KHUMBULANI KHABO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA & MAKONESE J J
BULAWAYO12 AND 5 JUNE 2014

L. Mcijo for appellant
Ms A. Munyeriwa for respondent

Criminal Appeal

KAMOCHA J: After hearing arguments from both legal representatives this court dismissed the appeal in its entirety and indicated that the court's reasons would follow in due course. These are they.

The appellant appeared before the Bulawayo Regional Court facing one count of raping his six year old daughter who had visited him for the school holidays from her grandmother's place where she resided following his separation with her mother.

The allegations were that on some unknown date during the month of April 2010 he unlawfully and intentionally had sexual intercourse with his six year old daughter Langelihle Rejoice Khabo a female juvenile without her consent or realizing that there was a real risk or possibility that she is unable to consent according to law.

The appellant pleaded not guilty on arraignment and the matter went to trial at the end of which he was convicted. He was then sentenced to undergo 18 years imprisonment of which 8 years was suspended for a period of 5 years on the customary conditions of future good behaviour leaving him with an effective sentence of 10 years imprisonment.

Appellant noted an appeal against both conviction and sentence. At the hearing, *Mr Mcijo* who was representing the appellant conceded that he would not persist with the appeal against sentence should this court hold that the conviction is proper. The concession was proper, in my view.

The appellant's grounds of appeal can be summerised as follows:

1) Appellant alleged that the court *a quo* erred in making a factual finding that the complainant shared the same bedroom with him hence the rape occurred in that bedroom simply because the complainant said so despite the denial by him and his two witnesses.
2) The trial court erred in law in deciding on the question of credibility of witnesses based on their age and not on their demeanour nor the essence of their evidence. That led the

court to make the finding that the complainant was young and could not have been manipulated to lie against her father but because the defence witnesses were adults they could have been easily influenced by appellant to save him.

3) The court *a quo* erred on a factual finding that complainant was abused on the last day before she went back to her grandmother's place. He contended that that was improbable because complainant had testified that appellant raped her and Lubelihle on the same night before they left and yet all defence witnesses including Lubelihle's grandmother said Lubelihle did not leave appellant's home at the same time with complainant but she collected her a week earlier. Hence the complainant's assertion that she was raped with Lubelihle on the night before both left the appellant's home was doubtful.
4) The court *a quo* erred in finding that complainant had been raped together with Lubelihle one after the other since Lubelihle herself totally denied ever being raped by appellant and he was not even charged with raping Lubelihle. Appellant concluded that if the complainant lied about the rape of Lubelihle she must have also lied about her own rape.
5) Appellant alleged that the court *a quo* erred in relying on the uncorroborated evidence of the complainant on sleeping arrangements.
6) The court *a quo* erred in rejecting the appellant's story of bad blood between the appellant and complainant's grandmother on the basis that if such bad blood existed then the grandmother would not have released the complainant to the accused for the holiday. This was despite the appellant having testified that at first the grandmother was unwilling to do so until complainant's uncles intervened on appellant's behalf. In the event that there was bad blood, the grandmother could have actually finally allowed the complainant to visit the appellant in order to use that opportunity to fix the appellant by making false rape allegations on the complainant's return.
7) The court *a quo* erred in relying on the evidence of complaint allegedly made to the grandmother whom the appellant was accusing of framing him. He contended that complainant should have made the report to her aunties before the grandmother arrived later that same day. The aunties should have been called to give evidence on the demeanour of the complainant from the time appellant left up to the time the grandmother arrived.
8) Finally, the court *a quo* erred in completely ignoring the anomalies in the state case and completely not addressing the issues raised by appellant both in his defence case and in his closing submissions without giving any reasons.

The complainant was examined by a doctor at Inyathi Hospital on 5 May 2010. The doctor compiled a report which was produced by consent as the third exhibit.

The findings of the doctor were these:

The complainant's apparent age was 6 years. Complainant's private parts revealed some bleeding on the labia minora. The labia majora seemed normal except that there were bruises thereat. The hymen was no longer intact. Her vagina admitted one finger and examination was

painful. The doctor observed some bleeding from the private parts and concluded that penetration was effected.

This evidence confirmed the complainant's story that she was raped by someone. It is in fact common cause. The evidence of Jane Ngwenya the complainant's grandmother to whom the complaint of rape was made was to the same effect. When the complainant alleged that her father had raped her Jane Ngwenya immediately examined her private parts. She observed that the complainant had been injured on her private parts. She had a cut on her private parts.

Having observed that the complainant had been abused Jane Ngwenya called her neighbour one Anna Sibanda to witness what she had observed.

The appellant does not dispute the fact that the complainant had been abused by someone. He accepted that the doctor and Jane Ngwenya indeed observed the blood and injuries they described on the complainant's private parts.

He, however, contended that the injuries and penetration may have occurred in one of the following two ways. Firstly the appellant suggested the grandmother may have deliberately effected penetration of the complainant's private parts using some object in order to fix the appellant. Secondly, the complainant may have been sexually abused by some male person whom the grandmother is shielding. This, he alleged could have taken place after he had brought back the complainant and dropped her at the grandmother's home in the absence of the grandmother.

The first suggestion was premised on the ground that Jane Ngwenya the grandmother and her family were bent on fixing the appellant in order that the complainant's mother could freely marry one Lynos Nyandeni. Jane Ngwenya told the court that she was hearing the story of that conspiracy for the first time in court. She was not aware of that. She denied any conspiracy. When it was put to her in her cross examination that she had deliberately injured the child's private parts in order to fabricate the charges. Her answer was:

> "How was I going to injure her, did l have any nail to use to injure her and what would l accomplish by injuring her?"

That suggestion was ridiculous to say the least. What it means is that the family conspired to injure the complainant in her private parts with her consent to be injured. It also means that the grandmother did that on arrival when she found the complainant at home after the appellant had brought her back.

The suggestion is too far fetched and the trial court was entirely correct in rejecting it outright.

The second suggestion was that the complainant was abused by some male person after the appellant had left her with her two aunts. What that means is that shortly after the appellant left her some male person sexually abused her. By the time the grandmother arrived later in the day she had already been sexually abused. The two aunts were at home with her. The appellant's contention was that the family agreed to shield the male culprit. Meaning that the sexual abuse was planned by the family members in order to fix the appellant. The

suggestion is equally ridiculous and far fetched. The trial court cannot be faulted for rejecting it.

Further the trial court's finding that the complainant was raped on the last day before she went back to her grandmother's place cannot be faulted because on arrival at her grandmother's home she was found to have fresh injuries on her private parts. It admits of no doubt that she had been recently sexually abused. She named her father as the culprit. There is no conceivable reason why she had named him if he had not been the one.

It does not follow, therefore, that because Lubelihle was not abused the complainant was untruthful when she said she herself was abused. There was conclusive evidence that she was indeed abused.

Furthermore the trial court was correct in holding that there was no bad blood between the grandmother's family and appellant. Jane Ngwenya would not have allowed the appellant to take the complainant for the holiday if that was the case. The contention that she allowed the appellant to take her so that Jane Ngwenya would fabricate rape allegation is farfetched and was correctly rejected by the court *a quo.*

The trial court cannot be faulted in convicting the appellant on the evidence before it. The appeal against conviction is devoid of any merits and must fail.

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

Makonese J …… I agree

Mcijo, Dube & Partners appellant's legal practitioners
The Prosecutor-General's Office, respondent's legal practitioners