REPORTABLE (38)

DAVID GARDNER
v
THE STATE

SUPREME COURT OF ZIMBABWE
UCHENA JA, KUDYA JA & CHATUKUTA JA
HARARE, 7 NOVEMBER 2024

N. Ndlovu and *B. Masanzu*, for the appellant

T. Kangai, for the respondent

CHATUKUTA JA:

1. This was a criminal appeal against part of the judgment of the High Court of Zimbabwe (the court *a quo'*) handed down on 31 January 2022 wherein the court dismissed the appellant's appeal against conviction on three separate counts of sexually related crimes against minors in terms of s 3(1)(b) of the Sexual Offenses Act [*Chapter 9:21*] (the Act).

2. The Court dismissed the appeal with reasons for the decision to follow in due course. These are they.

THE FACTS

3. The appellant appeared before the Regional Magistrates' Court on 6 June 2008 facing two counts of contravening s 3(1)(b) of the Sexual Offenses Act [*Chapter 9:21*] and two counts of contravening s 71 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). He pleaded not guilty to all four counts. He was however convicted at the conclusion of the trial of two counts of contravening s 3(1)(b) of the Act and one count of contravening s 71 (1) (a) of the Code. For each count, he was sentenced

to 8 months imprisonment totalling 24 months of which 12 months were suspended on conditions of future good behaviour.

4. The charges on which the appellant was convicted were that:

   (a) sometime in 2002 at 146 Enterprise Road, Highlands, Harare the appellant committed an immoral or indecent act upon a young person when he fondled R's genitals, a 14-year-old boy.

   (b) sometime in November 2005 and at Afdis Camp, Nyanga, the appellant committed an immoral or indecent act upon a young person by putting his hand inside the shorts and on or about the T's groin area.

   (c) sometime in August 2006 and in Lausanne, Switzerland the appellant committed an indecent act upon a young person when he put his hand inside J's jeans trying to find his boxer shorts flyer and did thereby put his hand on or about J's groin area.

5. The complainants were three boys. R and T were 14 years olds while (J) was 15 years old at the time of the commission of the offences. They were all enrolled at St Johns College in Harare. They were triathletes. The appellant was the Zimbabwe Triathlon Association Head Coach and was employed by St Johns School as the head of the sports department. He coached the complainants in triathletes.

6. The appellant entered pleas of not guilty to all the charges. His main defence was that the allegations were fabricated at the instance of the school committee. The allegations were intended to bolster disciplinary action by the school against him and counteract a labour case he had brought against the school before the Labour Court.

7. The respondent adduced evidence from a total of twelve witnesses. The list included the complainants, some of their parents and coaches.

8. R testified that the appellant had invited him to spend the night at his residence, 146 Enterprise Road, Highlands in Harare, where they slept in the same room but on different

mattresses. In the early hours of the morning, he awoke to find the appellant stretching over him with his hand in his boxers caressing his genitals. Disturbed by the incident, he went to sleep in the lounge away from the appellant. When he woke up, he feigned illness. The appellant drove him home where he confided in his mother, stating that the appellant had done "something gay" to him.

9. Later that day, the appellant returned to R's home under the pretext that he wanted to print a training program. He offered repeated apologies to R for his inappropriate behaviour, which were overheard by R's mother.

10. The trial court found the testimony of the State witnesses to be credible, observing its candour and lack of embellishment.

11. In respect of the second count, T testified that in February 2006, he and other triathletes attended a training camp in Nyanga under the supervision of the appellant. During the night, he awoke to find the appellant fondling his groin. Upon being detected, the appellant fled the room, leaving behind a bottle of baby oil. The following morning, when confronted, the appellant claimed that he had been searching for his dog. T subsequently reported the incident to the assistant coach Rory who in turn informed T's father, T also told his teammates of the incident. He did not however tell his parents as he was afraid that he would be barred from further training.

12. The court found that the appellant had not brought any dog on the camping trip and that his purported excuse merely underscored the inexplicable nature of his presence in T's room at an unusual hour. It also found T to be a compelling and credible witness, whose testimony was marked by honesty and restraint. He did not embellish the events and was forthright even in recounting that his father, in a moment of anger, had struck the appellant.

13. T's father testified that he arranged as a birthday present to T for him to attend a World Triathlon Championship in Switzerland. T refused to attend the Championship unless one of the parents accompanied him. He later heard of the abuse on his son in Nyanga from the assistant coach, Rory Mackie. He reported the matter to Borrowdale Police. He corroborated T's evidence that, enraged by the incident, he slapped the appellant.

14. In relation to the third count, J testified that he attended the World Triathlon Championship in Switzerland which T declined to attend. In fact, T's parents sponsored his attendance. He testified that he slept in the same room as the appellant. He was awakened at around 3 am with the appellant stroking his groin. Later that day, he reported the incident to R and then to his father. The trial court regarded J as a credible and persuasive witness, noting the absence of any motive to falsely implicate the appellant.

15. His account was corroborated by his father. The father testified that when the appellant resigned his position at the school, he offered an apology to J in his resignation letter to the school's Board of Governors, justifying the incident as a misguided practical joke.

16. It found the appellant's explanation that the incident amounted to a mere practical joke, to be both implausible and deeply troubling, particularly because his hand was inside the minor's boxers at approximately 3 am.

17. The trial court found all the State witnesses to be credible and that their evidence was not materially challenged by the appellant. It found the appellant's evidence to be highly improbable and unbelievable. It accordingly found the appellant guilty of the three counts and acquitted him on the fourth count. It sentenced him to an effective 12 months' term of imprisonment.

18. Irked by the decision of the trial court, the appellant lodged an appeal before the court *a quo* against both conviction and sentence.

PROCEEDINGS BEFORE THE COURT *A QUO*

19. The appellant contended that the trial court erroneously found the State witnesses credible. He argued that the complainants' evidence was not consistent. He also argued that the complainants were used in a conspiracy which included their parents and St Johns College and its community, all of whom were purportedly working together to bring about his downfall. He argued that the sentence was severe and induced a sense of shock having regard to the sentencing trends.

20. The respondent asserted that the trial court had meticulously evaluated the credibility of the State's witnesses and had arrived at a reasoned and judicious conclusion in accepting their evidence. It submitted that the State witnesses corroborated each other.

21. It further argued that there was nothing to support the appellant's allegations of a conspiracy to undermine him. It contended that the similar fact evidence in all the cases was striking. The respondent further contended that the trial court was correct in holding that the appellant's evidence was highly improbable and unbelievable. It argued that the conviction was sound.

22. On sentence, the respondent argued that the trial court properly exercised its sentencing discretion and imposed an appropriate sentence.

DECISION OF THE COURT *A QUO*

23. The court *a quo* held that the trial court's finding that the complainants were credible witnesses was beyond reproach. It found no fault with the lower court's assessment and

noted that sound and compelling reasons had been advanced in support of its reliance on their testimony.

24. In particular, the court placed weight on the fact that the incidents occurred at different times, different locations and in circumstances that strongly undermined any suggestion of a coordinated fabrication. It further observed that the complainants' parents had, for an extended period, refrained from filing a police report, conduct that is manifestly inconsistent with the existence of a conspiracy. The court *a quo* upheld both the reasoning and the conclusions of the trial court.

25. The court *a quo* was however of the view that there was an inordinate delay of thirteen years before the hearing the appeal. Notwithstanding that, the appellant had been on bail during that period, it reasoned that it would amount to a miscarriage of justice returning him to serve his sentence. It accordingly suspended the remaining term of imprisonment of 12 months on condition the appellant performed community service.

26. Aggrieved by the decision of the court *a quo* on conviction, the appellant noted the present appeal on the following grounds of appeal.

GROUNDS OF APPEAL

1. The court *a quo* misdirected itself in accepting the reasoning and findings of the trial court without first evaluating the evidence for itself.
2. The court *a quo* erred in finding that the trial court had exercised the required degree of caution in considering the evidence of the schoolboy complainants.
3. The court *a quo* erred in approaching the case from a viewpoint that the appellant was required to prove his innocence at trial.

4. The court *a quo* in failing to take cognizance of the fact that the trial court had ignored the inconsistencies, improbabilities and irregularities in the State case.
5. The court *a quo* erred in accepting the finding of the trial court that there was evidence corroborating that of the complainant Gibbon.
6. The court *a quo* erred in failing to take cognizance of the fact that the trial court had ignored the glaring inconsistencies between statements made by the complainants Mackie and Meyer prior to trial and their evidence in court.
7. The court *a quo* misdirected itself in speculating that the trial court had considered the evidence of a defence witness, Mrs Van Wyk, which exonerated the appellant on the first count, when the record shows that the court had not done so.
8. The court *a quo* misdirected itself in finding admissible references to the judgment of the Labour Court No. LC/C/246/2007 which was based on facts that gave credence to the defence case.
9. The court *a quo* misdirected itself in finding that the trial court was correct in rejecting the appellant's defence of conspiracy when neither it nor the trial court considered the evidence on which the appellant relied in support of that defence and, accordingly, erred in failing to find that it was reasonably possibly true."

PROCEEDINGS BEFORE THIS COURT

Application to amend the grounds of appeal

27. At the commencement of the hearing, Mr *Ndlovu*, for the appellant, applied for an amendment to the grounds of appeal and the introduction of grounds of appeal that raised constitutional issues which had not been raised before the trial court. In particular, he submitted that the appellant's right to a trial enshrined in s 69 of the Constitution was violated in the trial court. He submitted that the State had allowed the complainants to

refresh their memories whilst in the same room. It was further submitted that Mr Drury, a legal practitioner for St Johns School, was allowed by the State to amend one of the complainant's statement whilst in the Prosecutor's office. It was argued that the Prosecutor's conduct raised questions of his partiality.

28. Upon engagement with the court, Mr *Ndlovu* conceded that a constitutional issue may not ordinarily be raised for the first time on appeal. However, he argued that the application ought to be granted, in light of para 3 of the order of the Constitutional Court in case No. CCZ 13/24. The order reads:

> "1. The matter be struck off the roll with no order as to costs.
>
> 2. Acting in terms of the power of review conferred by s 19 of the Constitutional Court Act, the judgment of the court *a quo* be and is hereby set aside.
>
> 3. **The matter is remitted to the court *a quo* for the matter to be determined *de novo* having regard, in particular, to the requirements of s 175(4) of the Constitution**." (Own emphasis)

29. Mr Ndlovu argued that the Constitutional Court had, in effect, directed this Court to determine the constitutional issue.

30. The State opposed the application for amendment of the appellant's grounds of appeal. Mr *Kangai*, for the respondent, submitted that an appeal is confined to the four corners of the record of appeal. Since the constitutional issue had not been raised in the lower courts, the applicant could not raise it for the first time in this Court.

31. The appellant seeks to introduce a ground of appeal which raises a new issue that was never pleaded or canvassed before the court *a quo*. It is trite that a question of law can be raised for the first time on appeal if its consideration does not involve unfairness on the party against whom it is directed. Secondly, the issue must have been raised in proceedings in the lower court (s).

See AC Cilliers, C Loots and HC Nel in Herbestein and Van Winsen, *The Civil Practice of the High Courts*, (5th ed Juta & Co Ltd, Cape Town, 2009), at pp 1246,

32. It is improper for a constitutional issue to emerge for the first time at the appellate stage. The issue must have been properly raised before the court of first instance. To raise such an issue for the first time on appeal would be to usurp the powers of the lower courts. MALABA DCJ (as he then was) held in *The Cold Chain (Pvt) Ltd t/a Sea Harvest* v *Makoni* CCZ 08/17 at p. 5 that:

> "The principles to be applied in the determination of the question whether the Supreme Court determined a constitutional matter are clear. It is not one of those principles that the court against whose judgment leave to appeal is sought should have referred to a provision of the Constitution. **There ought to have been a need for the subordinate court to interpret, protect or enforce the Constitution in the resolution of the issue or issues raised by the parties. The constitutional question must have been properly raised in the court below. Thus, the issue must be presented before the court of first instance and raised again at or at least be passed upon by the Supreme Court, if one was taken.**" (Own emphasis)

33. The argument by the appellant that para 3 of the order in CCZ 13/24 is a mandatory directive to apply s 175(4) is without merit. The import of the appellant's argument is that this Court need not hear the appeal *de novo* but must determine whether s 175 (4) of the Constitution is applicable.

34. Having set aside the judgment of this Court in SC 110/22, the Constitutional Court remitted the matter to this Court for a hearing *de novo*, that is, to consider the matter afresh. A hearing *de novo*" entails full reconsideration of the case, affording the parties a full and unfettered opportunity to reargue their case, unburdened by the findings or conclusions reached in the original hearing. It is a fresh adjudication that must unfold according to the grounds of appeal filed by the appellant and submissions by the parties. KORSAH JA in

Muchakata v *Netherburn Mine* 1996 (1) ZLR 153 (S) affirmed the remarks observed by *L. Baxter and C. Hoexter* in Administrative Law at pp 589-590 that:

> "It is important to draw a distinction between the type of appellate proceedings which allows for a complete rehearing de novo, totally superseding the original decisional process and appellate proceedings which are self-contained and not a replacement of the original proceedings. In the case of the former, it is possible for the appellate tribunal, by observing the precepts of natural justice, to gather completely fresh evidence in a fair manner and to weigh it objectively and impartially. To this extent the injustice of the first hearing can be remedied. In the latter type of appeal it might not be possible for the 'taint' of the first hearing to be eliminated by the second. The appellate tribunal might have no power to consider the alleged illegality of the first decision. It might be confined to a record which is already distorted by the failure to comply with natural justice."

35. The Constitutional Court's specific reference to s 175(4) does not suggest a predetermined outcome or a directive to implement that section *ab initio*. Rather, it serves as a constitutional cue that should this Court, during its reconsideration of the matter, arrive at a point where it is called upon to pronounce on a constitutional question, it must then act in conformity with s 175(4) of the Constitution.

36. Furthermore, even if a constitutional issue arose during the initial hearing, the *de novo* hearing must not be short circuited on the assumption that the same result reached in the original hearing is inevitable. It must take its natural procedural course, informed by fresh argument placed before it. Only if this fresh process once again leads the court to a point where a constitutional issue comes into play, is s 175(4) applicable.

37. This Court therefore retains its powers and discretion to consider the appeal, any application and any issue placed before it by the parties and in so doing must keep at the back of its mind s 175(4) of the Constitution. It can only relate to the provisions of s 175 (4) of the Constitution if, in the exercise of its discretion, it considers it necessary to do so.

The court, having determined that the appellant's application to amend his grounds of appeal lack merit, considers it not necessary to relate to s 175 (4) of the Constitution.

38. It is for the above reasons the application by the applicant to amend his grounds of appeal was dismissed.

APPELLANT'S SUBMISSIONS ON THE MERITS OF THE APPEAL

39. On the merits, Mr *Ndlovu* elected to abide by the appellant's heads of argument. The essence of the appellant's submissions in the heads of argument is that the evidence of the State witnesses and in particular the complainants were not reliable for various reasons. It was submitted that the evidence of the witnesses was tainted by the involvement of Mr Drury when the witnesses were refreshing their memories. It was further submitted that the charges were orchestrated by the school board as a basis for disciplining him and to avoid a matter he had taken to the Labour Court against the school. The court *a quo* therefore misdirected itself by upholding the findings of the trial court on that inconsistent evidence.

40. However, Mr *Ndlovu*, submitted before the court that the record of proceedings before the trial court revealed a constitutional irregularity impacting on the appellant's right to a fair trial. Should the court find no merit in the grounds of appeal advanced, it ought to invoke its review powers in terms of s 25 of the Supreme Court Act [*Chapter 7:13*] (the Supreme Court Act) and remit the matter to the trial court for a hearing *de novo*.

RESPONDENT'S SUBMISSIONS

41. Mr *Kangai* also chose to abide by the respondent's heads of argument filed on record. The respondent submitted in the heads that the trial court's findings of fact were apt and the court *a quo* did not misdirect itself in upholding those findings.

42. Counsel opposed the appellant's request for the court to invoke its powers in terms of s 25 as that is tantamount to going back to the issue that the appellant was attempting to raise as a constitutional issue for the first time on appeal which was never raised before in the lower courts.

ISSUES FOR DETERMINATION

43. There are two issues for determination, that is:

    (a) Whether or not the court *a quo* erred in upholding the appellant's conviction.

    (b) Whether or not the Court should exercise its review powers in terms of s 25 of the Supreme Court Act.

ANAYLSIS

Whether or not the court *a quo* erred in upholding the appellant's conviction

44. The appellant's grounds of appeal are directed principally at the court *a quo's* decision to uphold his conviction, notwithstanding its apparent failure to engage meaningfully with the evidence and defence he presented. At the heart of his challenge lies the contention that the testimonies of the complainants, whom he refers to as mere "school boys", were marred by material inconsistencies, as are the accounts of Mackie and Meyer. He further asserts that the complaints were not independently conceived but were rather the product of external influence.

45. An appellate court is bound by the record of proceedings before the trial court. It is not at liberty to entertain new evidence or reassess matters not ventilated by the trial court. Its mandate is confined to evaluating whether the trial court erred in fact or law based solely on the evidentiary and procedural record placed before it.

46. An extensive body of judicial authorities has consistently affirmed that matters of credibility of witnesses lies within the trial court's discretion and appellate courts are disinclined to interfere with such discretion unless the circumstances warrant intervention. In *Christian Community Life Assurance (Pvt) Ltd & Ors* v *Prosecutor General & Anor* SC 9/25 at p 24 BHUNU JA held:

> "Ordinarily, a court of appeal does not lightly upset the assessment of the trial court on matters of credibility of witnesses and factual findings. This is because the trial judicial officer is best suited to determine matters of credibility and demeanor as they will have seen and heard the witness live in court. Where however, the trial court's assessment is grossly irrational in its defiance of logic, a higher court must not hesitate to intervene and put matters right in the interest of justice."

47. This Court in *Mushanawani* v *The State* SC 108/22 at p 22 this Court pronounced the following:

> "It is vital to point out that an appellate court is slow to interfere with the findings of credibility of the witnesses by a lower tribunal. This principle was well captured in the case of *Gumbura* v *The State* SC 78/14 at p 7 where the court remarked as follows:
>
> 'As regards the credibility of witnesses, the general rule is that an appellate court should ordinarily be loath to disturb findings which depend on credibility. However, as was observed in *Santam BPK* v *Biddulph* (2004) 2 All SA 23 (SCA), a court of appeal will interfere where such findings are plainly wrong. Thus, the advantages which a trial court enjoys should not be overemphasised. Moreover, findings of credibility must be considered in the light of proven facts and probabilities."

48. It was also aptly held in *S* v *Mlambo* 1994 (2) ZLR 410 (S) at 413 C that:

> "The assessment of the credibility of a witness is *par excellence* the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense. A careful reading of Ndlovu's evidence, to which no accompanying adverse demeanour finding was made, does not persuade me that the Magistrate's assessment was erroneous."

49. It is therefore trite that the trial court, having had the advantage of observing the demeanour and conduct of witnesses' first-hand, is best placed to make findings on factual disputes and credibility. Such findings are accorded significant respect on appeal, and *in casu*, both

the court *a quo* and this Court are constrained from freely interfering therewith unless the trial court's decision was grossly irrational in its defiance of logic.

50. In respect of count one, the trial court correctly found R's testimony to be both credible and probable. His description of the premises as unfurnished, save for a single mattress on the floor where he and the appellant slept was unshaken in cross examination. This account found corroboration in the evidence of a defence witness, and the appellant himself. Theresa Van Wyk testified that she vacated 146 Enterprise Road, Highlands before the appellant moved in, thereby confirming that the house stood almost empty during the relevant period. The appellant's own admission that he moved into 146 Enterprise Road in January 2003, immediately after the departure of his landlord in December 2002, further undermined his defence. This admission is directly consistent with Van Wyk's account and serves to corroborate R's description of the premises during the relevant period, thereby reinforcing the overall cogency of the prosecution's case.

51. In the seventh ground of appeal, the appellant argued that the court *a quo* misdirected itself by asserting that the trial court had relied on the evidence of Theresa Van Wyk, despite the fact that no express reference to her testimony appears in the trial court's judgment. The respondent, however, correctly submitted that while Van Wyk's evidence may not have been expressly cited, the court *a quo* was entitled to assess the full record in determining whether the trial court's factual findings were supported by the broader evidentiary matrix. In doing so, the court *a quo* engaged in a detailed analysis of Van Wyk's testimony, concluding that her evidence, far from exonerating the appellant, in fact reinforced the reliability of R's version. This approach is both legally permissible and aligned with the broader interests of justice.

52. The fact that R incorrectly stated that the incident occurred in 2002 as opposed to early 2003 is inconsequential. See Zulu v S SC 228/97 at 10-11. In *S* v *Nduna & Anor* HB 48/03, the court held that discrepancies must be of such magnitude and value that it goes to the root of the matter to such an extent that their presence would no doubt give a different complexion of the matter altogether. In *S* v *Oosthuizen* 1982 (3) SA 571 (T) the court held that:

> "Contradictions *per se* do not lead to rejection of a witness' evidence. Not every error made by a witness affects his credibility, in each case the trier of facts has to take into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence."

53. All three complainants testified that they were still very young at the time of commission of the offence and were afraid to report the abuse. They had developed a special relationship with the appellant. T testified that he was in fact afraid that if he disclosed the abuse, he would be barred by his parents from further training with the appellant. The explanations by the complainants for the delay was therefore plausible given their tender age and special relationship with the appellant.

54. With respect to the second count, the appellant's defence, that he was in T's room at 3 am searching for his dog, is, with respect, wholly implausible. It is common cause that he did not bring a dog to the camp, rendering the explanation not only improbable but patently false. Such a claim severely undermined his credibility and cast serious doubt on the veracity of his broader defence. It in fact strengthened the inference that his presence in T's room was neither innocent nor accidental. It is no wonder therefore that both the trial court and the court *a quo* found the appellant's explanation for being in the complainant's room at such an unusual hour to be a desperate attempt to deflect culpability.

55. While the appellant makes a concerted effort to discredit the testimonies of the State's witnesses, he remains conspicuously silent on his letter of resignation, in which he acknowledges the inappropriate conduct he engaged in with J. In his letter of resignation from St John's College, the appellant apologised for what he described as a "practical joke" involving one of the complainants during the Switzerland tour, wherein he wrote "three laps to go" on J's thigh while the boy was asleep at night.

56. By acknowledging the incident and attempting to characterise it as a "practical joke," the appellant not only confirmed his presence and actions during the alleged event, but also implicitly conceded that the conduct occurred as described by the complainant. Such a statement, emanating directly from the horse's mouth, so to speak, corroborated the complainant's version, undermining any suggestion of fabrication, and significantly weakening the appellant's defence.

57. The argument by the appellant that there was a conspiracy to falsely implicate him lacks merit. The allegations against him, which were similar, emanated from three different complainants, occurred at three different places and at different times. The appellant admitted to the "practical joke" on J. He apologized to R for his behavior at 146 Enterprise Road. His defence of conspiracy was therefore far-fetched in the circumstances.

58. The findings of the trial court were therefore consistent with the evidence placed before it. The court *a quo* was therefore correct in finding that the findings of the trial court did not defy logic or common sense. The court *a quo* was therefore constrained, and so is this Court, to interfere with the findings of the trial court. This Court therefore finds no basis for interfering with the judgment of the court *a quo*.

Whether or not the court should exercise its review powers in terms of s 25 of the Supreme Court Act

59. With regards the invitation by the appellant to invoke its review powers under s 25 of the Supreme Court Act, this is a power that the Court exercises *meru motu* and not on invitation by a party. In any event, the issue that the appellant raised as a basis for the Court to exercise its review powers is the very issue that he sought to raise through his fateful application to amend his grounds of appeal. As correctly submitted by the respondent, any engagement in the issue would amount to this Court reversing its own decision to dismiss the application. This is clearly untenable.

DISPOSITION

60. It is for the above reasons that the court found that the appeal lacked merit and accordingly dismissed it.

UCHENA JA : I agree

KUDYA JA : I agree

Masamvu & Da Silva-Gustavo Law Chambers, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners