THE STATE
v
PATSON MUFUNDIRWA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 9 May 2025

Criminal Review

ZISENGWE J: This matter once again rekindles the age -old debate on the extent to which a court may disregard or otherwise depart from the findings of an expert in a criminal trial. The record of proceedings was referred to this court of review accompanied by a note by the regional magistrate who presided over the trial. The first two paragraphs of the minute read:

> "*I am the trial magistrate in this case. I forward this record for review as a result of an administrative instruction on 19 September 2024 for me to do so. The basis of the review as per the administrative instruction is whether a court can overrule a finding by the psychiatric doctor that the complainant in incapable of consenting to sexual intercourse due to mental retardation.*
> *As far as I am concerned, I still stand by the finding which I made in my reasons for judgment overruling the expert's opinion that the complainant could not consent and the basis of my finding is contained in the reasons for judgment."*

The brief background to this matter is that accused was charged with two counts of rape. The allegations were that on two separate occasions in March 2014 he unlawfully had sexual intercourse complaint, Ivy Machokoto, a girl aged 16 years who was said to be mentally incompetent and incapable of consenting to sexual intercourse. The accused and the complainant were in a romantic relationship and the State alleged that the complainant "consented" to the sexual encounters. However, according to the state, the complainant was afflicted by mental incompetence hence the charge. The matter only came to light when the complainant let the cat

out of the bag by divulging her relationship and sexual encounters to her mother who in turn reported to the police.

The accused denied the charge. Although he admitted being in a romantic relationship with the complainant and having been intimate with her on those two occasions, he flatly denied any knowledge of her mental illness.

According to him she acted and behaved normally and even suggested that he should meet her relatives and that they should get married. He claimed to have come to know of her alleged mental illness when he was arrested in connection with the offence and the police informed him of the same.

The psychiatric report produced in support of the mental illness stated the following in relation to the complainant:

> *"Had delayed milestones walking and talking failing to cope with normal schooling, poor adaptive functioning at home. Social age ±13 years, amnesia both long and short term.*
> *As a result of these observations I formed the opinion that she has moderate mental retardation. She cannot follow court proceedings. She does not have capacity to consent [to] sexual intercourse."*

The complainant's biological mother Susan Muzvimwe, who testified as a State witness had this to say about the complainant's mental status - that she is always quiet does not interact with people, that her [mental development] does not correspond with her age (it is below) and that she needs supervision.

She further testified that the complainant's condition is well known throughout the community and that apart from repeating certain primary school grades, she has since dropped out of school because she could not endure the mocking she received from fellow students on account of her mental illness. Critically when asked if someone upon meeting the complainant for the first time would immediately discern her mental illness, she stated that was not so as one needed to observe her closely to be able to do so.

The complainant also gave evidence for the State. From the record of proceedings, she gave what appears to be a coherent account of her association and sexual experiences with the accused. Those were the only witnesses for the State.

For his part, the accused in his evidence apart from reiterating his romantic liaison with the complainant and their subsequent sexual encounters, testified that the complainant had told her that she was 19 years old.

Most importantly, according to him the complainant did not display any traits of mental retardation. He therefore disagreed with the complainant's mother who testified that the general conduct of the complainant was that of a person less than her age.

In his judgment, the regional magistrate did not do much to address the issue of mental retardation. He dwelt on the question of consent and found not only that the compliant consented to the sexual intercourse, but also that she had used guile and subterfuge to get away from her family so that she could meet up with the accused for their sexual trysts.

He was however satisfied that the accused was aware (or at least realised the real possibility) of the complainant being below the age of 18 years. He therefore convicted the accused of contravening section 70 (1) of the Criminal Law and Codification Act, *[Chapter 9:23]* ("the Criminal law code") before proceeding to sentence him to 12 months' imprisonment which was wholly suspended on condition the accused performed community service.

In defending his decision to depart from the doctor's findings to the effect that the complainant suffered from mental retardation. He relied on several cases for the general proposition that the evidence of an expert is not always decisive and that in appropriate cases the court may depart from it. He cited the case of *S* v *Ruvimbo Hope Nyandoro* v *State* HH-08-17 where the following was said:

> *"When a court relies on the evidence of an expert, it must be satisfied that the expert evidence is sound in light of the totality of the evidence before. (See S v Tendai & Anor (Juveniles) 1998 (2) ZLR 423 (HC) at 427 -B – C and Levy v Tune-O-Mizer Centre (Pvt) Ltd 1993 (2) ZLR 378 (SC) at 380 F- 381 E)."*

He further referred to the decision in *S* v *Ndzombane* S-77-14, where it was held as follows:

> "*Expert opinion evidence is admitted to assist the court to reach a just decision by guiding the court and clarifying issues not within the court's general knowledge. In Mandy v Protea Assurance Co. Ltd 1976 (1) SA 565 at p. 569 it was stated that it was not the mere opinion of the expert witness which is decisive but his or her ability to satisfy the court that, because of the special skill, training and experience, the reasons for the opinion expressed are acceptable. However, in the final analysis, the court itself must draw its own conclusions from the expert opinion and must not be overawed by the proffered opinion, and simply adopt it without questioning or testing it against known parameters."*

The court continued as follows:

> *"In S v Zuma 2006 (2) SACR 257 at p. 263 the court held that the expertise of a professional witness should not be elevated to such heights that sight is lost of the court's own capabilities and responsibilities in drawing inferences from the evidence. And, in my view, the court can only do this well if it requires the expert witness to give oral evidence in the clarification and elucidation of an affidavit that is otherwise technically dense and incomprehensible, contradictory or inadequate in all respects except the conclusion. A court errs when it merely adopts the conclusions of an expert report without exercising its mind on it by, for example, calling for oral testimony or drawing the necessary inferences from the evidence."*

Finally, the regional court also referred to a dictum in *AG* v *Roy Leslie Bennet* SC-07-11 where it was stated as follows:

> *"When an expert gives evidence, it is critical that the expert's evidence provides the factual basis of his opinion so that the court can decide whether or not to accept the expert's opinion"*

It was on that basis that the magistrate concluded in its referral minute that the opinion of the expert went against the grain when juxtaposed against the overall evidence adduced during the trial. He stated that he did not allow himself to be unduly overawed by the impressive qualifications of the expert. He therefore rejected the conclusions contained in the report in so far as they relate to the alleged lack of capacity of the complainant to consent to the sexual intercourse.

Regrettably a copy of the "administrative instruction" to the Regional Magistrate for him to submit the record for review was not attached to the record of proceedings. This instruction would have assisted me to ascertain its nature and import. That instruction would have helped to shed light on the reason for the misgivings or reservations with the Regional Court's findings. However, part of the controversy regarding the extent to which a court may depart from the evidence of an expert witness is that whereas generally speaking a court is indeed permitted, for good reason to so depart from that report, there are cases wherein courts, not being experts in the field are cautioned against making such contrary findings particularly in cases involving mental incompetence. Shortly a discussion will be made to both the general position and the special situation relating to mental incapacity to consent to sexual intercourse.

The general position with regards to expert evidence

The general position is that a court can for good reason depart from the evidence of an expert. Some of the factors that may influence the court to overrule or otherwise disregard the evidence of the expert include the following:

- The expert's methodology or conclusions are flawed.
- The expert's testimony is inconsistent with other evidence in the case.
- The court finds the expert's testimony to be unreliable or lacking credibility.

When a court relies on the evidence of an expert, it must be satisfied that the expert evidence is sound in light of the totality of the evidence before it. (See *S* v *Tendai & Anor* (Juveniles) 1998 (2) ZLR 423 (HC) at 427 -B – C & *Levy* v *Tune-O-Mizer Centre (Pvt) Ltd* 1993 (2) ZLR 378 (SC) at 380 F- 381 E).

In *Menday* v *Protea Assurance Co*. Ltd 1976 (1) SA 565 at 569B-C it was stated that "It is not the mere opinion of the expert witness which is decisive but his (or her) ability to satisfy the Court that, because of his (or her) special skill, training and experience, the reasons for the opinion which he (or she) expresses are acceptable."

It is generally accepted that in the final analysis, the court itself must draw its own conclusions from the expert opinion and must not be overawed by the proffered opinion and simply adopt it without questioning or testing it against known parameters. In *S* v *Zuma* 2006 (2) SACR 257, 263 the court held that the expertise of a professional witness should not be elevated to such heights that sight is lost of the court's own capabilities and responsibilities in drawing inferences from the evidence.

Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves: no more, no less. The weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.

Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

A court is therefore not compelled to accept the evidence of an expert but is entitled to accept or reject that evidence like any other, bearing in mind the whole of the evidence in the case. The court had placed the expert testimony in the context of the whole of the evidence and determined what weight could be placed upon it.

Further, a court must not consider expert evidence in a vacuum. It should not therefore be artificially separated from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa.

Expert evidence of psychiatric condition of the alleged victim in sexual offences.

Perhaps the "administrative instruction" to the trial magistrate in this matter may have been occasioned by some decisions which may have been misconstrued to mean that the evidence of an expert on the capacity of complainants in cases of sexual offences are cannot be overruled. In *S v Chimukwanda* 1990 (1) ZLR 172, the court stressed that expert evidence on the mental state of the victim is indispensable. The court had this to say:

> *"In my view matters which touch or relate to a person's state of mind, must as a matter of principle be referred to experts for their opinion. And though ultimately, the determination of the issue is a matter of fact, it is a special kind of fact. It would be unwise of lay people to venture into the unknown purely of the basis of appearance. As GUBBAY JA put it in* ***S v Mbizi*** *S184-89at p4.:*
> *"It is inadvisable to pronounce on what depth of mental retardation is necessary before a person can be described as being an idiot or imbecile"*

In *The State* v *Innocent Mamvura* HH-616-21, the judge on review declined to certify the proceedings as being in accordance with real and substantial justice on the basis, *inter alia* that oral evidence by the expert who examined the complainant had not been called to give oral evidence. The Court said:

> *"It is trite that the Court is not an expert and must rely on expert evidence in matters of this nature – see State v Chimukwanda 1990 (1) ZLR 172 (HC); State v Nyathi 1982(2) ZLR Mbizi v The State SC184-89 and State v Matekuzimura 1995 (2) ZLR 250. I am cognizant of the fact that in terms of s278 (2)(a) of the Criminal Procedure and Evidence Act, an affidavit by a medical practitioner in relation to a medical examination or treatment, is prima facie proof of the facts and opinion so stated. In my view, the medical practitioner should have been called to testify so that the contents of the report would be put to scrutiny see s 278(12). This is especially in view of the seemingly contradictory observations and opinion."*

In *S v Machona* 2015 (1) ZLR 665, the court grappled with the very question of the incapacity of a complainant to consent to sexual intercourse and concluded that the function of an expert is to assist the court to reach a conclusion on a matter on which the court itself does not have the necessary knowledge to decide. The court further remarked that it is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable.

Therefore, the question is not whether a court can overrule the decision of an expert *per se*, because it can. The question is whether in the particular set of circumstances, the court was correct and justified in overruling such an expert report.

I am inclined agree with the learned trial court Magistrate. Ultimately the decision whether or not the mental retardation is of such a degree to vitiate proper consent is a judicial one. While giving due deference to expertise in this regard, the court retains the ultimate decision. The state should have considered calling the expert who performed the examination and filed the repot to give oral evidence and shed more light on the complainants' mental state *vis-à-vis* the accused's defence. In light of the complainant's mother's evidence that to someone unfamiliar with the complainant would not have been unable to discern her mental condition coupled with the accused's unchallenged evidence that the complainant did not display any tell-tale signs of mental retardation evidence of the Regional court was in my view justified in rejecting the expert's overall conclusion that the complainant was incapable of giving valid consent.

In addition, the observations made on the psychiatric report hardly justify the conclusion reached. It is not clear how observations that the complainant had… "delayed milestones walking and talking failing to cope with normal schooling, poor adaptive functioning at home. Social age ±13 years, amnesia both long and short term" justified the conclusion that she lacked capacity to consent. Similar remarks were made in in the *Machona* case (*supra*) where it was stated that:

> "*Evaluation of the complainant's ability to consent should focus on the event in question, and include information on the individual's understanding of sexual behaviour and the context of normal sexual relationships; knowledge of the consequences of sexual intercourse, for example, pregnancy and infections; ability to make an informed decision to engage in sexual intercourse…"*

The report fell woefully short of what was expected of it. Delayed milestones in walking, talking etc do not necessarily imply lack of capacity to consent to sexual intercourse. In *S* v *Mbizi* 1989 (3) ZLR 317 (SC) the court held that not all mentally retarded persons are deemed to be incapable of consenting to sexual intercourse or other sexual activity. Although these sentiments were expressed in the context of the Criminal Law Amendment Act where the terms "idiot" and "imbecile' were employed they nonetheless find relevance in the present matter. The medical report in that case described the complainant, a girl of sixteen and half years, as being "mentally retarded, with the intelligence of an eight-year-old child." The trial court observed that she was "feeble-minded". The issue before the appeal court was whether the State had proved that the degree of the complainant's mental deficiency was such as to place her in the category of an "idiot" or "imbecile" as contemplated in the CLAA. Ultimately the appeal court in overturning the conviction stated that whether the state of mental defectiveness has been reached in a particular case is a question of fact, to be determined after reception of expert medical testimony and that proof of mental sub-normality and feeble-mindedness does not per se prove idiocy or imbecility.

Similarly, In *S* v *Nyathi* 1982 (2) ZLR 197 (H) the following was said in relation to the complainant:

> *"… all that can be said of the complainant is that she was mentally retarded or feeble-minded. To what extent is doubtful. She was certainly competent to give evidence. There is the further factor that the complainant was no stranger to sexual intercourse. The indications were that she was very sexually aware indeed. This in turn suggests that she appreciated what the accused proposed to do and consented to it"*

Rebuttal of presumption of complainant's incapacity to consent to sexual intercourse

The learned author Milton JRL in "South African Criminal law and procedure at page 453 posits in this regard as follows:

> "It should be borne in mind that even if the woman lacks the capacity for a valid consent, if X did not foresee the possibility not only that she was not mentally normal but that she was so mentally abnormal as to be incapable of consenting he would lack the necessary *mens rea* for the crime, *R* v *K* 1951(4) SA 49 (O) at 54-5, *R* v *K* 1958 (3) 420 (A) at 421, 423, 426; *S* v *J* 1989 (1) SA 525 (A*)*
>
> See also s 64 (3) of the Criminal Law Code.

Ultimately, therefore, not only did was the psychiatric report flawed in a fundamental respect (i.e., its failure to justify its conclusions from the observations made) but also that it was

inconsonant with the overall evidence led. Further, the accused was able to rebut the prima facie conclusions made by the expert of incapacity to consent. Accordingly, therefore, there is no justification in my view to interfering with the Regional Magistrates findings and I do hereby confirm the proceedings as being in accordance with real and substantial justice.

ZISENGWE J