SITHENI MASINA

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI AND NDLOVU JJ
BULAWAYO, 3 April 2025

Criminal appeal

N. Khumalo for appellant
K. Gundani for respondent

MUTEVEDZI J: Almost every human being has a primal need to have sex. A man with moderate mental impairment who actively initiates sexual intercourse is not a victim of sexual abuse. He is entitled to enjoy it. As such mentally challenged people, depending on the degree of the mental disability desire intimacy like any other human being. Those desires, where appropriate must not be subordinated to those of the so-called rational beings. This appeal however illustrates that where a rational person engages in sex with another who has a mental disability, the line between prison and enjoyment can be very thin.

Background

[1] The appellant was arraigned before Hwange Magistrate Court on 12 February 2024 on two counts of contravening section 66(1)(b)(i) of the Criminal Law (Codification and Reform) Act, *Chapter 9:23*, that is Aggravated Indecent Assault. On the first count, the allegations were that on a date to the Prosecutor unknown, but during the period extending from 1 January 2023 to 31 January 2023, in a field near BH 126, Victoria Falls, the appellant with indecent intent caused Shepherd Moyo a male adult to insert his penis into her vagina and had sexual intercourse with him once without his consent. In respect of the second count, it was alleged that on another date to the prosecutor unknown but during the period extending from 1 February 2023 to 09 June 2023 and at Hail Ndlovu's homestead, BH 126, Victoria Falls the appellant with indecent intent again caused Shepherd Moyo, a male adult, to insert his penis into her vagina and had sexual intercourse with him once without her consent.

[2] The background facts to the allegations are that the appellant and complainant were neighbours. Sometime in January 2023, the complainant visited the appellant at her place of residence. Upon arrival, the appellant invited the complainant to accompany her to the fields. The further allegations were that whilst the fields, the appellant spread a sack on the ground. She then asked the complainant to lie on it. The appellant removed the complainant's clothes, mounted him and made him to insert his penis into her vagina. She had sexual intercourse with the complainant without his consent. In the second count, it was alleged that between 1 February 2023 and 9 June 2023, the complainant again visited the appellant at her place of residence. On his arrival, he found the appellant alone inside a room which was used as the kitchen. He entered and sat on the floor. The appellant went behind the complainant and started caressing him on the shoulders. She directed the complainant to lie on the floor facing upwards and removed his clothes. The appellant also, removed her skirt, pant and went on top of the complainant. She then directed him to insert his penis into her vagina and had sexual intercourse with him without his consent.

[3] On 10 June 2023, the complainant told his brother about his sexual romps with the appellant. A report was made to the police and the appellant was arrested.

Proceedings in the court *a quo*

[4] When he was arraigned before the court aquo on the two charges of indecent assault, the appellant denied the allegations. She completely denied having had sexual intercourse with the complainant. She stated that the allegations were a fabrication orchestrated by the complainant's brother, one Steven Moyo, who had a long-standing feud with her and her husband.

[5] In support of its allegations, the State led evidence from the complainant Shepherd Moyo and his brother, Stephen Moyo. Below we summarise the important aspects of the witnesses' evidence.

Shepherd Moyo

[6] The witness suffered from mild/moderate intellectual disability. His evidence was that when the first encounter occurred, he was in the garden with the appellant who retrieved his penis and started rubbing it. He said the appellant then went on to insert his penis into her vagina after instructing to lie down while she mounted him. After the act, the appellant advised him not to disclose their affair to anyone.

[7] As he proceeded, the complainant's evidence became a bit disjointed. He said it had started in the kitchen. Presumably, he was referring to the second count. He said the appellant removed his trousers. She took his penis and inserted it into her vagina. He further stated that the appellant slept on top of him and insulted him at his brother's homestead. On further probing, he told the court *a quo* that the appellant had summoned him to the kitchen where she had spread a sack on the ground, forcibly held his arms and laid him on the ground. She had then removed his trousers and mounted him. She caressed his penis and inserted it into her vagina. He further told the court that the appellant had not ask to have sexual intercourse with him. After the second incident, he said he had told his sister who advised him to apologize to the appellant. It was later that the complainant's brother then engaged his sister. They were later summoned to Victoria Falls Police Station after an anonymous report had been made.

[8] When he was requested to comment on the relations between his brother on one hand and the appellant and her husband on the other, before the allegations arose, the complainant said the two sides related well. He vowed that he had no reason to false incriminate the appellant before the court. He concluded by mentioning that the acts had physically hurt on his penis and that he was mentally also affected.

[9] Under cross examination, the complainant was adamant that the appellant had sexual intercourse with him twice. He however vacillated on some issues. For instance, he shifted his story on whether they had used the sack at the fields or in the appellant's kitchen. He also shifted goalposts after saying he told people after the incident to saying he had only told his sister, Saziso after the second incident and that she had reprimanded her. He denied the

existence of any bad blood between her brother and the appellant. He said instead that the appellant's family was fighting amongst themselves.

Stephen Moyo (Stephen)

[10] As already stated, Stephen is the complainant's brother. His evidence was basically the report which was made to him by the complainant. It was similar to the complainant's testimony. The witness was subjected to long and intense cross examination. He, however, remained steadfast that the complainant had told him that the appellant had sexual abused him on two occasions. He equally denied the alleged bad blood between himself and the appellant and her husband. The State the closed its case with the evidence of the two.

[11] In her defence, the appellant testified. Interestingly, she also called the evidence of one Saziso Masina, the complainant's sister.

The appellant's evidence

[12] In her defence, the appellant maintained even under cross examination, the story in her defence outline that the allegations were fabricated because of the bad blood between her and the complainant's brother.

Saziso Moyo (Saziso)

[13] We have already said the witness is the sister to the complainant. Her evidence was that when the complainant approached her, he had advised her that he had proposed love to the appellant and not that the appellant had had sexual intercourse with him. She further stated that the complainant is mentally unstable and had a tendency of mentioning married women to be his wives though he would deny having sex with those women. The witness further stated that at one time, the complainant had approached her requesting assistance to solve an erectile dysfunction that troubled him and was the reason why he could not get married. On other occasions, the complainant could not control his urinary system and would soil himself.

[14] Under cross examination, Saziso conceded that she was the appellant's friend although she had initially denied that fact. She confirmed that the appellant and her husband occasionally

assisted the complainant with maize meal and packed food. She denied that the complainant had ever told her that he had had sexual intercourse the appellant. Instead, she claimed that the complainant had an erectile dysfunction as he could not sustain an erection to enable him to have sexual intercourse. She further said the complainant's testimony that he had had sex with the appellant was hard to believe because he always claimed having been in love with many other women. After being subjected to cross examination, the witness admitted that the complainant had told her about the sexual intercourse with the appellant but that she had chosen not to believe him because of his mental state and his wild claims of having bedded other women.

Findings of the court *a quo*

[15] The court *a quo* concluded that the appellant had sexually violated the complainant. In arriving at that conclusion, the trial magistrate dealt with the credibility of the complainant's evidence regard being had to the fact that he was a person suffering from a mild /moderate intellectual disability. It said that the complainant had an intellectual disability was common cause and that it was because of that understanding that the defence had challenged the complainant's capacity to testify in court. Despite that limitation, the court *a quo* found that the evidence of the complainant was credible. In that regard, it stated as follows: -

> "In the court's view he was a credible witness and his evidence is worth to be accepted in toto. That he told the court that the accused admitted to Stephen that she committed the offence while Stephen denies it cannot be taken to mean he was not a credible witness"

[16] The court *a quo* also dismissed the allegations by the appellant that there was bad blood between her family and that of the complainant's brother, Stephen. It reasoned that it was common cause that the appellant was giving the complainant food but Stephen never made an issue about it. It said it was, therefore, difficult to believe that Stephen had influenced the complainant to raise the allegations of abuse against the appellant.

[17] Importantly, the court *also* said it disregarded the evidence of the second defense witness, Saziso because in its view, she did not have the complainant's interests at heart given that she had disregarded a lot of things which the complainant had advised her solely on the basis of his intellectual disability. For instance, the court *a quo* said she had made no effort to assist the

complainant resolve his erectile challenge. In the end, the court concluded that indeed the appellant had committed the offence as alleged.

Proceedings before this court

[18] The appellant was dissatisfied with the decision of the court *a quo*. He lodged an appeal to this court against it. He had three grounds of appeal against conviction and four against the sentence imposed. Those grounds were as follows:

A. **Ad conviction**

1. The court *a quo* erred and misdirected itself at law when it convicted the appellant in the absence of proof beyond reasonable doubt particularly in that it found the complainant to be a competent witness contrary to section 246 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and when his testimony was riddled with material inconsistencies and was illogical indicative of the fact that he was not mentally fit to testify.
2. The court *a quo* erred and misdirected itself at law when it rejected the testimony of Saziso Moyo, the complainant's biological sister who was alleged to have received the first complaint as biased when her testimony was not discredited in cross examination. Her evidence was at variance with what the complainant told the court in material respects.
3. The court *a quo* erred and misdirected itself at law when it found that there was no bad blood between Steven Moyo and the accused that could lead him to use the complainant to fabricate these allegations when the evidence led in court proves otherwise.

B. **Ad sentence**

4. In the event that the court upholds the conviction, it is respectfully submitted that the court *a quo* erred and misdirected itself at law in the exercise of its sentencing discretion by imposing a sentence which is so severe as to induce a sense of shock.
5. The court *a quo* erred and misdirected itself at law in imposing the minimum mandatory sentence of 15 years when the case was not committed under aggravating circumstances that are listed under Amendment Act No. 10/2023.
6. The court *a quo* erred and misdirected itself at law in imposing the minimum mandatory sentence of 15 years when the case was allegedly before the Amendment Act No. 10/2023 came into effect. It has no retrospective effect.
7. The court *a quo* erred and misdirected itself at law in failing to place sufficient weight to the mitigatory factors as it was under the misconception that a mandatory sentence under Amendment Act No. 10/2023 was to be imposed. In essence, the court *a quo* did not consider the following personal and mitigatory factors:-
    7.1. Appellant is a first offender.
    7.2. She is a mother with three minor kids to take care of.

WHEREFORE, Appellant prays for the setting aside of the entire judgment of the court *a quo* and that it be substituted with the following:

1. The appeal succeeds.
2. The judgment of the court a quo is set aside and substituted with the following order:-
    2.1. The accused is found not guilty and acquitted in both counts.
    2.2. Or alternatively both counts are treated as one and accused is sentenced to 2 years imprisonment wholly suspended that she performs 600hrs of community service.

Issues for determination

[19] Broken down and summarised, the appellant's first ground of appeal is simply that the complainant was not a competent witness. The second ground of appeal complains that the appellant's witness Saziso's evidence was rejected without a basis. In the third ground, the appellant alleges the court *a quo* erred in finding that there was no bad blood between Steven Moyo and the appellant's families. The grounds against sentence from the fourth to the seventh appear self-explanatory. Put bluntly, the issues for determinations are whether or not:

a. the complainant is a competent witness.
b. the court aquo erred in rejecting the evidence of Saziso.
c. there was bad blood between Steven Moyo and the complainant.

[20] At the hearing, we took the view that both counsel had not fully ventilated the issues for determination for us to make an informed decision. We directed them to file supplementary heads of argument therefore. They duly complied and we are grateful for their assistance. The bone of contention was whether or not mentally challenged persons cannot consent to sex.

The law

The crime of having sexual intercourse with a mentally challenged person

[21] Even at common law, before the codification of our criminal laws, engaging in sexual activity with a mentally incompetent person was a crime with a very checkered history. Mentally challenged persons were referred to by some utterly derogatory terminology such as 'idiots' and 'imbeciles.' The early authorities took the view that whilst a mentally challenged person was incapable of consenting or dissenting to sexual intercourse their consent could be inferred from the so-called animal instinct. In other words, the understanding was that while animals cannot expressly accept or refuse to have sexual intercourse their natural actions and rituals which they generally exhibit during mating are usually taken either as an expression of consent or dissent. There was, therefore, no dividing line between animals and mentally challenged people when it came to sexual intercourse. In the case of *R v Kalil Katib* 1904 O.R.C.1, his LORDSHIP FAWKES J held as follows:

> 'While you are satisfied that the girl is in such a state of idiocy as to be incapable of expressing consent or dissent, and that the prisoner had or attempted to have connection without her consent, you should find him guilty of rape or of the attempt, but a consent produced by mere animal instinct is sufficient consent to prevent the act from constituting rape.

[22] What was clearly incongruous about making the analogy between the mentally challenged persons and animals was that whilst animals were equal partners during the mating, the same could not be said between a mentally challenged person and another with no mental abnormalities. Where it was so, the one would certainly take advantage of the other.

[23] The above position fortunately evolved over the years. Humans began to understand more and more of the intricacies behind mental illnesses. Perhaps author JRC Milton in his work *South African Criminal Law and Procedure Volume 3, 3rd ed* best summarized the position which prevailed under the common law when he said although the case authorities revealed a fair measure of contradictions what was clear was the question whether or not the complainant's mental defect was so profound to make her incapable of consenting was a matter of fact. He further stated the law to say that if a complainant's mental condition rendered her insensible or incapable of understanding what she was doing, her consent was regarded as vitiated. He said such was the law where the complainant was an idiot but not necessarily where she is an imbecile.

[24] In Zimbabwe, the case of *S v Nyathi* 1982 (2) 197 (HC) prescribed what the prosecution was required to prove to show the absence of consent by a mentally or intellectually incompetent victim of sexual intercourse. In summary, the law was that where the complainant on a charge of rape was mentally retarded, the prosecution was not required to prove that she was an idiot or an imbecile. Instead, it was enough to show that the woman did not have sufficient knowledge or understanding to comprehend that what was proposed to be done was the physical act of penetration of her body by the male organ or that the act of penetration proposed was one of sexual connection as separate from an act of a totally different character. The courts had the duty to judge if the required level of mental defectiveness had been reached but of course with the aid of expert medical opinion.

[25] Later, in 1986, the Criminal Law Amendment Act, [Chapter 9:05] previously [Chapter 58] came into operation and introduced an offence with the nomenclature of "*unlawfully have carnal knowledge or attempt to have carnal knowledge of any female idiot or imbecile woman or girl in circumstances which do not amount to rape."* It did not bring profound alterations to the law. The major changes came with the advent of the Sexual Offences Act [Chapter 9:21]. It was that statute which brought into Zimbabwean law the term *'mentally handicapped'* to replace the terms imbecile and idiot. Even more profound was the change that whereas the past laws only protected female persons, the new statute extended that protection to males. It was from such background that section 64 of the Code emerged. It provides as follows:

> **"64 Competent charges in cases of unlawful sexual conduct involving young or mentally incompetent persons**
> (1) …
> (2) …
> (3) A person who engages in sexual intercourse, anal sexual intercourse or other sexual conduct with a mentally incompetent adult person shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, unless there is evidence that the mentally incompetent person—
> (*a*) was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct, and
> (*b*) gave his or her consent thereto.
> (4) If, in the case of a male person who engages in anal sexual intercourse or other sexual conduct with a young male person of or below the age of fourteen years, or with a mentally incompetent adult male person, there is evidence that the young or mentally incompetent person—
> (*a*) was capable of giving consent to the anal sexual intercourse or other sexual conduct, and
> (*b*) gave his consent thereto; the first-mentioned male person alone shall be charged with sodomy."

[26] In our view, the language employed in the above provision needs little if any interpretation. Reliance must therefore be placed on its ordinary grammatical meaning. To begin with, it is unlawful to have sexual intercourse or any other proscribed sexual conduct with a mentally incompetent adult person. The basis of that prohibition is that it may not be possible for a mentally challenged person, even where they are an adult, to appreciate the nature and consequences of a sexual act. By its nature sexual intercourse is a complicated act. It may and usually does confuse even the rational person. The emotions and stimulations that it invokes are often so strong that they can easily numb the brain of a mentally fit individual. It is therefore understandable that the law draws caution when such acts are performed on or with mentally challenged people. It is the reason why it must be shown that such individual understood the nature of the act. In the case of *S v Machona* 2015 (1) 655 the court emphasized that point when it held 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…"

[27] As such, when the interrogation is made, of whether or not a mentally challenged complainant consented to sexual intercourse his understanding of the act of sex must not be left out. It must also be ascertained if he or she had previous sexual experience; if he/she appreciates the consequences of having sex. Such may extend to issues like loss of virginity in females; that she could get pregnant/he could get a woman pregnant; the responsibilities attendant upon such pregnancy; and the danger of contracting sexually transmitted infections. The inquiry must not end there. Rather, it must proceed to ensure that if the complainant appreciated sexual intercourse, was he or she able to act in accordance with such appreciation because even if they did, it is very possible that the person may not be able to resist indulging in the act- the so-called irresistible impulse. Lastly, because of the mental impairment, the complainant may have been at the material time incapable of expressing his/her dissent to engage in the act. Clearly, that position in our law rubbishes the illogical concept of the animal instinct previously used to infer consent.

[28] But put conversely however, the above provision also demonstrates that it is within the rights of those mentally challenged people who can appreciate the nature of sexual intercourse and other permissible sexual acts; are also aware of the consequences of such acts and can act in accordance with such appreciation to have sexual intercourse or perform other sexual acts.

[29] As can be discerned, there are various offences that emanate from the provision including that a male person who engages in sexual intercourse with a mentally incompetent adult female will be charged with rape; a male person who engages in anal sexual intercourse with a mentally incompetent person (whether male or female) will be charged with aggravated indecent assault and that a female person who has sexual intercourse or anal sexual intercourse with a mentally incompetent male person will be charged with aggravated indecent assault.

The degree of incompetence

[30] Our laws appear to unnecessarily complicate the question who is a mentally incompetent person by fragmenting the definition of the terms used in that process. Section 61(1) of the Code does not define who is a mentally incompetent person. Rather, it refers to section 2 of the Mental Health Act [Chapter 15;12] (the MHA) for that definition. It provides that:

> "**mentally incompetent person** means a person who is mentally disordered or intellectually handicapped as defined in section 2 of the Mental Health Act [*Chapter 15:12*].

[31] In turn, section 2 of the MHA defines the term in the following manner:

> "Mentally disordered or intellectually handicapped in relation to any person, means a person suffering from mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind."

More often than not, in the courts the question whether a complainant is mentally challenged or not rarely arises because medical examinations would have been carried out to ascertain that issue. It is not only difficult but also dangerous for a court to attempt to deal with issues of mental illness without reference to and reliance on expert medical evidence. As was held in the case of *Tapiwa Nyakatembo v The State* HH 73-20, expert evidence is usually supported by oral testimonies of witnesses who know the incompetent person's behaviour such as his/her relatives and acquaintances. In *Nyakatembo* (supra), this court held that: -

> "It is slighting to disregard the evidence of the complainant's own mother and consider not sufficient to speak on the complainant's mental status. She raised her and has lived with her all her life. Who else other than a mother is better placed to observe and note the challenges faced by her child?"

[32] Once the above is admitted, the next question is who bears the burden to prove that the complainant had capacity to consent and that he/she granted such consent? Section 64 appears silent on that matter leaving itself open to the interpretation of the courts. An accused person charged with a crime under the section obviously retains an interest to show that the complainant was capable of consenting and indeed gave his/her consent. As held in *Nyakatembo* where there is medical evidence that the complainant was incapable of consenting the state may simply produce a medical affidavit in terms of s 278 of the CPEA. That affidavit would on its mere production by the prosecutor become prima facie proof that he/she suffers from a mental affliction which rendered him/her incapable of giving his/her consent to the

sexual act. Where that happens, the onus shifts on to the accused to show that the complainant did not suffer from any such affliction and, therefore, was capable of giving consent at the material time. See also G. Feltoe's *Commentary to the Criminal Law Code*. In discharging that burden an accused as per the norm, must do so on a balance of probabilities.

Competency of mentally challenged complainants to testify

[33] The law is that regardless of their mental incompetency, mentally incompetent complainants may still be competent witnesses to testify. In the case of *S v Machona* 2015 (1) ZLR 655 (S) the Supreme Court held that incompetence is relative and only lasts as long as the mental illness is present. There is no valid reason why such people must be excluded from testifying in instances where they demonstrate an ability to do so. Medical evidence may assist a court in this regard but is obviously not decisive. It is so because the question whether or not a witness is competent or not to testify is entirely the value judgment of the court. Experts give opinions on matter which are usually outside the expertise of the court itself. There is nothing medical about the testimony of a witness in court. See *Machona* (*supra).*

Application of the law to the facts

whether or not the complainant is a competent witness.

[34] It is common cause that the complainant suffers from a mental disorder. From the psychiatric report presented in the court *a quo*, the complainant is afflicted by a mild-moderate intellectual disability. In the doctor's opinion, the complainant was not only incapable of giving consent to sexual intercourse but was equally incapable of giving evidence in a court of law. At the commencement of the trial, the defense challenged the competence of the complainant to testify based on the doctor's opinion. The court *a quo* dismissed the application. Section of the CPEA provides as follows:

> **245** Court **to decide questions of competency of witnesses**
> It shall be competent for the court in which any criminal case is depending to decide upon all questions concerning the competency and compellability of any witness to give evidence.

[35] Clearly therefore, it was the province of the court *a quo* to decide the question of the complainant's competency to give evidence. It arrived at the decision that the complainant was competent to testify. The psychiatrist rendered an opinion to the court. He did so on a matter

where the court had the expertise to decide on its own. Expert witness testimony on an issue tends to be more readily relevant when the subject is one upon which the court is usually quite incapable of forming an unassisted conclusion. We have already indicated that there is nothing medical about a witness's testimony in court. The opinion of the doctor in that regard was, therefore, irrelevant. In *S v Machona* HH-450-15 that:

> "In essence, 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**. 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. **Any expert opinion which is expressed on an issue which the court can decide without receiving expert opinion is in principle inadmissible because of its relevance."** (My bolding)

The credibility of the complainant's evidence

[36] Having resolved the question of the complainant's competence to testify, the only issue remaining in that regard is the credibility of his evidence. Obviously that a witness is competent to testify does not automatically make the evidence he/she gives credible. The court *a quo* clearly appreciated that the complainant had a mental challenge but still found that his evidence was credible regardless of the discrepancies noted in earlier paragraphs of this judgment. It stated thus:

> "Despite suffering from his mild moderate intellectual disability, the complainant gave his evidence very well. Despite the defense submitting that the witness showed incompetence to testify, the court holds a different view. By just mixing the two incidents by saying the sack was laid in the kitchen and in the garden as earlier stated cannot lead one to a conclusion that he was incoherent…With the thorough cross examination he went through accused's counsel, if the complainant had been influenced to fabricate the allegations he would have cracked and just told the court that he was told what to say. He stood his ground on what he had told the court in his evidence in chief. This is not to say that there were no traces showing that the complainant suffers from a mental disability."

[37] As demonstrated, the court *a quo* remained alive to the fact that the evidence given by a person suffering from a mental disability may not be as coherent as that of one who is not in such predicament. What was important at the end of the day was not the witness's eloquence or coherence but rather, whether his evidence made sense, and whether it could be believed. We find it illogical for one to imagine that all people with mental disabilities must be barred from testifying in court and if they are not that their evidence be disregarded on the basis of a few mix ups which are a direct result of the state of their mind. In this case, whether or not the appellant had sex with the complainant after spreading the sack either at the fields or in the

kitchen would be immaterial. What is important is whether or not the two had sex and if they had whether the complainant satisfies the requirements for consent attendant upon people with mental disabilities which we outlined above. In the end, the question of the credibility of a witness's testimony is the province of the trial court. As put by the Supreme Court in *Nickolas Van Hoogstraten v Tapiwa Nelomwe* SC-4-20 at p.7 of the cyclostyled judgment:-

> "It has been long regarded as settled in this jurisdiction that this Court will not interfere with factual findings including findings on the credibility of the witnesses, made by a trial court unless the decision is irrational. This Court has, in a number of cases, followed the general rule on whether to interfere or not which was expressed in *Hama v National Railway of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-D where the court pronounced:
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> > "The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion."

[38] Without satisfying us that it was irrational for the trial court to find the evidence of the complainant credible we refuse to interfere with that decision. At the hearing and in his heads of argument, the appellant alleged that the court *a quo* erred in accepting the complainant's evidence regarding the place where the sack was used as credible because it was incoherent. The argument was that the complainant in his evidence in chief had said the appellant laid him down on the sack in the garden but later under cross examination he had said the appellant laid him down on a sack in the kitchen. Further, the appellant stated that the complainant appeared to be delusional when he insisted that she had admitted the sexual intercourse yet Steven insisted there was no such admission. But our analysis is that the appellant was just splitting hairs. Admittedly, the complainant might have mixed the events of the two incidents. That however does not detract from the irrefutable evidence that in one or either of the incidents, the sack had been used as a spread on the ground. That fact mixed as it was, did not detract from the complainant's testimony. If anything, it strengthened the fact that he was speaking to things which had happened but as already stated, the mix up is attributable to his mental state.

[39] We couldn't help but find no basis to interfere with the court *a quo's* conclusion. It exhaustively dealt with the complainant's credibility and found it satisfactory. Having lived

through the atmosphere of the trial, it was better placed than this Court to make those conclusions. The first ground of appeal, in its entirety therefore lacks merit and is dismissed.

Whether or not the court aquo erred in rejecting the evidence of Saziso

[40] The court *a quo* concluded that Saziso was unconcerned with the complainant's affairs. It said she just chosen what to believe or not to believe from the various issues presented to her by the complainant without giving any rational basis why she made those choices. In its judgment at p. 18 of the record of proceedings, it stated that the complainant had no reason to lie that he told Saziso about the incidents when if he had not. It detailed that:

> "Saziso in her evidence told the court the court that she does not know if the accused had sexual intercourse with the complainant. She doubted that the complainant had proposed love to the accused when the complainant told her she also showed her other side.
> She also told the court that the complainant's penis does not erect. This, she believed because it will suit the accused's cause. She did not believe the complainant when she said he was in love with so and so. She did not believe the complainant when he said he [had]proposed the accused.
> She told the court that the complainant told her that his manhood does not erect. She did nothing about it. She did not help him or advise the other family members. One may not be wrong to say that indeed she was advised by the complainant what the accused did to him and she did nothing." (Sic)

[41] The grounds relied on by the court *a quo* to dismiss Saziso's evidence are apparent from its reasoning. For instance, it questioned why Saziso believed the complainant when he advised her that he had an erectile problem but disbelieved him when he said he had proposed love to the appellant. It added that if Saziso had really been concerned with her brother, she ought to have taken up his complaints with the rest of the family and tried to solve them. It further added that Saziso later admitted that she was friends with the appellant. The narrative that the complainant was impotent suited their defence that he could not therefore have had sex with the appellant given that condition. What further betrayed the falsity of her evidence was that she also divulged that the complainant had on other occasions claimed to have been in love with some married women in the community. As stated, the reasons given by the trial court in rejecting the evidence of Saziso are solid and founded on the evidence on the record. Given the above, it rightly found that Saziso did not have the interests of the complainant at heart. In her evidence in chief, she told the court that she knew the appellant as the wife to the village head. She further told the court that the complainant had said he proposed love to the appellant and did not mention about sexual intercourse. Under cross examination, she denied having any

relationship with the appellant despite that the appellant had said they were friends. On further probing, she admitted being friends with the appellant. The same witness was adamant during evidence in chief that the complainant did not make a sexual complaint to her but under cross examination, she changed goal posts and admitted being informed but not taking the complainant seriously because of his mental challenges. When quizzed, she responded as follows:

> "Q. Why would the complainant lie that he told you about these allegations?
> A. I do not know.
> Q. You were told by the complainant and decided not to do anything?
> A. Yes but what made me not to take action is his mental state.
> Q. You are now agreeing he told you but you did not take action because of his mental status?
> A. Yes

[42] In *Manjala v Maphosa* SC-18-26, GUVAVA JA had this to say in relation to a witness that lies in his or her testimony:

> "If a litigant lied in one material respect, the court would be entirely justified in taking the view that he has lied in all other respects and in treating his evidence accordingly.
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> In *Leader Tread Zimbabwe (Pvt) Ltd v Smith* HH1311/03 NDOU J at p 7 of the cyclostyled judgment stated as follows:
>
> "It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences maybe drawn as if he had not given evidence at all-see *Tumahole Bereng v R* [1949] AC 253 and South African Law of Evidence by LH Hoffman and DT Zeffert (3ed) at p 472. If a litigant lies about a particular incident the court may infer that there is something about it which he wishes to hide." (own emphasis)

[43] In the instant case, Saziso lied. She hid evidence. She admitted so. She constantly shifted from her evidence. The court *a quo* cannot, therefore, be faulted for rejecting her evidence. She was simply not a credible witness. Clearly, she wanted to save her friend at the expense of her mentally challenged brother. Talk of selfishness. Throughout the trial, pointers were that she was not a responsible sister towards her brother considering his disability. There is further evidence that on many occasions, Saziso left the complainant untended resulting in the appellant assisting him and ultimately taking advantage of him. In her own admission, she disregarded the sexual complaint because the complainant has a mental problem. In our view, the court *a quo* therefore proceeded in terms of established principles and properly exercised its discretion. It has not been shown that the exercise of that discretion was so irrational that no reasonable person would have come to the same conclusion. Therefore, the ground of appeal has no merit and it is dismissed.

Whether or not there was bad blood between Steven Moyo and the complainant.

[44] The court *a quo* refused to believe that there was bad blood between the appellant and Steven Moyo. In its judgment, it stated that:

> "The accused maintained her argument that the complainant was influenced by Stephen. On record there is nothing to show that there were bad relations between the accused and Stephen. Stephen was aware that his sister Saziso who is friends with the accused would take the complainant with him to the accused's place. He did not raise issues with that. There was also nothing wrong with the accused giving the complainant food. There was nothing wrong because
>
> 1. the complainant was Saziso's brother who was friends with the accused
> 2. They were related. Accused said Stephen is a cousin to her brother.
> 3. Social responsibility. As the village head, he has a responsibility to look after disadvantaged people in his jurisdiction."

[45] The appellant, in her heads of arguments, contends that Steven Moyo confronted Saziso about why he was taking the complainant to the appellant's homestead. Further, the appellant alleged that there were some land disputes between the two families and therefore, Steven Moyo could have easily fabricated the allegations and coached the complainant considering the complainant's disability.

[46] We are equally not convinced that there could have been any bad blood between two families before the abuse occurred. If there had been, the appellant would not have bothered to feed or assist the appellant in any way. Steven Moyo may have questioned the complainant's frequent visits to the appellant's homestead as a concerned brother not out of malice. If the allegations had been fabricated the complainant would not have survived the extensive cross-examination considering his mental shortfalls. It was not possible that Steven could have sat with the complainant and weaved such an intricate web of lies. The complainant simply didn't have that capacity. His insistence on what happened apparently shows that it is what happened. As a result, we once more take the view that the ground of appeal is unmeritorious. We therefore dismiss it.

[47] Given the above reasons, we did not have any misgivings with the findings of the court *a quo* and its conclusion that the State managed to prove its case beyond reasonable doubt. It was illogical for the appellant to completely deny having had sexual intercourse with the

complainant. It could have been a better defence had the appellant argued that the complainant consented to the intercourse. With his little or no experience in sexual intercourse, the complainant was able to narrate how the appellant had caressed his genitals and inserted his penis into her vagina. In the end, the only conclusion is that the appellant took advantage of the mental status of the complainant and forced herself on him. We traced the history of the crime of having sex with mentally challenged people and the law regulating it mainly for purposes of guidance to magistrates and putting into context the issues at hand because strictly speaking this appeal turned on far narrower issues.

The appeal against sentence

Whether or not the minimum mandatory sentence of 15 years can apply retrospectively.

[48] Both of the counts with which the appellant was convicted occurred between 1 January 2023 and 9 June 2023. Needless to state, that was before the coming into operation of the Criminal Law (Codification and Reform) Amendment Act No. 10/23 ("the Amendment Act") on 14 July 2023. The Amendment has no retrospective effect. That approach has been adopted by our courts several times. For example, in *Agere* v *Nyambuya* 1985 (2) ZLR 336 (SC) at 338H-339A GUBBAY JA (as he then was) had this to say: -

> 'It is a fundamental rule of construction in our law, dating probably from Codex 1:14:7, that there is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impair existing rights of obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, where it is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that the legislature intends to deal only with future events and circumstances.'

The Constitution of Zimbabwe, 2013, also specifically proscribes the retrospective operation of criminal laws. In the case of *State v TG & Anor* HH-51-24, this court directly related to the same provision and held that:

> "in the second case, MAWADZE J correctly observed that the rape had occurred earlier than the advent of Amendment Act No. 10/2023 whose provisions did not have retrospective effect. The current penalties could therefore not apply to the offender's case."

[49] The appellant, therefore, correctly submitted in her heads of argument, that, the court *a quo* applied the wrong law. It could not have sentenced the appellant using a law that came into operation after the commission of the offence. The mandatory penalties for rape and aggravated indecent assault which were introduced by the amendment to section 65(2) of the CODE do not in this instance. The ground of appeal has merit and is therefore upheld.

[50] Sentencing is ordinarily the discretion of the trial court. An appellate court can only interfere with a sentence where an appellant clearly demonstrates that such sentence is afflicted by a misdirection. In this case, before the amendment, offenders convicted of aggravated indecent assaults were in appropriate cases, entitled to discounts from their gross penalties depending on the mitigatory factors raised in any particular case. The offender here is first timer. She is a mother to three minor children. We are forced to interfere with the sentence imposed.

[51] In the result, we order as follows:

a. That the appeal against conviction be and is hereby dismissed in its entirety.
b. The appeal against sentence succeeds.
c. The sentence imposed by the court aquo be and is hereby set aside. In its place is substituted the following:

   *"The offender is sentenced to **7 years imprisonment** of which 3 years imprisonment is suspended for 5 years on condition within that period she does not commit any offence of a sexual nature for which she is sentenced to imprisonment without the option of a fine."*

d. The period which the offender has already served shall count as part of her effective sentence.
e. The trial magistrate is directed to recall the appellant and advise her of her new sentence.

MUTEVEDZI J……

NDLOVU J ……. Agrees

Khumalo & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners