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WITCLIFF MUGANHU
V
THE STATE

SUPREME COURT OF ZIMBBWE
GWAUNZA DCJ, GUVAVA JA & BHUNU JA
HARARE: 30 SEPTEMBER 2019 & 16 SEPTEMBER 2021

A. Dururu, for the appellant.

R. Chikosha, for the respondent.

BHUNU JA: The appellant was convicted by the Harare Regional Magistrates Court of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 18 years' imprisonment of which 6 years were suspended for a period of 5 years on appropriate conditions of good behaviour.

Aggrieved by both conviction and sentence, he appealed to the High Court (the court *a quo*) against both conviction and sentence without success. He now appeals against the whole judgment of the court *a quo* to this Court for relief.

FACTUAL BACKGROUND

The appellant was employed as a high school teacher together with the complainant's mother. He doubled up as a trainee priest. The complainant was a toddler aged 3 years at the material time. She resided with her parents at the same school. Her parents shared

the same house at the school with the appellant. He is alleged to have raped the complainant on the afternoon of 10 July 2012. He pleaded not guilty to the charge and the matter proceeded to trial on the merits.

The state alleged that on 10 July 2012 the appellant was sitting with the complainant in his motor vehicle. He later took her to his bedroom. Once in the room he closed the door, laid her on the bed, removed her underwear and then raped her. When she wanted to cry due to pain the appellant threatened to beat her. After he had finished his purpose he threatened to assault her if she reported the rape to anyone. Shortly thereafter around 16:30 hours her mother noticed that she had difficulties in sitting. Upon being questioned the complainant told her mother what the appellant had done to her.

A report was made to the police and the complainant was referred to Harare Hospital for a medical examination. Doctor Gwiza who examined her observed that there was a laceration on her right labia minora and bruising on her vestibule. As a result of such observation he concluded that penetration had definitely been effected.

The appellant denied the charge. His defence was premised on alleged insufficient and discredited evidence led by the State in the Magistrates Court. To that end, he attacked the credibility of evidence led against him on the basis of animosity between him and the complainant's mother. He further submitted that the medical evidence relied upon by the State was inconclusive to sustain the verdict of rape.

THE EVIDENCE

The complainant testified on her own behalf. Her evidence was to the effect that she knew the appellant as her brother and friend. On the day in question she was playing with the appellant in his bedroom. As they were playing they both lay on the bed. By use of dolls and a sofa she demonstrated how they lay on the bed with the appellant lying on top of her. The appellant hurt her by touching her vagina which she called, *"Chimbumu*". She cried with pain and later made a report to her parents.

The complainant's mother testified and confirmed before the trial magistrate that the complainant was acquainted to the appellant and she used to call him her brother. It was her testimony that when she got home from work around 16:00 hours, the complainant was in the appellant's room with the door closed. Shortly after her arrival from work the complainant came out of the appellant's bedroom. She came to her as she was opening her bedroom door. The accused was standing in the passage. She observed that the complainant appeared distraught and unhappy. The appellant shouted at the complainant inviting her to accompany him to the shops in his motor vehicle but she was reluctant to accompany him. Her reluctance puzzled her because the complainant used to frequently accompany the appellant in his motor vehicle to the shops. She observed that the complainant was distressed. She was however persuaded to accompany the appellant to the shops in the company of her young brother.

The appellant returned a short while later with both children and he left them with her. As the complainant was playing with her young brother, the complainant complained of feeling pain in her private parts and she asked to be bathed. The complainant's mother then took her to the bathroom and placed a bucket under her legs intending to bath her private parts. In her own words this is what she had to say:

"I took a bucket wanting to bath her private parts and placed the bucket in between her legs. I noticed a whitish colour on the right thigh. I don't know what had caused that. When I wanted to bath her she said that I should not touch her since her private parts were painful. She started crying. I then persuaded her and said I would take a wet towel and wipe her in the bedroom. When we were in the bedroom and when I tried to remove her trousers she did not want me to touch her private parts or even wipe with the towel. I asked her why she was refusing to be touched. I asked her what the problem was and she told me that she had been hit by a stone. I asked her how a stone could hit her while she put on a pair of trousers. It was then that she told me that it was the brother who had hurt her by putting his big fingers on the private parts. I then left her and put on her trousers."

It was her evidence that the complainant told her that the appellant threatened to assault her if she reported what he had done to her to anyone. The complainant was then immediately taken to hospital for medical examination.

Dr Gwiza who examined the complainant testified that when he examined the complainant he observed that she had sustained a laceration on her right *labia minora* and redness on her vestibule. It was his testimony that the nature of the injury sustained was consistent with penetration with a male organ and inconsistent with a fall or being hit by a stone. He explained that while a straddle fall can cause a laceration on the *labia minora* if one falls with her legs apart, the redness on the vestibule is inconsistent with such a fall. On the basis of such observation he concluded that penetration had definitely been effected.

The doctor also testified that when he questioned the complainant, she told him that a man had removed her pants and hurt her genitalia with his hand.

In his defence outline which he adopted as his evidence in chief the appellant's evidence to some extent converges with that of the State witnesses. He confirmed that for the better part of the day he was playing with the complainant and her baby brother in his motor

vehicle. They later relocated to his bedroom. They continued to play in the room sometimes lying on the bed together. At one time he swung the complainant as she sat on his lap on the bed. Eventually the baby brother fell asleep.

It was his testimony that while the baby was asleep the complainant started pulling his legs. He cautioned her to stop pulling the baby's legs. She complied but a short while later she started jumping on the bed disturbing him and the baby. He became angry and feigned a blow. In trying to evade the blow she slipped and fell from the bed. She wanted to cry because of the pain. When he asked her where she had been hurt, she pointed at her vagina. He then called out to the maid asking her to come and collect the children as the baby wanted to sleep. He disputed that while this was happening the door was closed.

In his bid to extricate himself from the damning evidence against him, the appellant argued that there was animosity between him and the complainant's mother because he possessed better qualifications than anyone else at the school. This was refuted by the complainant's mother.

He called one Rumbidzai Gamanya to buttress his evidence of the alleged animosity between him and the complainant's mother.

THE MAGISTRATE'S FINDINGS OF FACT

On the basis of the above evidence the trial magistrate found that the State witnesses were honest and credible witnesses who corroborated each other in every material respect. He also found that the appellant had to some extent corroborated the State case in that he admitted being with the complainant and her young brother in his bedroom for a long time

when she sustained the injury. He believed the Doctor's evidence that the laceration on the complainant's labia minora and bruising on her vestibule could only have been caused by a male organ.

He found the appellant to have acted suspiciously by his failure to inform both the complainant's mother and the maid of the child's injury. Consequently he concluded as a matter of fact that the accused was guilty of rape as charged.

FINDINGS OF THE HIGH COURT

The court *a quo* found on appeal no misdirection on the part of the trial magistrate and upheld the appellant's conviction and sentence. It found the complainant's evidence before the trial court credible as evidence of rape beyond reasonable doubt. In the process the learned judge *a quo* remarked at p 2 of the cyclostyled judgment as follows:

> "It will also be noted that whilst the complainant consistently referred to the appellant as having touched her *'chimbumu'* using his hand, thereby creating some doubt as to whether she had been indeed penetrated, that doubt was completely erased by the complainant's report to her mother that the "finger" that touched her was a big finger that the "brother" (appellant) took from his trousers after unzipping his trousers. See p 38 of the record"

On the basis of such observation the learned judge *a quo* found that the complainant's evidence provided conclusive evidence that she had been sexually violated. Having said that, he proceeded to reject the appellant's defence to the effect that she was injured in the course of a straddle fall from the bed in his bedroom. Both the trial court and the court *a quo* found no credence in the complainant's initial intimation to her mother that she had been injured by a stone. In saying that she appeared to have been influenced by the threats of assault impressed upon her by the appellant if she reported him to anyone.

The court *a quo* found that the appellant's defence of animosity between the appellant and the complainant's mother was an afterthought as it had not been raised in his defence outline. It accordingly discredited his defence in this respect on that score and drew adverse inferences against him to the effect that the defence was conjured up and the product of recent fabrication.

ISSUES FOR DETERMINATION

Only two issues arise for determination by this Court on appeal. The two issues are:

1. Whether the State proved beyond reasonable doubt that the appellant raped the complainant.
2. Whether the sentence imposed on the appellant is so severe as to induce a sense of shock warranting interference by this Court on appeal.

DETERMINATION OF THE ISSUES

Whether the State proved beyond reasonable doubt that the appellant raped the complainant

The facts leading to the complainant's injury on her *labia minora* and vestibule are by and large common cause. It is not in dispute that the complainant was injured while in the appellant's bedroom. She was in the company of her baby brother who had fallen asleep when she sustained the injury. It is common cause that while the baby was asleep both the appellant and the complaint were reclining on the appellant's bed.

The appellant testified that while reclining on his bed he at one time playfully placed the complainant on his lap and swung her with his legs. He admitted that the complainant sustained the injury in his bedroom but proffered an innocent explanation for the injury on her *labia minora* and vestibule. His explanation was that the complainant fell from the bed with her legs apart as she playfully jumped on the bed.

His explanation was contradicted by independent expert medical evidence. Doctor Gwiza who examined her the following day after the injury concluded that the injury was a result of sexual abuse. He discredited the appellant's explanation that the injury was due to a straddle fall as being highly unlikely. He explained that while a straddle fall could cause the laceration on the *labia minora*, if one falls with her legs apart with an object in between the legs, the fall could not cause the redness on the vestibule.

He therefore opined that the injury could most probably have been caused by a penis.

When being questioned by her mother the complainant initially told her that she had been injured by a stone. Upon being questioned as to how she could have been injured while wearing a pair of trousers she immediately recanted and told her that she had been sexually molested by the appellant in the manner previously recounted elsewhere in this judgment.

ANALYSIS

The facts speak for themselves. The appellant's attempt to discredit the evidence of the complainant's mother on account of animosity bears no credibility. This is for the simple

reason that apart from his mere say so, the appellant was unable to provide any credible evidence of animosity between him and the complainant's mother. On the contrary the evidence tends to show that he was acquainted with the complainant's family. They lived in harmony together in the same house. He was free to take the children to the shops and to play with them in his room frequently without let or hindrance as happened on the fateful day.

His protestation that the complainant's mother could have conjured up the serious allegations against him on account that he possessed better qualifications than everyone else at the school sounds hollow and not worthy of belief. It is therefore not surprising that both the trial court and the court *a quo* found no credibility in his defence. His explanation as to how the complainant could have sustained injury on her private parts in his bedroom was heavily discredited by independent expert evidence. The complainant, young as she was, gave damning irrefutable evidence against the accused. She told a simple believable story as to how she got injured. Her evidence was amply corroborated by independent medical evidence to the effect that she had been raped. Admittedly the appellant was the only male person capable of committing the rape who was in her company when she was raped.

Very young children are unlikely to be influenced to make serious unfounded allegations against anyone. In *S v Edmore Musasa* H-H-42/02, the High Court held that, "it is highly unlikely for very young complainants to make serious allegations without any basis at all" Considering that in this case the complainant was only 3 years old, the possibility of her having fabricated evidence against the appellant is virtually nil.

The case fell to be determined on the credibility of witnesses. The trial court had the vantage position of hearing evidence and seeing the demeanour of witnesses. It believed

the State witnesses and disbelieved the appellant's evidence for good reason shown. Once the appellant's evidence had been discredited, the supporting evidence of his witness Rumbidzai Gamanya was equally discredited. This is for the simple reason that there would have been no credible defence evidence for her to support or corroborate. This Court, not having had the benefit of seeing and hearing the witnesses, finds no basis for interfering with the trial court's findings on the credibility of witnesses.

Having come to that conclusion the appeal against conviction can only fail.

APPEAL AGAINST SENTENCE

As regards the appeal against sentence, the appellant was sentenced to 18 years imprisonment of which 6 years were suspended on appropriate conditions of good behaviour. This left him with an effective sentence of 12 years imprisonment.

I take the view that rape is a horrible and reprehensible offence deserving severe penalties of imprisonment. The rape of a toddler of no more than 3 years of age is so disgusting such that no amount of mitigation can ameliorate the gravity of the appellant's moral blameworthiness. In this case the appellant's moral turpitude is so bad that if the sentence imposed upon him errs at all, it errs on the side of leniency. On the facts of this case he deserved an effective sentence of no less than 20 years imprisonment. He should therefore consider himself lucky that the sentencing court was very lenient with him.

COSTS

In the normal run of things it is not the practice of this Court to award costs in criminal matters one way or the other.

DISPOSITION

It is accordingly ordered that the appeal be and is hereby dismissed in its entirety.

GWAUNZA DCJ: I agree

GUVAVA JA: I agree

Dururu. A and Associates, appellant's legal practitioners.

National Prosecuting Authority, respondent's legal practitioners.