ARTHUR MARUFU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP AND UCHENA J
HARARE 29 September and 7 December 2011

Criminal Appeal

R Chikwari, for the appellant
F I Nyahunzvi, for the respondent

UCHENA J: The appellant was convicted by a regional magistrate on four counts of rape. He pleaded not guilty but was convicted on all four counts after a full trial. He was sentenced to 12 years imprisonment of which 4 years were suspended on conditions of good behaviour. The four counts were treated as one for purposes of sentence.

The appellant appealed to this court against both conviction and sentence.

Appeal against conviction

His appeal, against conviction, is premised, on the following grounds of appeal.

1. That the trial; court failed to carefully consider the evidence led, and to appreciate that a conviction should only be based on credible evidence.
2. That the trial court erred by failing to give reasons why it believed the State's evidence and not the appellant's.
3. That the trial court erred when it convicted the appellant on all four counts, without giving reasons why it believed the complainant and her mother and disbelieved the appellant and his sister. when the complainant's mother told the court that the complainant had reported to her two counts, of rape, but later reported four counts of rape to her father.

4. That the trial magistrate erred by convicting the appellant on all four counts when his guilt had not been proved beyond reasonable doubt.

Mr *Chikwari* for the appellant submitted that the magistrate convicted the appellant on contradictory evidence as the reports the complainant made to her mother and father differed on the number of times the complainant was raped. He further submitted that the magistrate should have convicted and sentenced the appellant on two counts and not four counts. This submission seems to suggest that the appellant's own counsel accepts that his convictions on the two counts the complainant reported to her mother, are not being contested.

Mr *Nyahunzi* for the respondent stood by his heads of arguments in which he supported the convictions on all four counts and conceded that the sentence was too severe in view of the appellant's youthful age at the time the crimes were committed.

The facts on which the appellant was convicted are as follows. The appellant is the complainant's uncle. He is her father's young brother. She narrated to the court four instances of rape by the appellant. The first one was at their rural home in Murewa. The remaining three were at the complainant's grandmother's house in Mufakose. The complainant gave detailed accounts of how each rape was committed, including the place, period and manner of commission.

The crimes were not brought to light by human action. They were exposed by the complainant falling ill. She suffered from scabies which caused the Headmaster of her school to write a letter to her mother advising her that the complainant had to be withdrawn from school till she had been treated as the disease was communicable and could affect other pupils at the school. It was only after the complainant's mother received this letter when she asked the complainant at the instance of the complainant's father who suspected that she was suffering from a sexually transmitted disease. The complainant told her mother of the first two counts, before she was referred to her father to whom she disclosed two further counts.

In her evidence the complainant's mother told the court that the complainant reported to her two counts of rape before she referred her to her father, who further

questioned her leading to the disclosure of two further counts of rape. On p 6 of the record she narrated the events which took place during the disclosures as follows:

> "She said that uncle Arthur had raped her. I then went into the house where father was and told him that the accused had raped the complainant
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> The father indicated that he was going to call all his young brothers. The complainant said she was initially raped in Murewa. The second occasion was at 102 Murara in Mufakose. When she was further questioned by the father she then added that accused raped her on two more occasions at Murara in Mufakose."
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> "I was present as she was telling her (*sic*) mother."

In her reasons for judgment the regional magistrate at p 19 said:

> "The complainant narrated her story. Her story was also further corroborated by her mother. The evidence from both the defence and the State witnesses clearly shows that there was no bad blood between the family members. Meaning that there would not be any reason for the State witnesses' to fabricate the story against the accused person."

The appellant had in his defence outline denied raping the complainant, and causing her to suffer from a sexually transmitted disease. He offered to submit himself to medical examination as he said he had at no time suffered from scabies.

The complainant's evidence is detailed and seems to be a narration of what happened to her. She on the first count narrates how the accused lured her to an aunt's abandoned homestead and raped her there. She narrated the other three counts in detail, giving the occasions places, and time. This seems to indicate she was narrating her experience at the appellant's hands. The existence of an aunt's abandoned home in Murewa is not disputed. There seems to be no reason why the complainant had to lie against the appellant as her family enjoyed good relations with the appellant.

I am aware that the appellant denied having suffered from scabies which led to the discovery of the rape. He need not have suffered from that disease for him to be the rapist. The Headmaster's letter clearly says the complainant had to be withdrawn from school for fear that the scabies could spread to other school children. If the scabies are communicable through none sexual means, no purpose would have been saved by having him examined to prove that he had had sexual intercourse with the complainant.

The case simply depends on the credibility of the complainant. The regional magistrate found her to be a credible witness. That finding cannot be faulted. The reporting of two counts to her mother and a further two to her father is not a basis for disbelieving her. The mother's explanation as quoted above explains why she had to reveal further counts to her father. The mother's narration shows that on being told of the two counts she went into the house to inform her husband of what the complainant had told her. The father further questioned the complainant resulting in the complainant reporting the further counts in the presence of her mother. Rape is an embarrassing experience, and can not be easily and fluidly narrated. In this case the complainant's mother also seems, to have been exited by the discovery and went to report to her husband before the complainant had finished reporting to her.

A reading of the record does not reveal any misdirection on the part of the trial court. The reason for its believing the complainant and her mother and not the appellant and his sister is explained in her judgment. The credibility of the complainant is beyond doubt. The reason for the trial court convicting on all four counts has been explained. The trial court found the complainant and her mother to be credible witnesses, who were able to stick to their evidence throughout their cross examination by the appellant. She further found that they enjoyed good relations with the appellant's family and thus had no motive to lie against the appellant.

In the result I am satisfied that there is no merit in the appellant's appeal against conviction. His appeal against conviction is therefore dismissed.

Appeal against sentence

The appellant's appeal against sentence is based on the sentence being so severe as to induce a sense of shock in view of the appellant's age at the time he committed the offence.

The appellant committed the offences when he was 17 years old. If the wheels of justice had turned as fast as they should have, he could have been tried and sentenced when he was still below 18 years of age. He could then have been sentenced to corporal punishment plus a suspended sentence of imprisonment. He would not have been

sentenced as an adult and exposed to the rigors of imprisonment and contamination with hardened criminals.

Mr *Chikwari* for the appellant submitted that the sentence of 12 years, of which 4 years were suspended on conditions of good behaviour, is harsh and induces a sense of shock. Mr *Nyahunzvi* for the respondent conceded that the sentence imposed by the trial court induces a sense of shock. They both referred the court to the cases of *S* v *Lucky Bob* HH 40/2005, and *S* v *Francis Gororino & Ors* HH 35/2005, in which KUDYA J and BHUNU J respectively dealt with the sentencing of juvenile offenders and the need to avoid effective terms of imprisonment. Both cases involved offenders who were below the age of majority. In the case of *S* v *Lucky Bob* (*supra*) KUDYA J at pp 1 to 2 of the cyclostyled judgment, commenting on the seriousness of the offence of rape and the need to balance that with the youthfulness of the offender, said:

> "The seriousness of the offence cannot be gainsaid. The accused was a maternal cousin of the girl. Their grandmother left her in his care in trust. His actions were clearly unpardonable. He however was 16 years old at the time and was in Form 2. His actions in my view were motivated perhaps by sexual awakenings which afflict boys at this age. They can properly be regarded as forming part of boyish pranks. He is an orphan. His educational prospects have been severely compromised by the sentence imposed. In prison he will associate with hardened criminals. He will most likely come out unrehabilitated. He requires in my view help in realizing the error of his ways rather than condemnation to a lengthy prison term.
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> The sentence imposed on him even having regard to the aggravating features highlighted induces a sense of shock. It was appropriate to temper justice with mercy by paying particular attention to his mitigatory features. The trial magistrate misdirected himself in imposing a sentence on the higher end of the scale, which would have been appropriated for an adult. The proper sentence should have been the imposition of the maximum number of strokes with a rattan cane with an additional suspended prison term to dissuade the accused from contemplating sexually related crimes.
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> The accused was sentenced on 14 March 2005. He has been in custody for close to 2 months now. That period is ordinarily too lenient for one convicted of rape. Indeed the sentence I substitute the present sentence with should not be regarded as a guideline for future sentences on 16 year

olds or 17 year olds who ravish young girls but should be viewed as a way of correcting an error in the present case".

In the case of *S* v *Gororino* (*supra*) BHUNU J dealing with a similar case at pp 2 to 3 of the cyclostyled judgment said:

> "Teenagers who commit serious offences such as rape stand in need of a constant reminder not to transgress again from the narrow and straight path. It is therefore certainly not enough to simply sentence the offending juvenile to corporal punishment with a few strokes of a rattan cane.
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> I am of the strong view that in serious offences for corporal punishment to achieve the desired effect it ought to be coupled with an appropriate wholly suspended term of imprisonment on conditions of good behaviour.
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> On the other hand sentencing a juvenile first offender to 9 years imprisonment for a serious offence which may be the product of juvenile pranks brought about by immaturity and the foolishness of youth, is tantamount to killing a fly with the proverbial sledge hammer. There is need to temper justice with mercy and leniency without exposing society to the dangers of deviant juvenile delinquency.
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> I am therefore caught in between too lenient sentences and a manifestly too severe term of imprisonment which induces a sense of shock.
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> As regards the too lenient sentences all I can do now is to decline to certify the proceedings as being in accordance with real and substantial justice.
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> There is however need to interfere with the harsh sentence for justice to be done. Francis Gororino is a 17 year old first offender. He was sentenced to 9 years imprisonment of which 2 years were suspended on conditions of good behaviour in circumstances where other juveniles were sentenced to corporal punishment for the same offence.
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> By now he has served more than 5 months of the sentence. No useful purpose can be served by his continued incarceration. The longer he stays in prison the more he is likely to be brutalised and contaminated by hardened criminals. The punishment he has already served is in my view adequate for his transgression. He is therefore entitled to his immediate release."

I agree with the observations of KUDYA J and BHUNU J. The cases they were dealing with are similar to the one before us. The accused persons in their cases were of almost the same age with the appellant. They like the appellant had acted from the

foolishness of youth. They like the appellant needed guidance and deterrence more than immediate punishment in the form of imprisonment. They were credited for the time they, had spent in prison and were saved from further immediate imprisonment.

I am aware that the appellant's crimes are more serious than those in the cases referred to. He raped the complainant four times over a long period during which he failed to appreciate the wrong he was doing to his own brother's daughter. His conduct however remained that of a youth. His punishment must be higher than those imposed in the *Bob* and *Gororino* cases (*supra*) where sentences of 12 months and three years were imposed with parts suspended. It however cannot be allowed to remain at 12 years of which 4 years were suspended on good behaviour. Both Mr *Chikwari* for the appellant and Mr *Nyahunzvi* for the respondent suggested a lesser sentence than the one imposed by the magistrate would be appropriate. They both submitted that the appellant need not be send back to prison where he served 14 months of the sentence imposed on him by the trial magistrate, before he was granted bail pending appeal. I agree with their submissions. The period he served should be treated as his effective sentence and the balance will be suspended on conditions of good behaviour.

In the result the sentence imposed by the trial magistrate is set aside, and is substituted by the following;

All four counts, being treated as one for sentence:

4 years imprisonment of which 2 years 8 months is suspended for 5 years on condition, the appellant does not during that period commit any offence of a sexual nature for which he will be sentenced to imprisonment without the option of a fine.

Mutezo Mushangwe & Company, appellant's legal practitioners

Attorney General's Criminal Division, respondent's legal practitioners.