EDWARD RUZIYE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 9 & 16 February 2023

Criminal Appeal

Appellant I person
F I Nyahunzvi for the respondent

ZHOU J: This is an appeal against both conviction and sentence. The appellant was convicted after a full trial, of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 20 years imprisonment.

The appellant was found by the court *a quo* to have raped the complainant from 2011 to 2015 during the time that the complainant was living at the appellant's residence. The complainant is a daughter of the late sister of the appellant's wife. She regarded the appellant as her "father". The appellant was aged 46 years old at the time of the trial. The evidence which was accepted by the trial court was that the complainant fell pregnant as a result of the unlawful sexual intercourse.

The appellant relies on the following grounds of appeal to seek the setting aside of the conviction: that the lapse of about 6 years before the matter was reported to the police required caution to be applied by the court *a quo*; that the requirements for admissibility of the report were not met; that the evidence relied upon was "unreliable, inhumane; illogical and incoherent (and) marred with irregularities; that the mention by witnesses of the complainant's boyfriend and the animosity between appellant and his former wife adversely affected the state case; that complainant had the opportunity to disclose the rape while she was at Gutu; that the medical report was not helpful in the absence of DNA results; and that the complainant contradicted herself about what she observed on her genitalia after the rape.

The court *a quo* was alive to the need for a complaint of a sexual nature to be made timeously, freely and voluntarily, and cited the relevant cases of *State* v *Nyirend*a 2003 (1) ZLR 70 and *State* v *Banana* 2000 (1) ZLR 607 (S). The court took note of the relationship between the complainant and the appellant and the fact that they were living together. The complainant was no doubt dependent upon the appellant for accommodation and food since she regarded him as her parent. He looked after her. Further, the appellant manipulated his relationship with the complainant by threatening that his wife would commit suicide or would assault her if she became aware of the rape and the pregnancy. In any case, the report to the police may have come through her aunt in Harare, but evidence was led that she disclosed the rape to Irene Mufuka who decided not to assist the victim. In light of the above facts, the court a quo correctly came to the conclusion that the complaint was made freely and voluntarily and within a reasonable time given the circumstances of the case. The magistrate believed the complainant that the appellant manipulated her into leaving his home-stead in order to conceal the rape, and planted upon her the story that she had been impregnated and dumped by her boyfriend Takudzwa. The ground of appeal challenging the admissibility of the complaint is therefore without substance. The learned magistrate did approach the evidence with caution

The mention of an alleged boyfriend of the complainant does not in any way affect the evidence tendered. This is not a case of a paternity dispute relating to the pregnancy of the complainant. The appellant was being charged with rape, the first assault being alleged to have been committed in 2011 well before the pregnancy was conceived. The details of the evidence which was given by the complainant pertained to the very first act of rape. The boyfriend's name has no relevance to that incident. The alleged boyfriend's name only features in relation to the pregnancy. Clearly, the appellant is barking up the wrong tree by submitting that the mention of the boyfriend means that the evidence of the complainant that she had been raped by the appellant over a period of about five years becomes unreliable or incoherent. The complainant stated, and she was be believed by the court *a quo*, that the appellant intruded into a room where she was sleeping with a young girl aged two years and raped her. She gave evidence that she even asked the appellant what he was doing and his response was that "he wanted to do something". Appellant then went on to remove complainant's underwear completely and closed her month after which he

penetrated her. All this evidence does not in any way place Takudzwa the alleged boyfriend at the scene.

The alleged animosity between the appellant and Josephine Nyanyiwa, his former wife, did not in any way impact on the prosecution's evidence. This is so because Josephine Nyanyiwa actually disputed the complainant's evidence that she reported the rape to her after the first encounter. This witness also disputed the complainant's evidence that she broke up with the appellant because of the allegations of rape against appellant. No reliance was placed on the evidence of Josephine Nyanyiwa in convicting the appellant. The court *a quo* accepted only the report that was made by the complainant to Irene Mufuka. In any event, the alleged animosity did not play out in the manner in which Josephine Nyanyiwa gave her evidence. Thus the attack on the judgment of the court *a quo* based on the mention of a boyfriend and the alleged bad blood between the appellant and his former wife is without merit.

The failure to disclose the rape to the persons who stayed with complainant at Gutu does not invalidate the evidence of the complainant. She had already disclosed the rape to Irene Mufuka before going to Gutu. Her explanation that she merely recited a story that had been given to her by the appellant was accepted by the court *a quo*. We find no misdirection in that regard. After all, the persons who stayed with the complainant at Gutu were total strangers who had only offered to assist her. The court *a quo* was correct in not reading much into the fact that the complainant did not tell her hosts about the rape.

The ground of appeal based on the medical report is meritless because the court *a quo* did not rely on the medical report when it convicted the appellant. The matter turned on the credibility of the two key witnesses the complainant and Irene Mufuka whose evidence corroborated the complainant's testimony. The disclosure of the rape to Irene Mufuka was unsolicited. It was made freely and voluntarily. Irene Mufuka was believed. She clearly had no bad intentions against the appellant. Indeed, even after being told about the rape she decided to keep quiet. She says she was shocked by the disclosure and, understandably, found herself helpless given the position of the assailant as the "parent" or "father" of the victim. The court *a quo* also took note of the evidence of the complainant which was corroborated by Josephine Nyanyiwa, that the appellant was at some point summoned to the Chief's court to explain the allegation that he had impregnated

the complainant. This court has no reason to interfere with the findings of credibility made by the trial court.

As regards the sentence, the appellant's complaint is that the sentence is so excessive that it induces a sense of shock. Sentencing is a matter that falls primarily within the discretion of the trial court. The appellate court does not interfere with the exercise of the discretion unless it is shown that it was not exercised judicially having regard to all the facts and circumstances of the case. The court *a quo* did consider the mitigation factors, particularly that the appellant was a first offender who, as far as possible, must be given a chance to reform. It also considered that he was a family man with two wives and dependents who looked up to him for support. This court would have found fault in the failure to suspend a portion of the prison term on condition of good behaviour, especially because there are no reasons given for the approach. However, the effective sentence imposed still falls short of the maximum penalty of imprisonment for life which is permitted by the law, per s 65(1) of the Criminal Law (Codification and Reform)Act [*Chapter 9:23*]. The learned magistrate, correctly in our view, took note of the egregious features of this case. Notwithstanding the fact that the appellant was charged with only one count of rape, the evidence shows that the sexual assaults actually took place over a long period of time which is about five years. The court *a quo* also considered the relationship of dependence and trust that existed between the appellant and the complainant, the age difference between the two, and the manner in which the appellant manipulated the complainant in order to conceal the offence. There was also the fact that the rape resulted in the birth of the child and appellant did nothing to assist the complainant in managing the pregnancy and maintaining the child. When all these factors are considered, the effective imprisonment term of 20 years cannot be said to be excessive at all.

In the result, the appeal is dismissed in its entirety.

CHIKOWERO J: Agrees……

National Prosecuting Authority, respondent's legal practitioners.