PROSECUTOR GENERAL
versus
ITAI WAFAWAROVA

HIGH COURT OF ZIMBABWE
FOROMA & KWENDA JJ
HARARE, 26 January & 3 July 2023

Criminal Appeal

F.Kachidza, for the appellant
M Mandikumba, for the respondent

FOROMA J : The respondent was arraigned in the Regional Magistrates Court for the Eastern Division sitting at Harare facing 4 counts of contravening s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] each of which counts involved allegations that the respondent had raped his minor biological daughter, herein after called the complainant, over the period between 2017 and December 2019. It was the state's allegation that the first sexual assault took place in 2017 in respondent's motor vehicle at a service station along Samora Machel Avenue in the night when respondent was taking the complainant to her mother who resided at 185 Block 34 Zambezi Flats in Mabereign Harare. The second incident was alleged to have taken place on a date complainant could not remember but at house number 328 Briston Avenue The Grange Harare where the respondent resided with his first wife and their children including the complainant. On this occasion the complainant had allegedly been left alone at the residence when the step mother and her children had gone to church. The respondent on this occasion had allegedly returned to the residence where complainant was alone and ravished her.

The third occasion allegedly took place on the 6th December 2019 when the respondent was allegedly taking complainant to her mother's residence at Zambezi Flats aforesaid. On the way respondent allegedly drove into Hillmorton Road in Mabelreign and raped the complainant before dropping her at her mother's residence. None of the three occasious were reported by complainant to anyone whom complainant would have reasonably been expected to report.

The 4th and last incident of rape allegedly took place in respondent's vehicle on 22 December 2019 along Hillmorton Road Mabelreign when as before respondent was taking the complainant to her mother's residence.

The respondent who was defended by a legal practitioners pleaded not guilty to all the 4 counts of rape and denied any sexual contact with the complainant. In his defence out line respondent alleged that the allegations were a classic case of fabrication by complainant and her mother against the respondent driven by hatred, malice and greediness as there was a raging war between the complainant's mother and her relatives on the one side and the accused on the other. The respondent also indicated in his defence outline that he would challenge DNA results that the State would seek to produce and rely on. It is important by way of background to highlight that respondent was polygamously married to complainant's mother and that by arrangement with complainant's mother respondent got complainant to stay at the respondent's first wife's residence so that she would go to school together with her siblings. This arrangement further provided that respondent would take complainant to her mother during weekends.

At the end of the trial respondent was acquitted of all the 4 counts of rape the court having determined *inter alia* that the complainant 's rape complaint fell foul of the requirements for the admissibility of a rape complaint namely that the complaint must be made or reported at the first opportunity presenting itself after the offence to the first person who complainant could reasonably be expected to make the report to see *S* vs *Banana* 2002 (1) ZLR 607

The court's *a quo* view was that complainant was expected to have made a report to either her mother, or one of her friends or teachers at school as complainant knew after she had been taught at school that any unlawful sexual intercourse (assault) should be reported immediately. The court *a quo* found as a fact that the complainant reported the last incident of rape on 23 December 2019 a day after the alleged incident which report though apparently timeous also fell foul of the other requirements for the admissibility of a rape complaint namely that the report should be made freely and voluntary and not as a result of duress or leading questions.

In his judgement the learned magistrate considered that the report was not made freely and voluntary as complainant instead of divulging to her mother much earlier that she had been raped by respondent, She instead waited until her mother got angry before disclosing that her father had been sexually abusing her. In regard to the other earlier incidences of abuse the court considered that complainant had opportunities to disclose the abuse to her teachers when she allegedly made 2 attempts to commit suicide. Then complainant also had an

opportunity to tell her Arts teacher that the reason she wanted to commit suicide was because she could not stand the endless sexual abuse by her own biological father. The court *a quo* also did not find that handling of the exhibit from which the DNA tests were conducted had been properly done thus could not exclude the risk of the exhibit having been tampered with by the complainant and her mother to respondent's prejudice.

The respondent's acquittal aggrieved the prosecution which sought and obtained leave to appeal against the said acquittal. In its notice of appeal the appellant relied on 4 grounds of appeal which were couched as follows: The Court *a quo* misdirected itself in acquitting the respondent on the basis that the rape report did not meet the requirements of admissibility when the evidence by the state was replete with reasons why contemporaneous report s could not be made after each incident of rape before the last incident was reported.

2. The court *a quo* misdirected itself in acquitting the respondent on the basis that the last report did not meet the requirement of admissibility that it was not voluntarily made, when there was no evidence that undue pressure was put on the complainant when she made the report.

3. The court *a quo* misdirected itself in finding that it was not safe to convict the respondent when evidence adduced by the state was consistent with the allegations hence complainant tried to commit suicide and was at the same point given morning after pills by respondent.

4. The court a quo erred by failing to properly analyse and comment on the evidence led by all the state witnesses and commented only on complainants evidence.

At the hearing of the appeal the appellant's counsel motivated grounds of appeal No 1 and 3 only. Ground number 4 was abandoned with the filing of appellants heads of argument. Appellant attempted to motivate ground number 2 of the grounds of appeal but abandoned it when the following evidence at page 94 of the record was brought to her attention–

Q Yes when you made a report you did not disclose to your mother the detail of the 4 counts of sexual abuse.

A - I did not give her a detail of the counts of each and every one from the 4 counts but …. narrated to her in general what would happen.

Q. You appreciate that she was angry she was fuming at you.

A yes

Q And you felt threatened she was about assault you

A yes

Q Had it not (been) for that short temper which had been exhibited by your mother you were not going to disclose these offences to her

A yes

Q So I will be correct to say that when you gave a complaint to her you were not free you were not in a position to divulge everything. You did not volunteer information

A correct

In her detailed heads of argument the appellant's counsel citing the case of *State* v *Nyirenda* 2003 (2) ZCR 70 H submitted that the legal requirements for a complaint of a sexual abuse to be admitted are – a) the complaint must have been made freely and voluntarily not as a result of questions of a leading, inducing and intimidating nature.

b) it must have been made without undue delay and at the earliest opportunity to the first person to whom the complainant could reasonably be expected to have made it.

c) The complainant must give evidence. These requirements for admissibility of a complaint in sexual offences had earlier on been crystalised in the case of *Banana* v *State* 2002 (1) ZLR 607.

It is significant to note that the appellant's counsel's submissions in support of the admissibility of complainant's complaint in respect of count 4 had not weighed with the court *a quo* as the complainant clearly admitted that although the complaint had been made a day after the alleged assault it had not been made freely and voluntarily.

The appellant's counsel also argued that the reason for not disclosing the complaints in counts 1-3 immediately must be understood in the context of complainant's age and relationship with respondent. Appellant's counsel further argued that appellant was made to watch pornographic videos and that respondent made her to believe that sexual inter course between a father and biological daughter was acceptable in other jurisdictions though not in Zimbabwe. This argument is totally without any basis as the record of trial is replete with evidence that the complainant's alleged discomfort at the abuse was not allayed by the alleged excuses by the respondent as evidenced by the complainant's alleged reports to her 3 school friends and the 2 alleged suicide attempts brought to complainant's Arts teacher) on account of the alleged sexual molestations or abuse by respondent.

The appellant's counsel also argued that the complainant was first raped in 2017 and that even though the complaint of abuse came to light in December 2019 complainant had told her friend Natasha in January 2019 at which occasion the complainant had not gone into details on how the rape had occurred.

This submission overlooks the following evidence led by the state.

(1) that according to Natasha's testimony complainant had earlier on told her other 2 friends namely Munopashe and Miriam.

(2) that Complainant testified that she would have informed her mother of the abuse but feared that her mother would not believe her.

(3) that despite Natasha asking complainant to confide in her details of abuse complaint would not disclose such details.

(4) When Natasha was given the report by complainant of the alleged abuse by respondent complainant did not allege that she had been raped - the record reflects on p 102 the following –" Oprah (complainant) was in distress on that day and I wanted out what was going on with her. She did not openly tell me what was wrong she beat about the bush for quite a while eventually she told me that she was not normal. And I asked her why she thought she was not normal and she said and she said " My father incest with me" I thought I had (heard) wrong and l asked her to repeat what she had said to me and she said it again. I asked her if she had told anyone about it and she said she had told 2 of her friends Munopa and Miriam."

It is significant to note that complainant did not allege rape when she disclosed the alleged sexual abuse to Natasha. Neither did complainant allege rape when she informed her 2 friends Miriam and Munopaishe about the alleged sexual abuse by the respondent. It is clear that the report made to Natasha had earlier been made to Miriam and Munopaishe and that report was incest and not rape. It is also important to note that in its state outline produced in court at respondent's trial there is not an iota of reference to threats allegedly made by respondent to complainant not to disclose the abuse to third parties. When this court has regard to complainant's report to Natasha that respondent was sexually abusing her so frequently (about 4 times every week) and the fact that no complaint of the alleged rape was made for the period 2017 to 2019 despite the readily available opportunities to do so ie to complainant's own mother, school authorities, her own Arts teacher, including her own friends this court cannot fault the court *a quo*, for considering that it was not safe to convict the respondent in those circumstances.

The appellant's counsel sought to argue that complainant believed the respondent's threats which appellant's counsel listed as follows:

(i) that respondent told the complainant not to tell anyone and if she did she would have no proof.

ii) that he was a rich man well connected in social and Governmental Circles nothing would happen to him

iii) that if she told any one respondent and her mother would team up to get her prosecuted for attempted murder and she would be jailed for attempted murder - this in reference to alleged some food poisoning incident when complainant had allegedly poisoned her mother with pesticide.

These alleged threats did not seem to have weighed with complainant if one has regard to the fact that she allegedly told Miriam and Munopaishe and Natatsha yet complainant had no guarantee that the friends would not disclose or let the cat out of the bag so to say.

It is also pertinent to note that in her own evidence during cross examination complainant indicated that she had twice attempted to commit suicide on account of the abuse. No evidence was led as to whether any of these alleged suicide attempts were brought to the complainant's parents either by the school authorities or complainant's school mates or friends.

In the court's view the school authorities would have found a need to go deeper into these alleged suicide attempts by ensuring that the parents not only got to know about them but because the complainant had allegedly lied that the cause thereof was a friend. The appellant did not lead the evidence of the school authorities in order to get to the bottom of the alleged suicide attempts. Although the court *a quo* made reference to the suicide attempts as presenting an opportunity to disclose the alleged abuse no comment was made in the judgement as to whether and why complainant's parents were not informed about this very risky and dangerous behaviour on complainant's part.

During cross- examination by the Defence counsel during trial it was put to complainant that one of her friends Munopaishe who had given a statement to police as a state witness would give evidence that complainant had told her that the abuses used to take place in the hotels which complainant flaty disputed. For reasons not at all clear Munopaishe was not called by the prosecution to testify as alleged. The state case was closed without reconciling the apparent contradiction between complainant's evidence and Munopashe's version that put to complainant as aforesaid had.

Although the appellant's counsel sought to argue that complainant was threatened by respondent not to tell anyone there is no cogent testimony to confirm it. Complainant gave various explanations in her own evidence as to why she did not report the matter to those

she would have reasonably been expected to confide the complaint of the alleged sexual abuse. One of the explanations was the fear of a stigma. She did not tell her mother for fear she would not believe it. A reference to page 34 of the record will show that after the alleged first encounter respondent sought to excuse his alleged conduct on the basis that he had taken some aphrodisiac as he was going to be with complainant's mother. Complainant testified in her evidence that she did not believe the said aphrodisiac excuse even though she assured respondent that she was not going to tell anyone about it. It would then not be surprising that complainant did not disclose respondent's alleged repeated abuse to those she was reasonably expected to report for the entire period until she allegedly disclosed it to her school friends if her evidence is to be believed. In the circumstances it becomes clear that the delay in disclosing the abuse as rape had nothing to do with any alleged threats by respondent.

It is also significant to note that in her evidence in chief the complainant disclosed that what was indicated as the second count was infact not the second occasion of abuse as she was abused several times before that occasion (second count). If the complainant's story be believed and considering that to Mirriam , Munopaishe and Natasha complainant made a complaint of incest and not rape one surely cannot find fault with the court *a quo's* reasoning in acquitting respondent. Besides there is also no real evidence of complainant resisting the abuse by respondent. It would not be far-fetched to opine that that if her story is anything to go by complainant had settled herself to the position of respondent's mistress. Complainant's version becomes difficult to believe especially as her complaint was found not to pass the test of admissibility as per case authorities afore said. Bearing in mind that respondent totally denied any sexual contact with the complainant it would have been a gross miscarriage of justice for the court *a quo* to convict respondent in the circumstances. As submitted by respondent's counsel once the appellant abandoned ground of appeal number 2 the entire appeal remained with no leg to stand on.

In the circumstances we find that the appeal has no merit and it is accordingly dismissed in its entirety.

FOROMA J……

KWENDA J……

National Prosecuting Authority, applicant's legal practitioner
Mundikumba & Partners, respondent's legal practitioner