

ADMIRE KAFURURA
and
THE STATE

HIGHCOURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE; 6 & 16 February 2023

Criminal Appeal

T K Bvekwa, for the appellant
F I Nyahunzvi, for the respondent

CHIKOWERO J:

1. This is an appeal against both conviction and sentence. The appellant was convicted on a charge of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to fifteen years imprisonment. Three years were suspended on appropriate conditions.
2. The appellant was twenty-nine years old at the time of the commission of the offence. He was a teacher conducting some extra lessons at a certain house in Harare. The complainant was a seventeen year old school girl.
3. The complainant's evidence was that she appeared at the house in question. She was in the company of her cousin. Though younger, the latter was almost the same age as the complainant. The residence in question also served as an educational institute of sorts where extra lessons were conducted. The complainant was not feeling well. She went into the appellant's office. She told him that she was under the weather. He gave her some water to drink, which she partook, whereupon he assured her that she would recover. She attended two lessons. She became worse. She told her cousin that she was going to the appellant to seek to be excused from the Accounts lesson on account of her illness. The cousin remained outside, waiting, and holding the complainant's bag. Inside his office, the appellant insisted that the complainant should not miss the lesson. She continued pleading with him to be allowed to go home. Meanwhile she was getting worse. He stood up. A

table separated the parties. He tried to grab her hand. At that point she fell unconscious. On regaining consciousness she discovered that she was seated on the floor with her blouse, jersey and pair of socks on but without her pants and socks. She felt pain on her vagina and saw blood stains on the floor. Meanwhile, the appellant was wearing his pair of trousers but the belt had not been buckled. She shouted at him demanding to know what had happened. His response was to ask her to dress and vacate his office as he would tender an explanation in due course. On exiting the office, she beheld her cousin by the door. The complainant was crying. Straight-away, she told that relative that the appellant had raped her while she was unconscious. The two girls then proceeded to the toilet where the complainant showed her cousin the blood stained pants. However, wary of the stigma that would befall her, the complainant told her cousin that the matter should not be reported either to the complainant's parents or to the police. It was only eleven months later that the complainant, who had indulged in sexual intercourse with some other person or persons before and after the commission of the offence, made a police report. She had been traumatised by the incident to such an extent that, hard as she tried, she could no longer keep the matter a secret.

4. The cousin testified that indeed the complainant had gone into the appellant's office on a certain day in May 2019 to seek permission to miss the lesson on account of ill health. The cousin had remained outside, waiting for the complainant. The two girls stayed together. The cousin was holding the complainant's school bag. Worried that the complainant had taken too long to return, she knocked at the door. The appellant responded. He said the complainant had already left. The cousin said that was not possible, she had not seen the complainant leaving the office. In any event, she was still holding onto the complainant's school bag and the two girls were to go home together. Later, the complainant opened the door. She was crying. She voluntarily made an immediate complaint that the appellant had raped her while she was unconscious. Shocked, the cousin asked the complainant to proceed to the toilet together. There, the bloodied pant was exhibited. The complainant, to protect her reputation, impressed upon her cousin that the former's parents and the police were not to be told of the crime.

5. The defence was that the chain of events leading up to the commission of the offence and the crime itself never happened. For reasons known to themselves, the two girls had come up with a false story. They were imagining things. His office was so small that it was not possible for the offence of rape to have been perpetrated therein. In addition, there was so much human traffic at the house in question that it was not practicable for the appellant to have committed the offence.
6. The trial court was impressed by the credibility of the complainant and the cousin. It found that they had stood their ground despite lengthy cross-examination. It was satisfied that the appellant had failed to suggest any tangible reason for false incrimination. The defence that the rape was the product of the two girls' imagination was not only improbable but beyond reasonable doubt false. The appellant's own witness confirmed that five teachers operated from the appellant's office which meant that space was not an issue. The same office could not fail to provide room for one teacher and a school girl when it was big enough to accommodate not one but five teachers at the same time. The delay in making a false report had been satisfactorily explained.
7. The appeal against the conviction is wanting in merit.
8. The conviction turned on factual findings premised on an assessment of the credibility of the state witnesses and the appellant. The court, having lived through the atmosphere of the trial, concluded that the state witnesses were telling the truth. It found that the appellant was clutching at straws.
9. An appellate court is slow to interfere with factual findings made by a trial court where such findings are based on the credibility of witnesses. The exception is where there has been a misdirection or a mistake of fact or where it is clear from the record that the basis on which the trial court reached its decision was wrong. See *Hughes v Graniteside (Pvt) Ltd* S 13/84; *S v Soko* SC 118/92; *S v Mlambo* 1994(2) ZLR 410(S); *Chimbwanda v Chimbwanda* S 28/02.
10. Having referred to *S v Musumhuri* 2014(2) ZLR 223(H), the court concluded that the delay of eleven months in making a police report was satisfactorily explained. The complainant was a mere seventeen year old school girl at the time of commission of the offence. She explained that since the appellant was her teacher and she would continue to appear at the

house for extra lessons, together with other school children, she feared the stigma that would visit her were she to report the crime to her parents and the police. It was only after living with the trauma for eleven months that she then made a police report. There was nothing unreasonable in the trial court accepting this explanation.

11. As for the contention that the court misdirected itself in concluding that the offence occurred because it was not possible to lie down in the office for want of space, the appellant's own witness discredited that point. In any event this, being a factual issue dealt with by the trial court, has not been shown to have been either wrongly disposed of or marred by a misdirection. We cannot interfere.
12. Similarly, that there were people milling around the premises could not have made it impossible for the appellant to commit the offence. The totality of the evidence on record clearly shows that the appellant laced the water with some unknown substance, caused the complainant to consume it, she eventually fell unconscious whereupon he locked the office door and ravished her in that state. He had taken care of not only the complainant but any intruder. Were it not for the fact that the complainant's cousin stood by the door, to whom an immediate complaint was voluntarily made, this could have ended up as a single witness case.
13. Quite apart from the court having reposed credibility in the cousin, whether that witness was a student at that educational institute was really immaterial. What was important was that she spoke to the chain of events before and after the commission of the offence, and was believed. We see no basis, on a reading of the record, to suppose that the court should have found that her detailed testimony was nothing but imagination. That would be illogical.
14. Discrepancies in the state case can only vitiate a conviction if they go to the root of the matter. They must be of such a magnitude and value that they give a different complexion to the matter altogether. Discrepancies whose presence do not measure up to this standard are immaterial. They are inconsequential to the determination of the truth or otherwise of the matter at hand. See *S v Lawrence and Anor v The State* 1989(1) ZLR 29(SC). We are satisfied that what Mr Bvekwa choseto characterise as contradictions are in fact discrepancies which do not go to the root of the matter. These include whether the

appellant conducted one on one lessons at all, whether the complainant saw blood stains on the office floor immediately she came to or only on the following day and whether Bright was by the institution's gate or at any other place on the premises.

15. The complainant and her cousin gave an account so rich in detail that it would be an affront to the intelligence of the trial court to have expected that tribunal to conclude that the two were imagining things. They testified in early 2022 about an offence committed in May 2019, but still managed to give flesh and blood to their testimony. It was not just a case of alleging that the appellant raped the complainant without being able to provide the context within which that offence was committed. Although she was not an eye witness to the offence itself, for obvious reasons, the cousin was still able to corroborate the complainant's evidence to a great extent.
16. The appeal against the conviction cannot succeed.
17. The appeal against the sentence meets the same fate. The trial court considered the mitigating factors. Besides being self-employed as an extra lessons teacher the appellant was also a first offender with family responsibilities. However, he committed a vile crime. It was an assault on the complainant's integrity and dignity. He stood in loco parentis to his victim. She was traumatised. She continually broke down as she testified. She was clearly traumatised. That the matter proceeded into a protracted trial meant that she was forced to re-live her ordeal by giving evidence and being subjected to a barrage of questions under cross-examination. Although only seventeen years old and a school child, she was put in a position where she had to turn down a love proposal from her married teacher. Determined to carnally know her against all odds, the appellant then decided to administer some substance on her. That was premeditation. He pretended to be caring. He was a wolf in sheep's clothing. He caused his student to fall unconscious and proceeded to ravish her.
18. In defending the sentence, Mr Nyahunzvi referred us to *S v Chitima* HH 109/16 where the court had this to say:

"The legislature has deemed it fit to provide for life imprisonment in fitting cases. In the circumstances of this case I am unable to agree that the sentence of 18 years imprisonment induces a sense of shock on account of its severity. In any event, being a school teacher, and the victim's class teacher, the appellant knew very well the risk attendant to his conduct. He shamelessly

committed this crime against a child society expected him to take care of. He has no one to blame when the courts, in their indignation, impose the sentence he received on this occasion.”

19. In *S v Chamu SC 165/94* the court observed that:

“All cases of rape are horrible and sentences for rape have been increasing over the years.”

20. The utterances by the courts in Chitima and Chamu (*supra*) are on point.

21. We agree with Mr Nyahunzvi that the court balanced the mitigating factors against the aggravating ones and properly concluded that a lengthy custodial sentence was merited. Indeed, considering the heinous manner in which the offence was committed, coupled with the relationship between the parties, the appellant was fortunate that a stiffer sentence was not imposed.

22. The sentence is not excessive. It induces no sense of shock. There is no room to interfere with it.

23. In the result the appeal be and is dismissed in its entirety.

CHIKOWERO J:.....

ZHOU J:.....I agree

Bvekwa Legal Practice, appellant’s legal practitioners
The National Prosecuting Authority, respondent’s legal practitioners