TAFADZWA MUDENGEZERWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 19 and 22 September 2022

Criminal Appeal

E E Matika, for the appellant
F Nyanhunzvi, for the respondent

CHIKOWERO J:

1. This is an appeal against the judgment of the Regional Court convicting the appellant of rape as defined in s 65 of the Criminal Law Code.
2. The appellant was sentenced to 16 years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions of good behaviour.
3. The appellant withdrew the appeal against the sentence at the hearing.
4. We reserved judgment after hearing argument from Mr Matika. We found it unnecessary to hear oral argument from counsel for the respondent.
5. The appeal against the conviction is without merit.
6. The then 30 years old appellant was found to have raped the 14 year old complainant, recently orphaned, in April 2018.
7. Although the evidence clearly revealed four counts, all committed during the same month, the charge was couched as a single count.
8. The complainant was, according to custom, the appellant's "mother –in-law", in the sense that his mother-in-law and the complainant's late father were siblings.
9. At the time the offences were committed the victim was staying under the appellant's roof in Norton together with his spouse and their two young children.
10. The complainant gave detailed evidence describing how the appellant raped her in his bedroom (twice), kitchen and the bathroom. On each occasion, he would thereafter

threaten her not to report lest there would be an altercation between the victim and the offender. Desperate for shelter, and not sure what the reference to an altercation entailed, the complainant only broke her silence the following month after she had left the appellant's residence.

11. Yet even that disclosure did not bear fruit. Chipo Mberengwa, young sister to appellant's own wife, did not act on the complaint.
12. It was only after the complainant met her half-sister, Yvonne Mukiwa, that the latter made efforts to cause the complainant to meet her maternal relatives.
13. Evemore Kazangarare is young sister to complainant's mother. She was the only other witness for the prosecution at the trial. Another complaint was made to her, in the company of her brother, once these maternal relatives had taken custody of the complainant. This was in May 2018, leading to the arrest of the appellant.
14. The medical report was produced by consent. The complainant's hymen was torn. The tears were not fresh. Penetration was definite. The examination was conducted by a medical doctor on 26 June 2018.
15. The conviction rested on factual findings predicated on the trial court's acceptance that the complainant was a credible witness. Such acceptance was bolstered by the contents of the medical report and the manifest lies of the appellant and his defence witnesses.
16. The grounds of appeal read as follows:

> "1. The court *a quo* erred at law in finding that complainant timeously and voluntarily disclosed the rape at the earliest available opportunity disregarding the fact that:
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> (a) Chipo Mberengwa completely denied knowledge of this report and Yvonne Mukiwa never testified in court.
> (b) The complainant alleged that it was Yvonne Mukiwa who made a call to her aunt prompting them to call her to ask where some of the family members were gathered.
> (c) The complainant had a cellphone but did not use it to communicate the alleged rape.
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> 2. The court *a quo* further erred in finding that the inconsistencies in complainant's evidence *viz* the police statements were inconsequential yet such inconsistencies had a material bearing to the reliability of the complainant's evidence.
> 3. The court *a quo* failed to take into account that the complainant deliberately concealed evidence by washing stained linen.
> 4. The court *a quo* further erred in failing to take into account that the reaction by the complainant after the alleged rape of continuing to do household chores and washing

> stained linen after the alleged painful rape was inconsistent with the alleged rape incidences.
> 5. The court *a quo* erred in finding that the complainant was afraid of reporting the rape incidences because she will be rendered homeless whereas the same had relatives to stay with including Chipo Mberengwa at whose place she ended up staying at."

17. The appellant, through counsel, abandoned the second and fifth grounds of appeal at hearing.
18. The remaining grounds raise one issue, namely, whether the trial court was correct in finding that the complainant was a credible witness.
19. The approach of an appellate court in a situation such as this is well-settled. As pointed out by Mr Nyahunzvi in his heads of argument, this court will not lightly interfere with findings of fact made by a trial court and which are based on the credibility of witnesses. See *Hughes* v *Graniteside (Pvt) Ltd* SC 13/84; *Chimbwanda* v *Chimbwanda* SC 28/02.
20. Interference is only justified where there has been a misdirection or mistake of fact or where the basis the court *a quo* reached its decision was wrong. See *State* v *Katsiru* 2007 (1) ZLR 364 (H); *State* v *Mlambo* 1994 (2) ZLR (S) 410 at 413.
21. We are satisfied that the threshold for interference has not been met.
22. The trial court's finding that the complainant made a timeous and voluntary complaint of the rape to Chipo Mberengwa is beyond reproach. That Chipo, who testified as a defence witness, denied that such a complaint was made to her is neither here nor there. Chipo was correctly found to have been protecting her brother –in –law by trying to sweep the matter under the carpet. The police would not have called Chipo to submit a statement as a witness if the complainant had not told the police that she made the first complaint to Chipo during the month following that in which the offences were committed. It was common cause that in June 2018 the complainant was staying with Chipo in Chinhoyi, minding the latter's baby, for no remuneration.
23. It was not necessary for the prosecution to lead evidence from Yvonne Mukiwa. The complainant never said that she made a complaint to Mukiwa. All that she said was that she was about to disclose her ordeal to Mukiwa when Chipo called, summoning the complainant to come back home. On noticing that something was amiss, so said the

complainant, Mukiwa then made arrangements for the complainant to relocate to her maternal relatives where, as we have already pointed out, another complaint was made. It is this second disclosure which led to the arrest and prosecution of the appellant.

24. That the complainant washed the blood stained linen, continued to carry out household chores under the appellant's roof and did not use her cellphone to make a complaint of the rape all speak to the complainant's desperation. This was a 14 year old orphan whose top priority was to retain a roof over her head. She explained that she could neither make a complaint nor a report of the rape while still residing with the appellant lest she would be rendered homeless. In addition, she had been threatened by her male host not to disclose the offence. The trial court found this explanation to be plausible. By abandoning the fifth ground of appeal the appellant himself has effectively conceded that the complaint was timeously and voluntarily made in the circumstances.
25. Since there are no grounds of appeal challenging the court's reliance on the contents of the medical report and its rejection of the defence tendered at the trial, the need to advert to these matters does not arise for the purposes of this appeal.
26. In the result, the appeal against conviction be and is dismissed.

CHIKOWERO J:……

ZHOU J:……

Matika, Gwisai and Partners, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners