct of the appellants has now plunged the historically troubled complainant into premature motherhood.

All what this narrative points out to is that the appellants must have been imprisoned for a much longer period than the one imposed by the court a quo.

In the final analysis the appeals against conviction and sentence in respect of both appellants is dismissed.

Hungwe J agrees…….

Chinamasa, Mudine and Maguranyanga, first appellant's legal practitioners
Maposa, Ndomene, and Maramba, second appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners