TIMOTHY DZAPASI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 29 January and 3 February 2015

Criminal Appeal

S Simango, for the appellant
E Makoto, for the respondent

BERE J: The offence for which the appellant was convicted of is one of indecent assault as defined in s 67 (1) (a) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant was sentenced to 16 months imprisonment a portion of which was suspended leaving him to undergo a straight term of 10 months imprisonment. The appeal before us is against both conviction and sentence.

Although the grounds against conviction appear to be numerous, the truth of the matter is that it is basically one ground of appeal, viz, that the court *a quo* erred in its assessment of the evidence that was presented to it.

It is the appellant's position that the evidence adduced was fraught with numerous contradictions which did not support a verdict of guilty as found by the learned magistrate.

As against sentence the appellant's position is that the sentence induces a sense of shock and that the court *a quo* paid lip service to the mitigating factors submitted on behalf of the appellant.

I propose to deal first with the appeal against conviction.

One of the main criticisms levelled against the complainant's testimony is that her evidence was loaded with contradictions to the extent that it was not worth believing. The complainant was castigated for manufacturing her evidence in court.

In his brief analysis of the evidence that persuaded him to return a verdict of guilty the learned magistrate summed up his analysis as follows:

> "---- The court is of the view that there was no plausible explanation why the complainant would lie against accused. The complainant was attending Avenues

Educational Centre for the 1st time and met accused on the very day the offence occurred.

The court is mindful of the relationship that existed between accused and complainant. The complainant would have had the utmost respect for the accused who was her Headmaster. The court understood when the complainant mentioned she could not do anything at the time and was afraid, as more likely she was in disbelief of what was happening.

The complainant then not only told the first person she was in contact with, in the form of Laura Chimanikire, a fellow classmate and peer, she also told her mother, on that very day the offence occurred.

The accused did not provide the court with any reason why the complainant would fabricate these allegations against him.

The court was also convinced by the evidence led that the complainant was indecently assaulted on the buttocks.

The complainant herself was confident in giving evidence and the court was left in no doubt that this offence took place."[1]

This analysis, weighed against the evidence which was adduced in the lower court is difficult to challenge.

The learned magistrate properly dealt with the issues of the credibility of those who appeared before him which he was entitled to do. Short of abusing its appeal powers the appeal court is most reluctant to challenge the findings on credibility by the lower court unless there are compelling reasons for it to do so. No such reasons have been advanced to persuade this court to depart from this long, tried and tested principle of our law. See the case of *S* v *Katsiru*[2].

The appellant's counsel in the heads of argument sought to exploit the disparity between paragraph 5 of the state outline which speaks to the appellant having indecently assaulted the complainant by touching her breasts as opposed to her buttocks as testified by the complainant in court.

That criticism was most unfair and irrational in my view. I say so basically for three reasons.

Firstly, the criticism failed to appreciate that the charge sheet makes specific reference to the complainant's buttocks.

Secondly and more importantly the criticism failed to appreciate that the complainant

herself is not the author of the state outline which may have distorted her story. The inconsistencies in the state outline cannot possibly be held against her. See *S* v *Chigora*.[1]

Thirdly and equally important is the fact that it was not only the complainant who testified that not her breasts but buttocks were touched by the appellant. The complainant's story got corroboration from Laura and her mother.

It was accepted as a factual finding by the court *a quo* that when the complainant was indecently assaulted the appellant's office door had been closed by the prefect after she had ushered in the complainant into the appellant's office. This was consistent with the evidence of the complainant and there is nothing raised in the arguments before us that persuades us to take a different view.

There can be no doubt in my mind that the analysis of the evidence by the court *a quo* leaves this court with no room to interfere with its factual findings. The reasons advanced to support the conviction are sound and I totally associate myself with same.

The appeal against conviction ought to be dismissed.

In passing I wish to comment the vigilance and the alertness of the complainant in exposing this rot. Equally commendable is the swift reaction by the complainant's mother in doing the correct thing in lodging a report.

As against sentence, the record of proceedings will show that the learned magistrate was alive to both the personal circumstances of the appellant and the aggravating features of the case.

In my view it was ill conceived on the part of the appellant to try and attack the correctness of the sentence imposed against him. The appellant or his handlers ought to have accepted that the court *a quo* was extremely lenient in its sentence for an offence of this nature which is of greater concern to the generality of the citizens of this country.

The appeal against sentence is dismissed as well.

BERE J _____

HUNGWE J agrees _____

Messrs Nyikadzino, Simango, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners