THE STATE
versus
MATIVENGA MOYO

HIGH COURT OF ZIMBABWE
CHATUKUTA & KWENDA JJ
HARARE, 3 June 2019 & 17 March 2021

CRIMINAL APPEAL

F Watungwa, for the appellant
W Badalane, for the respondent

KWENDA J: The appellant appeared before the defined court at Kadoma charged with the crime of Rape as defined in s 65 (1) 9 of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]* in that on the 31st December 2016, at Collingdale Village Kadoma he had unlawful sexual intercourse with a named adult woman without her consent. The complainant was the appellant's wife's young sister and she was visitor at appellant's homestead when the incident took place. The appellant pleaded not guilty and the matter proceeded to trial. His defence was that the sexual intercourse was consensual. He said the he proposed love to her on the night in question. They agreed that she was going to move from the room where she had been sleeping with the appellant's children and to another. Pursuant to the arrangement, the complainant went to sleep in the other room. The appellant then sneaked out of the bedroom which he shared with his wife and into the room where the complainant was sleeping where he had consensual sexual intercourse with her. He would pay for the services of sexual intercourse. After the act, the appellant returned to his bedroom. His wife did not notice because she was asleep. The appellant failed to pay the consideration for the sexual services rendered by the complainant and he suspects that must have motivated her to fabricate rape allegations against him.

At the end of the trial, the appellant was convicted and sentenced to imprisonment for 15 years of which 2 years were suspended on condition of good behaviour. Aggrieved by the judgment of the trial court, he appealed against both conviction and sentence. His grounds of appeal are para-phrased below. They are that: -

a) The court *a quo* erred in failing to consider that the appellant, who was not legally represented, had not been afforded adequate time and facilities to prepare his defence
b) The court *a quo* erred in failing to comply with the provisions of s 278 sub section (2) as read with subsection (11) of the *Criminal Procedure and Evidence Act* [Chapter 9:07] which entitles an accused person to three days' notice before a medical affidavit can have admitted in evidence at his trial unless the appellant waives the right and that confirms that the appellant was not given adequate time and facilities to prepare for the trial.
c) The court *a quo* erred in placing undue weight on the evidence of the complainant and other witnesses which was scanty and fraught with inconsistencies and disregarding that the sexual intercourse was consensual.

The appellant's relied on one ground of appeal against sentence only which is that the trial court imposed a sentence which induces a sense of shock after placing too much emphasis on the seriousness of the crime and ignoring very strong and important mitigatory factors.

Appellant raised a new point *in limine* as a question of law for the first time in his heads argument. It was submitted on his behalf that he had not been advised of his right to legal representation by either a lawyer of his choice or provided by the State as enshrined in s 70(1) (d), (e) and (f) of the Constitution pf Zimbabwe (Amendment No 20) Act 2013.

The State opposed both the appeals against conviction and against sentence.

With respect to the first ground of appeal against conviction, the State counsel submitted that the appellant did not suffer any prejudice at all. The ground of appeal is factually incorrect because the appellant was admitted to bail before the trial started and he there had adequate opportunity and time to prepare for the trial. As regards the second ground of appeal against conviction, the State counsel conceded that the appellant was indeed entitled to three days' notice before the medical affidavit prepared by the medical practitioner who examined the complainant could be properly admitted into evidence on its mere production from the bar by the prosecutor as envisaged of s 278 sub section (2) as read with subsection (11) of the *Criminal Procedure and Evidence Act* [Chapter 9:07] but argued that the appellant expressly waived his rights. On the merits, the State counsel submitted there was sufficient evidence which proved that sexual intercourse was not consensual. Hymen tears observed at the time of the complainant's medical examination showed that the sexual intercourse was not consensual. The complainant was corroborated by her uncle in material respects and both the complainant and her uncle were unshaken under cross examination. The trial court found the witnesses

credible and a trial court's finding on credibility is not lightly interfered with on appeal because the trial court is better placed to assess the demeanour of the witnesses and the manner of answering questions. The complainant made a report voluntarily, with expedition, to the person she was reasonably expected to report. The court believed the reasons proffered by the complainant for not reporting to her sister or mother. She heard her sister conversing with the appellant soon after the rape and she concluded the sister had been complicit. She decided against informing her mother who was of ill-health. The fact that the complainant cut short her visit at the appellant's house meant that she had not consented to the sexual intercourse. The State counsel relied on the concession by the appellant that the complainant did cut her visit shorter than expected and that there was no prior bad blood between the complainant and him. The State counsel also responded to the new point *in limine* raised by the appellant in his heads of argument as a question of law that the trial court failed to advise the appellant of his rights as enshrined in s 70(1) (d), (e) and (f) of the Constitution by conceding the omission by the trial court but argued that the omission did not result in any prejudice to the appellant and miscarriage of justice.

With regards to sentence the State submitted that the sentence is not shocking and is in line with decided cases.

I note, with regards to conviction, that the trial court decided the matter by way of firstly, identifying those facts that were not in dispute and secondly, identifying the issues for determination and thirdly resolving the issues by reference to the undisputed facts.

The facts which the trial court found to be common cause are the following: -

1. The appellant is married to the complainant's sister.
2. The complainant arrived at the appellant's residence on the 23rd December 2016 to visit the appellant's family.
3. On the 30th December 2016 the complainant's sister asked the complainant to move from the room where she was sleeping with the appellant's children to another room. At night but in the early hours of the 31st December 2016, the appellant followed the complainant to the room where sexual intercourse took place.
4. That at daybreak the complainant ended her visit and left the appellant's homestead.
5. A report of rape was made on the 2nd January 2017 and the appellant was arrested.

In light of the facts that were common cause the trial court found that there was only one issue to be determined by the court which is whether or not he sexual intercourse between

the appellant and the complainant was consensual. In resolving that issue the trial court took into account the following:

(1) That from the date the complainant commenced her visits she was sleeping in the kitchen.
(2) On the 30th December 2016 the appellant's wife told the complainant to move bedrooms and sleep in another room, ostensibly, because she was getting up late and delaying household chares
(3) When the appellant returned to his bedroom the complainant heard him talking to his wife, her sister. Given the background that the appellant's wife had asked her to move to the bedroom where the appellant followed and raped her, the complainant concluded that the appellant and his wife had planned the rape.
(4) The appellant produced her pant which she said had been torn on two parts as she resisted the appellant.
(5) On the following date she decided to leave and did leave. When the appellant's wife asked what the problem was she simply said something was wrong.
(6) The complainant sent a text message to her uncle who immediately reported to the Police.

The trial court concluded that in all the circumstances of the case the sexual intercourse was non-consensual. If she was consenting, she would have removed her pant on her own, in which case, her pant would not have been torn. Further, if the intercourse was consensual the complainant would not have cut short her visit and ended it abruptly. The complaint made a voluntary report. There was no reason for her to make a false report against the appellant if the sexual intercourse was consensual.

I find that it is not disputed on appeal that the parties had sexual intercourse on the night in question. Those facts which the trial court identified as common cause remain undisputed. The trial court concluded that the only reasonable inference to be drawn from the facts was that the complainant had not consented to sexual intercourse. None of the grounds of appeal speak of any other reasonable inference. In other words, the appellant has not demonstrated in argument how the lack of legal representation prejudiced him in his defence. He has also not demonstrated how the production of the medical evidence without giving him three days to study it was prejudicial to him. I say so because the court's judgment was based on facts which even at this stage, remain common cause. I did not hear appellant's counsel to submit in

argument that the complaint falls short of the requirements for admissibility set out in the headnote of *S* v *Banana* 2000 (1) ZLR 607 as *per* GUBBAY CJ at page 609 B-D that: -

> "…… evidence of a complaint in a sexual case is admissible to show the consistency of the complainant's evidence and the absence of consent. The requirements for admissibility are that (a) the complaint must have been made voluntarily, not as a result of questions of a leading and inducing or intimidating nature; and (b) must have been made without undue delay, at what is in the circumstances the earliest opportunity, to the first person to whom the complainant could reasonably be expected to have made it."

The trial court was therefore correct in concluding that the sexual intercourse was non-consensual thereby convicting the appellant.

A question of law may properly be advanced for the first time on appeal if it is based on the facts which were before the court and does not cause prejudice to the other party. See Cillers, Loots & Nell; Herbstein & van Winsen *Civil Practice of the High Courts of South Africa Vol 2* JUTA 5 ed 1246. In this case the legal issue was properly raised since it is clear on record that the appellant was not advised of his said rights. The State has conceded the omission and has not alleged any prejudice to it arising from the manner in which the issue has been raised. There is, however, merit in the State's submission that the appellant did not suffer prejudice. Appellant's counsel could not demonstrate to us the prejudice suffered by the appellant. The issue for determination by the trial court, being whether the sexual intercourse was consensual, was very simple and straight forward. It was resolved on facts that were common cause at the trial and remain uncontested. The appeal against conviction cannot succeed.

As against sentence I agree with the State's submission that the sentence is not shocking. In my view it is not even severe because it is in line with decided cases. The State relied on the case of *S* v *Madzemwa* HC 288/2012 where an effective term of imprisonment for twelve years was confirmed on appeal.

I therefore order as follows:

The appellant's appeal be and is hereby dismissed both against conviction and sentence.

CHATUKUTA J: agrees: …….