TAKAWIRA JUTA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 5 & 12 September 2022

Criminal Appeal

B Mufadza, for the appellant
R Chikosha, for the respondent

ZHOU J: This is an appeal against conviction on a charge of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appeal against sentence was abandoned at the hearing of the matter. The appellant was convicted following a trial.

The appeal is opposed by the respondent.

The background to the case is as follows. The complainant is a daughter of the sister to the appellant's wife. She was residing with the appellant and his family at Norton. The complainant alleged that the appellant raped her on 30 April 2016 at night. Her case was that the appellant entered into the bedroom where she was sleeping alone, and had sexual intercourse with her without her consent. The appellant's defence was an outright denial of the allegations. He stated that the allegations of rape were fabricated by the complainant because he had reprimanded her for her wayward behaviour. He also stated that he \could not rape her on the night in question because there were other persons in the house and that the complainant was sleeping with Takudzwa, a nine-year old boy, in the same room.

After a very thorough analysis of the evidence led, the learned magistrate accepted the complainant's testimony, and found the case to have been proved beyond reasonable doubt. The magistrate rejected the appellant's defence as being beyond reasonable doubt false. He convicted the appellant and sentenced him to ten years' imprisonment of which three years' imprisonment was suspended for five years on the usual condition of good behaviour.

The appellant raised five grounds of appeal which are set out in his notice of appeal to challenge the conviction. At the hearing, counsel for the appellant abandoned ground 4 and informed that it would not be persisted with.

The first ground of appeal is that the court *a quo* erred in making a finding of law that the sexual complaint was voluntarily made. The appellant's counsel combined this ground with the third ground which is that the magistrate erred in making the factual finding that the second state witness was told of the rape without the influence of the prophet. In argument, Mr *Mufadza* for the appellant submitted that a delay of two weeks was inordinate and inexcusable. He further submitted that the report itself was instigated by a prophet and the suggestive questioning by Kudakwashe Chitembwe.

The submission that there was a delay of two weeks in making the report is based upon a false premise. The evidence of the complainant was that the first person that she told about the rape was Chantal. The report was thus made within about two days of the occurrence of the sexual assault. The court *a quo* believed the complainant on this aspect. That finding of credibility in accordance with the settled position of the law, will not be lightly interfered with. The court rejected the evidence of Chantal that she was not told about the rape. Her denial is not surprising and, in fact, predictably accords with the probabilities. She could not readily nail her own father. Her reaction of crying after the rape was disclosed by the complainant shows that the disclosure placed her in an understandably difficult predicament. But there are other aspects of Chantal's evidence which the learned magistrate thoroughly examined before concluding that complainant had told her of the rape and in finding that she was a witness who could not be believed. Her confirmation that she only returned from the funeral on Monday 2 April 2016 explains why she could only be told about the rape on that day. Her claim that she never spoke to the complainant for almost a week was correctly rejected as not only improbable but a false attempt to escape the fact that she was the first person to be told about the rape.

The Prophet Emmanuel only got in the matter after the complainant had already disclosed the rape to Chantal. Chantal in turn disclosed the rape to Ashley who also disclosed it to the appellant's wife. The Prophet was first brought onto the picture by the appellant and his family when they enlisted his services in the hope that they would conceal the offence. He refused to be used to conceal the rape. Instead, he advised the complainant to report the matter citing the possibility of being pregnant or of having been infected with a disease. This advice does not in any way amount to any undue influence.

Kudakwashe Chitembwe's evidence that was accepted by the court *a quo* was that complainant told her about the rape. The Prophet did not put any undue influence upon Kudakwashe Chitembwe either to report the matter or to interview the complainant. To his credit, his conscience did not allow him to ignore such a crime. The third ground of appeal is therefore meritless.

The second ground of appeal attacks the finding that the complainant was a credible witness. The position of the law in relation to findings of credibility has already been stated above. An appellate court does not lightly interfere with the trial court's findings on credibility in the absence of a misdirection in relation to the evidence placed before the trial court. Appellant's counsel cited the statement in the state outline to the effect that the rape came out following a visit to a prophet as evidence of inconsistencies. The complainant adequately explained the possible origins of that statement but categorically stated that it did not come from her. The court *a quo* accepted this explanation to be credible. This court finds no misdirection in that respect. The complainant stuck to her version of events during the trial so did her sister Kudakwashe when she was being cross-examined by defence counsel whose questions merely produced inadmissible hearsay evidence. For instance, she only heard about but did not witness, the visit to the prophet by the complainant and her cousin sisters.

The fifth and last ground of appeal is that the trial court erred in convicting the appellant after rejecting his defence "which was never rebutted by state witnesses". The appellant's defence was a bare denial. However, the basic facts are that he was in the same house as the complainant on the night of the rape. Complainant said that she clearly saw him when he raped her because the bedroom was well-lit by an electric bulb. The falsity of the appellant's defence was decidedly sealed when Takudzwa, his young son, corroborated the complainant that on the night of the rape she did not sleep with the complainant. Appellant had claimed that Takudzwa was sleeping in the same bedroom as the complainant. After Takudzwa's evidence nothing remained of the appellant's defence. The medical report confirmed the rape and the fact that there was no evidence of previous sexual experience on the part of the complainant prior to the rape. The appellant's attempt to portray the complainant as a naughty girl who flirted around with boys was correctly rejected as a figment of his imagination. Appellant could not cite a single incident in which complainant had been found to be in sexual relationships with different boys; he could also not cite a single incident in which he chastised or rebuked her for mischief relating to promiscuity. He may have decided to take advantage and abuse her sexually because

of his mistaken view that she was promiscuous. But her evidence, which is supported by the medical report, is that she bled as a consequence of the rape. Bleeding is not consistent with a person who has the kind of sexual experience that the appellant sought to pontificate about.

In all the circumstances, the challenge to the judgment of the court *a quo* cannot succeed.

In the result, the appeal against conviction is dismissed.

CHIKOWERO J, agrees: ……

Mufadza & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners