TAYENGWA CHIURIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 21 November 2022 & 10 January 2023

Criminal Appeal

Appellant in person
R Chikosha, for the respondent

CHIKOWERO J:

1. This is an appeal against both conviction and sentence.
2. The appellant was convicted of two counts of rape as defined in s 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23]*.
3. He was sentenced to 20 years imprisonment, with both counts having been taken as one for the purpose of sentence.
4. The facts found proved were as follows. During the mornings of 13 September and 22 November 2017 the appellant and complainant were the only persons at home. The complainant had on each occasion accompanied the appellant's daughter to school, returned and was preparing to herself go to her own school. The appellant ordered her into the dining room, then to the children's bedroom whence he raped her once on each occasion. In respect of the first count the complainant, upon returning from school, made a complaint to the appellant's wife. According to the complainant this recipient of the complaint took no action, insisting that her husband did not act that way. As for the second count, the appellant assaulted the complainant before committing the rape and thereafter ordered the victim to take a bath before proceeding to school. The complainant, her eyes bloodshot, only arrived at school at 10 o'clock in the morning. This was during break-

time. Other pupils mocked her for her lateness. She took refuge in the toilet. Her class teacher, a lady, was informed that complainant was hiding in the toilet. The teacher, who also testified for the prosecution, instructed that the complainant be brought to her. This was done. Observing that the complainant had been crying, the teacher asked what the problem was. Initially, the complainant stated that she was suffering from a headache. However she then disclosed that the appellant had raped her on that very day, hence her late pitching up at school. Not only that, he had also raped her on 13 September 2017 with no action having been taken despite her complaint to the appellant's spouse.

5. The fortuitous complaint to the class teacher led to the lodging of a police report and the medical examination of the complainant.
6. Such medical examination was conducted on 24 November 2017. This was only two days after the commission of the second count of rape.
7. The medical report was produced by consent. Redness was detected on the *labia minora* with the vestibule and fourchette swollen. The hymen was partially torn. The State Registered Nurse recorded that there was definite evidence of penetration.
8. The trial court rejected the appellant's defence. He had averred that the complainant had fabricated the rape allegations against him. His protestations that the complainant was a problem child who could have been sexually abused by some other person on her way to school but for some unknown reason decided to protect the offender by fingering the appellant did not find favour with the trial court.
9. The appellant did not dispute that on both occasions he only left home after all the children had left for school.
10. The complainant was a 7 year old Grade 1 pupil at the material time. The appellant, uncle to the complainant, was an unemployed 47 year old. He, together with his spouse, provided a roof over the complainant's head.
11. That the complainant was raped was not an issue at the trial. The only issue was whether it was the appellant who had committed the offences.
12. Having reposed credibility in the complainant, noted that the medical report spoke to the offences having been committed, found that the complainant's evidence of the timeous and voluntary complaint was consistent with the testimony of the teacher to the same effect and

that the appellant and his wife were clutching at straws, the trial court convicted the appellant.

13. We have carefully perused the record. We are satisfied that there are no material inconsistencies in the evidence of the complainant and her teacher. Both witnesses gave clear evidence. The cross-examination of the complainant by the appellant's erstwhile legal practitioner was so poor that it left her testimony intact. As for the teacher, the cross-examination was no better. In fact, the legal practitioner did not challenge the teacher's evidence at all, choosing instead to embark upon an enquiry. Not surprisingly, the result was that the witness simply confirmed her evidence in chief. In making findings of fact, the learned regional magistrate, to his credit, was mindful of the fact that, at the end of the day, the evidence of the complainant and that of the teacher was not challenged at all.
14. We are satisfied that the trial court was on firm ground in finding that the appellant's spouse was not at home when the first incident of rape was committed. The complainant testified to that effect and was believed. The appellant's spouse testified as a defence witness. She claimed that she was at home on 1 September 2017, not having gone to work. She also claimed that the complainant went to school at 7:00am on 22 November 2017. In so testifying, she contradicted her husband. This was so because the appellant admitted under cross examination that he remained with the complainant on 13 September 2017, his wife having left the residence. As for 22 November 2017, the appellant admitted that he only left home after all the children had gone to school. That the complainant did not leave for school in the company of his children is demonstrated by the fact that it was only the former who arrived at break time. The complainant explained that this was so since the appellant had initially instructed her to take his daughter to pre-school and, on re-appearing at the residence to herself prepare for school, the appellant then raped her. We are satisfied that the appellant was correctly found not only to have been at the scene of crime at the material time but to have committed the two offences.
15. The learned magistrate did not at all place the *onus* on the appellant to prove his innocence. Rather, in view of the admitted fact that the complainant was raped, the trial court excluded the danger of false incrimination by finding that even the appellant and his spouse had failed to suggest any possible reason why such a young child, provided for by the couple,

would be so malicious as to nail her own uncle by shielding the real culprit. She was too young to be protecting a lover. In any event, it was not even suggested that such lover ever existed. We do not agree that this thought process by the trial court amounted to requiring the appellant to prove his innocence.

16. We think it necessary to set out the fourth ground of appeal. It reads:

> "4. The court *a quo* erred in failing to exercise caution when faced with evidence of a young child whose tendency to fantasise, hallucinate and fabricate fake stories are very. The court ought to have been on the guard and exercise caution when dealing with such evidence as children are very much pliable and open to manipulation."

This ground of appeal is misplaced. It has no foundation on the record. It is a fact that the complainant was raped. There can be no fantasy, hallucination and fabrication of fake rape stories to talk about. Equally, it was really fortuitous that the offence came to light at the school when the innocent young complainant had fled the mocking by her peers, for being a late-comer, by hiding in the toilet. We agree with both the trial court and Mr Chikosha that there was no manipulation of the complainant by anybody to, so speak, crucify an innocent man.

17. It is unnecessary that we discuss the fifth ground of appeal. It is a repeated complaint that the defence was incorrectly rejected. We have already dealt with that issue.
18. The medical report was produced by consent. The appellant cannot on appeal take issue with the manner of production of that documentary evidence. Further, that the complainant was raped was not an issue at the trial. It follows that the fact that the complainant was examined by a nurse rather than a medical doctor cannot suddenly become an issue before us. In any event, in terms of s 278 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], it is competent for a state registered nurse to examine a victim of sexual assault, to depose to an affidavit reflecting his or her observations and for the prosecution to produce such affidavit as evidence at a criminal trial. A state registered nurse is a medical practitioner.
19. The sentence of 20 years imprisonment for two counts of rape of a 7 year old niece by a 47 year old uncle is not manifestly excessive as to induce a sense of shock. The penalty for rape is imprisonment for life or any definite period of imprisonment. Although he was a first offender a reading of the factors listed in s 65(2) of the Criminal Law Code

demonstrates this as a bad case of rape. The complainant was a mere 7 year old girl at the time that the offences were committed. We have already set out the physical injury inflicted upon the complainant during the commission of the offences. As for trauma, the complainant, having received no support from her aunt, who happened to be the offender's spouse, took refuge in a school toilet of all places. The appellant was a married father of five. The age difference between his victim and himself is four decades. No wonder the trial court remarked:

> "It is indeed disgusting and mind boggling what sexual gratification the accused derived from sexual intercourse with a 7 year old infant."

20. The appellant used a switch to assault the complainant before thrusting her into the house whence he sexually ravished her on the second occasion.
21. The appellant is uncle to the complainant. He breached the duty of trust by sexually molesting the complainant instead of protecting her. He stood in the position of a guardian. His moral blameworthiness is very high.
22. He did not commit one but two counts of the rape. By its nature this is a serious offence; it was planned and premeditated in the circumstances. The appellant made sure, not once but twice, that no one else was about before he pounced on the complainant.
23. The trial court considered but decided against suspending any portion of the custodial sentence in view of the weighty aggravating factors accompanying the two counts. The discretion to assess an appropriate sentence reposed in it. There is nothing wrong in the trial court's approach in identifying its purpose as general and individual deterrence and sentencing according.
24. The sentence imposed is not so severe as to amount to a substantial miscarriage of justice. See *S* v *Sidat* 1997(1) ZLR 487(S); *S* v *Ramushu and others* S 25/93; *S* v *Mundowa* 1998(2) ZLR 392(H). Indeed, we hold the view that there was no miscarriage of justice in the sentence imposed.

25. In the result, the appeal can only but completely fail.
26. The appeal be and is dismissed in its entirety.

CHIKOWERO J:……

ZHOU J:……Agrees

The National Prosecuting Authority, respondent's legal practitioners.