DAVID MHARIWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 26 June & 10 July 2023

Criminal Appeal

I Gonese, for the appellant
FI Nyahunzvi, for the respondent

ZHOU J: This is an appeal against conviction and sentence. The appellant was convicted of one count of aggravated indecent assault and as defined in s 66(1) and one count 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 after the two counts were treated as one for the purpose of the sentence.

The appellant is the complainant's step-grandfather. Appellant is married to the complainant's grandmother, the mother of complainant's biological mother. Appellant is not the biological father of the complainant's mother but her step-father. It is common cause that during the period that the offences were found to have been committed the complainant was staying at the appellant's residence in Beatrice.

In respect of count one, the court *a quo* found that on a date to the prosecutor unknown but in 2014 the appellant entered the kitchen hut where the complainant was after her return from school. Appellant closed the door and held the complainant tightly between his legs. He fondled her breasts and went on to insert his finger inside her sex organ. He repeated this on subsequent days. When the assaults started the complainant was 9 years old and doing grade four.

Regarding count two, the court *a quo* found that sometime in 2015 the appellant followed the complainant into the bedroom after she had just taken a bath. He closed the door, and started suckling her breasts while pushing her into a lying position on the floor. She was still undressed.

He went on to have sexual intercourse with her without her consent. After that incident the appellant on diverse occasions had sexual intercourse with the complainant without her consent. In some cases he would wake up at night under cover of darkness and force himself upon her while she slept in the same kitchen hut where the appellant sometimes slept with his wife. The court *a quo* accepted the evidence tendered that these sexual assaults continued up to 2017 when the complainant left the appellant's place of residence to go and stay in Harare.

Complainant disclosed the sexual assaults to her maternal aunt, her mother's sister, in Harare. This disclosure resulted in a police report being made which resulted in the arrest of the appellant.

The appellant's defence in the court *a quo* was that the rape allegations were fabricated by the complainant's mother and her sister. According to his defence outline, the allegations were contrived to separate him from his wife by causing his arrest and incarceration. This defence was rejected by the court *a quo*.

The appellant challenged the conviction on four grounds. In the first ground he took issue with the delayed reporting of the rape. The second ground of appeal alleges a failure by the court *a quo* to scrutinize the evidence of the complainant as a young and vulnerable person susceptible to undue influence. In ground 3, the appellant alleges a failure to adequately exclude the possibility of false-incrimination. The final ground of appeal contends that the appellant's theory about the motive for incriminating him was wrongly rejected. As against the sentence, the appellant's complaint is that the overall effective sentence of 20 years imprisonment was so excessive as to induce a sense of shock when regard is had to the appellant's status as a family man and first offender who did not infect the complainant with the HIV or any other sexually transmitted infection (STI).

It is common ground that the matter was only reported to the police in February 2022. This would be some eight or so years after the first act complained of took place and about 5 years after the complainant had ceased residing at the appellant's residence. The appellant contends that this delay was not adequately explained by the complainant, and thus dents her credibility and casts aspersions on the authenticity of the allegations.

The requirement that complainants of a sexual assault must be made without undue delay and voluntarily is one that is entrenched in this jurisdiction, see *S* v *Banana* 2000 (1) ZLR 607 (S) @ 616A and the cases cited therein. What constitutes an undue delay in relation to the making of a complaint of a sexual assault of necessity depends on the facts and circumstances of each case. Courts are not manned by statisticians who will sit down and mathematically count the hours, days, months or even years that have gone by before a complaint relating to a sexual assault is made as if the assault took place in a vacuum. Each case must be looked at in light of its unique facts and circumstances, and the explanations tendered regarding the time taken to disclose the assault must be considered in the context of such facts and circumstances.

In this case a number of factors must be considered as was correctly done by the learned magistrate. These include the age of the complainant, her relationship to the appellant, the set-up in which she lived more particularly the extent to which she depended upon the appellant and those close to him for her livelihood and social life in general, the general reaction of the public to issues of a sexual mature and, the availability of persons to whom free disclosure could be made.

The first observation to be made is that the complainant stated and was believed, that the first person to whom she disclosed the sexual assaults was her grandmother who also happened to be the wife of the appellant. She let her down by not just taking no action to protect her but by positively concealing the assaults. She dissuaded the complainant from disclosing the sexual assaults to any person. In fact, the grandmother was not just told about the sexual assaults; she came face to face with it when in one incident described by the complainant, the appellant raped her in broad daylight and she screamed. The grandmother was a witness to this incident. So the complainant reported the sexual assault without undue delay to the person whom she could reasonably be expected to report to.

Complainant cannot be blamed for the time that it took to make the second report. She regarded the appellant as her grandfather. But he kept reminding her that she had nowhere to go if she disclosed the sexual assaults because her father was unknown and her mother was poor. In other words appellant reminded the complainant about her vulnerability because she would have no place to stay at if she disclosed the rape. There was also the involvement of the grandmother in preventing her from reporting the rape. These two were the closest relatives to her and they were

staying with her. Complainant's mother was staying elsewhere for most of the time. Thus the complainant was essentially dependent upon the appellant for her livelihood. Even the grandmother reminded her that she should never reveal the sexual assaults because complainant and her mother would have nowhere to go since they had no place of residence of their own. The court *a quo* believed the complainant's version and rejected that of the grandmother. We find no misdirection to warrant interference with findings on the credibility of the witnesses by the trial court.

The court *a quo* also believed the complainant's evidence that even after disclosing the rape to her mother, the latter took no action. She only acted after her sister had received the report from the complainant.

In light of the factual findings noted above, the first ground of appeal cannot succeed.

The alleged failure to scrutunise the evidence of a young complainant is not based on a proper reading of the judgment. The learned magistrate thoroughly analysed the testimony of the complainant. He also found that her evidence was corroborated by the medical report and the evidence of the complainant's mother and Nyaradzai Javheni. The latter did not even know the appellant. Appellant also did not know her. She had no reason to plant a false story upon the complainant in order to incriminate the appellant. The submission that the complainant's evidence was not scrutinized is therefore not supportable.

The appellant did not allege, let alone prove, the facts from which the danger of false incrimination could have arisen. The evidence proves that the complainant fought against the odds to get justice. Appellant intimidated her, the grandmother also intimidated her, her own mother turned a blind eye to the issue. No motive was shown for the complainant to falsely incriminate the appellant. The maternal aunt who eventually pushed for the matter to be reported to the police was unknown to the appellant.

The appellant's explanation for the possibility of false incrimination was correctly rejected as being manifestly groundless. Appellant suggested that the rape allegations were fabricated by the complainant's mother and her sister as a device to separate him from his wife. Firstly, complainant's mother actually ignored the report when it was made to her by the complainant. Her reaction to the complainant is not consistent with an intention to nail the appellant. On the

other hand, as noted earlier on, Nyaradzai Javheni did not know and had never met the appellant. In any event, the evidence led shows that when the appellant was arrested his wife immediately left Harare to go to the rural area. She fought in his corner by giving evidence as a defence witness. Appellant's theory about the motive for reporting him to the police was therefore shown to be without substance.

As regards the sentence, the ground of appeal is that the sentence is so excessive as to induce a sense of shock. The respondent made a partial concession to the effect that a portion of the sentence ought to have been suspended on condition of future good behaviour. The concession was based on the remarks in the case of *S* v *Morisha Mahove & Ors* 2009 (2) ZLR 19 (H).

In that case the court found that the magistrate had not given reasons for not suspending a portion of the sentence. The learned magistrate also gave no reason for not suspending a portion of the sentence *in casu*. However, the failure to suspend a portion of the sentence is not the ground upon which the sentence is being challenged by the appellant. The concession is therefore misplaced in that it is not based on the ground of appeal. The overall effective sentence of 20 years imprisonment cannot be said to induce a sense of shock when regard is had to the fact that two counts were taken as one for sentence. Further, the evidence proved that many acts of aggravated indecent assault and rape were actually committed upon the complainant by the appellant even though he was charged only with two counts. The offences were committed in the most egregious manner and over a long period of time by a person who would be expected to protect the vulnerable complainant. Notwithstanding the fact that the appellant was a first offender and a family man, he certainly deserved a more severe penalty than the 20 years imprisonment that was imposed. The court *a quo* showed a measure of mercy by treating the two counts involving very serious offences as one for sentence. We find no fault in the approach taken. We also find that the sentence is not excessive. The sentence does not induce any sense of shock.

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

ZHOU J:……..

CHIKOWERO J: Agrees……..…….

Lawman Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners