B.R.J.Versus
THE STATE

HIGH COURT OF ZIMBABWE
KAMOCHA AND GOWORA JJ
HARARE, 13 November 2003 and 22 September 2004

Criminal Appeal

E.T. Matinenga, for the applicant
R.K. Tokwe, for the respondent

KAMOCHA J: The appellant was charged firstly with indecent assault in that on some unknown dates to the prosecutor but between March 1997 and 5 November 1999 and at G.E., Harare he unlawfully and intentionally indecently assaulted his 10 year old daughter on divers occasions by forcing her to rub his penis and inserting his finger into her vagina without her consent.

In the second count he was charged with a crime of rape in that on a date unknown to the State but between March 1997 and 5 November 1999 at G.E., Harare he unlawfully and intentionally had sexual intercourse with his 10 year old daughter who at law was incapable of consenting to sexual intercourse.

On arraignment he pleaded not guilty to both charges but was convicted after a lengthy trial. He was sentenced to 8 years and 5 years imprisonment respectively. Of the total of 13 years imprisonment 3 years imprisonment was suspended on the customary conditions of future good behaviour. He appealed against both conviction and sentence.

His grounds of appeal against conviction were these:

1. The learned magistrate erred in finding that the totality of the evidence established beyond reasonable doubt the guilt of the appellant.
2. The learned magistrate erred in finding the appellant to be an untruthful witness.
3. The learned magistrate erred in finding that the evidence of Dr Idenburg established beyond reasonable doubt that there had been sexual activity in respect of the complainant.
4. The learned magistrate erred in accepting the evidence of the complainant and her brother.

Appellant's complaint against sentence was on the grounds that:

a) the trial magistrate erred in treating each of the counts separately rather than treating them as one for sentence;

b) the sentence imposed is manifestly excessive so as to induce a sense of shock;

c) the factors of aggravation were over-emphasised at the expense of the factors in mitigation; and

d) the trial magistrate misdirected herself in imposing a custodial sentence.

The State adduced evidence from four witnesses at the trial that is the complainant, her mother, her brother and the medical doctor who examined the complainant. The appellant also gave evidence but had no witnesses to call.

The background information which is common cause is that the appellant and one W.A.H. "the mother" were once husband and wife. They separated sometime in 1996. The wife instituted divorce proceedings resulting in an order for divorce being granted by consent in December 1998. She then got married to a Mr Quinton Holder on 16 April 1999. The appellant was granted custody of the complainant and her brother by consent. Thereafter the appellant was staying with the two minor children at G.E. just outside Harare. The mother had visitation rights in that she had access to the children during the third weekend of every month.

The allegations levelled against the appellant were said to have been committed during the period when he had the custody of the children but the appellant claimed that they were contrived by the mother as a ruse to secure custody of the children.

In her evidence the ten-year old girl said she started staying with her father in Mazowe in the absence of her mother in March 1997. During that time she used to share the same bed with her father because she had nightmares if she slept alone. She shared the same blankets with the appellant who used to sleep naked.

While they slept the appellant would take her hand by the wrist and cause her to rub his private parts for an hour. Thereafter appellant would go back to the lounge while she went to wash her hands. It was her evidence that the appellant used to force her to rub his penis with her hand. She did not remember how many times that happened. She stated that while the appellant used to sleep naked she slept with her pants and nightie. The complainant did not report the appellant to anyone because he threatened to give her a hidding if she did so. He threatened to do that on the first occasion that he took her hand by her wrist and forced to rub his penis. The complainant went further and stated that not only did the appellant force her to rub his private parts he went further and stuck one of his fingers into her vagina. It was her evidence

that he also did that many times. Complainant did not report this as well because of the hidding appellant had threatened to give her should she tell anybody.

According to the complainant the appellant did not end at indecently assaulting her many times but he went further and raped her as she lay on her side facing the direction of the door. She described the manner in which the rape took place. She said she went to bed after bidding a good night to her brother. Appellant followed when she was half asleep. He switched off the light. After that he turned her to one side and thereafter removed his shirt, shorts and underwear. He then lifted up her nightie and pulled down her pants and proceeded to rape her. She felt pain. She thought the appellant had inserted a little bit of his penis into her vagina. Thereafter appellant pulled up her under pants and pulled down her nightie. Complainant did not report to anybody because the appellant said if she told anybody she would get a flogging. Unlike the rubbing of the appellant's penis and the sticking of one of his fingers into the complainant's vagina the rape only occurred once.

Complainant said she, on one occasion, noticed blood on her underpants and thought that marked the beginning of her menstrual periods and she told her brother about that. Complainant was subjected to a lengthy cross- examination in which she denied being tutored by her mother or anybody else. She was not shaken. Instead she maintained her story. He account of what she alleged to have happened is too detailed for a child who has been coached.

W.A.H. the complainant's mother was allowed by the court to give her evidence in camera. She chose to do so because she felt intimidated by the appellant who also made her feel nervous. Appellant used to beat her up during the subsistence of their marriage. That he used to give her a hidding is in fact common cause. It is also common ground that he did not even spare the two children from the beatings.

Her evidence was that she separated with appellant in 1997 and finally divorced in 1998. The custody of the two minor children was granted to the appellant while she was granted access rights to see them.

During the weekend of 30 and 31 October 1999 she went to pick up the children. She noticed that the complainant was not happy and was withdrawn. She did not want to be near any man and she also would not play with other children and just wanted to be around her mother. She asked complainant what the matter was but she said there was nothing wrong. The next day she asked her again after reassuring her that she loved her. It was at that stage that complainant broke down and began to cry. She then said if she told her mother she would be in big trouble. She said that as she twisted her underwear with a finger. When asked about who was going to put her in big trouble she said the appellant would. When asked why would he put her into big

trouble she said he would do so because of the things that he used to make her do. She finally reported to her mother that appellant used to make her rub his private parts and that he used to insert his finger into her private parts. Her report of the rape came after she had been seen by a psychologist.

The witness told the court that she had to return the children to the appellant after the weekend despite receiving reports of what the appellant used to do to the complainant as she did not want to raise suspicion on the part of the appellant who has a propensity to violence. She said later she reported the matter to the police because her daughter reported to her and she had noticed that there was something wrong with her not because she was using the allegations as a ruse to gain custody of the children. As a concerned mother she felt bound to report the matter to the police. The witness was not aware of any other allegation relating to the complainant having been sexually abused in April 1999. But the appellant on 21 April 1999 had had the complainant examined by Doctor M. Chhanabhai for possible sexual abuse. The doctor found her hymen intact and concluded there was no evidence of sexual activity. The mother did not know why the appellant was having the complainant examined for possible sexual abuse at that point in time. What is significant to note is that appellant did that after the children returned from the April 1999 vacation which they had spent with their mother. The mother vehemently denied ever having accused appellant of having sexually molested the complainant at that stage.

The witness was subjected to a lengthy and thorough cross-examination during which she emphasised that the custody of the children was granted to the appellant by her consent and she never took any steps to seek the custody of the children as they seemed happy enough with their father. She, however, had made inquiries with lawyers and social welfare officers who advised her that it would take long and would be expensive to claim back custody of the children. It was then suggested to her that this case was brought up after she had been advised that in order to get back custody she must show that the other parent was unfit to be a custodian parent. The witness denied that this case was the vehicle by which she sought to show that appellant was an unfit parent.

It also came to light under cross examination that the complainant was allegedly not allowed by the appellant to go to her mother as he did not want her to go there. The witness denied ever telling the complainant what to say. It was suggested to her that she had told her that unless the case proceeded against the appellant complainant would not see her again but the witness flatly denied ever saying anything of that kind.

The lengthy cross-examination failed to shake the witness who, as a whole seemed to be truthful and worth to be believed.

The appellant complained about why the witness testified in camera. The witness explained why she could not give evidence in open court. She said she felt intimidated and made nervous by the violent conduct the appellant had subjected her to during the subsistence of the marriage. It was infact common cause that appellant subjected her to beatings during the marriage. That was the main reason why she did not want to be in the same room with appellant. It was the endless beatings which caused the breakdown of the marriage.

The appellant held the view that he was denied a fair trial by the trial court when it allowed the witness to testify in camera. That, in his view, amounted to a fatal irregularity. In *Hayes v Baldaclum and another* (2) 1980 ZLR 422 at 430 D it was held that the hearing of a case *in camera* when that was not warranted constituted an irregularity of a serious nature.

In casu, it seems to me, that the giving of evidence by the witness in camera was warranted. The appellant is a violent man. The witness was going to feel intimidated and nervous if she gave evidence in the same room with him. It was going to be very difficult for the witness to testify freely in the circumstances.

The trial court was justified in exercising its discretion in terms of the Criminal Procedure and Evidence Act Amendment Act No. 8 of 1997 which was introduced in order to cater for the Protection of Vulnerable Witnesses. Section 319 B provides thus:

> "If it appears to a court in any criminal proceedings that a person who is giving or will give evidence in the proceedings is likely -
>
> a) to suffer substantial emotional stress from giving evidence; or
> b) to be intimidated, whether by the accused or any other person or by the nature of the proceedings or by the place where they are being conducted, so as not to be able to give evidence fully and truthfully;
> the court may, subject to this part, do any one or more of the following, either *mero motu* or on the application of the party to the proceedings -
>
> i) appoint an intermediary for the person;
> ii) appoint a support person for the person;
> iii) direct that the person shall give evidence in a position or a place, whether in or out of the accused's presence, that the court considers will reduce the likelihood of the person suffering stress or being intimidated:
> Provided that, where the person is to give evidence out of the accused's presence, the court shall ensure that the accused and his legal representative are able to see and hear the person giving evidence, whether through a screen or by means of closed circuit television or by some other appropriate means."

The witness appeared on a closed-circuit television as she gave her evidence and was even subjected to a lengthy cross-examination during which the court and defence counsel could

have easily assessed demeanor. The State counsel was entirely correct in submitting that the trial court had properly exercised its discretion and that there was nothing irregular about adopting a procedure laid down by law.

The next witness B.T.J. is appellant's son and complainant's brother. He and complainant stayed with appellant from 1997 to the end of October 1999. His evidence mainly highlighted the fact that the appellant was a violent man. He used to say to the witness;-

"I will knock your block off" meaning that he would knock the witness' head off. The witness was therefore very scared of him. The witness described him as being horrible to his mother (the witness' mother) as he used to beat her up. The appellant used to threaten him with a fist. At one stage he was hit on the head. On another occasion he was threatened over the table at dinner.

B. said the appellant did not want him and his sister to communicate with their mother in Mutare and he believed that appellant had the telephone disconnected so that there could be no communication by telephone between the mother and the children. Not only did appellant not want the children to communicate with their mother by telephone he also did not want them to do so by letter. He, on a certain occasion, shouted at the complainant one evening after she had given him a letter to post to her mother. Appellant must have torn the letter because he wrote another letter which he asked B. to copy. The letter was reproduced at page 110 to 111 of the record of proceedings. It is clear that B. could not have written the letter as he was very poor at spelling and was even in a special class at his school. I therefore accept B.'s story that appellant wrote the letter and asked the children to copy it.

It was his evidence that the reason why the complainant did not go to visit her mother during the August school holidays was because appellant did not want her to and had in fact prevented her from going.

He told the court that one morning complainant went to wash her face and then went to the toilet where she discovered that her underpants were bloodstained. She showed her brother the blood stained underpants. B. thought complainant had started her menstrual periods.

B. told the court that nobody told him what to say in court. He did not believe that his mother was using this case to get the custody of the children but he felt that as a mother she was merely trying to help the complainant.

The witness was subjected to a lengthy cross-examination. He emphasized under cross-examination that he was still very scared of the appellant whom he alleged did not love him at all that is why he was violent towards him. When asked if he would never want to speak to his father again he said whenever he saw him he ran away from him. He would do so until he was

old enough to solve his own problems with him. But for now he hides away each time he saw him. That, in my view, was a brilliant answer from the child. He cannot be said to have been tutored to give such an answer. The tutor would not have known that such a question was going to be asked. The long and thorough cross-examination was unable to shake B.. He was worth to be believed.

Doctor Christine Maria Alert-Idenburg was the last prosecution witness. She is a qualified medical practitioner. She specialises in examining sexually abused children below the age of 16 years. She compiled a medical report in respect of the complainant on 8 November 1999. At that time she had 2½ years experience in examining sexually abused victims at the Family Support Unit Clinic.

On examining the complainant the doctor observed and found that the labia majora had increased pigmentation. The labia minora and vestibule were red. The increased pigmentation on the labia majora and the red labia minora and vestibule were a sign of chronic rubbing or repeated friction. The hymen of the complainant was found to be irregular with a complete healed tear at 6 o'clock making the posterior viginal wall visible. The orifice was so enlarged that the doctor was able to look into the vagina and could see its rear wall. That was too big for a little girl. It was the doctor's evidence that that suggested repeated penetration and so did increased pigmentation. It was also her evidence that the redness she observed suggested recent interference. She made it clear that the orifice remains open either due to recent penetration or repeated penetration.

The doctor opined that the redness on the labia minora and vestibule and increased pigmentation on the labia majora could not have been caused deliberately by the complainant without also causing bruises to those areas. She also explained that an injury to the hymen would cause bleeding which can even last for 2 to 3 days. Her view was that what she observed could not have been a result of masturbation and could not have been caused by the complainant's own finger since it was unlikely for an own finger to cause an injury at 6 o'clock. A tear in the hymen would be painful and cause bleeding and generally a child would not go to that extent.

The doctor concluded that her findings were consistent with vaginal penetration. She however could not say whether penetration was penial or digital. Her evidence tallies with that of the complainant's who told the court that appellant inserted his finger into her vagina many times meaning in other words that he penetrated her vagina digitally may times and effected penial penetration once. The repeated penetration caused the orifice to remain open as observed by the doctor. The increased pigmentation of the labia majora seen by the doctor also supports the complainant's story that appellant penetrated her digitally many times.

The appellant had no witness to call but he gave evidence himself. In his evidence appellant admitted that he had given his former wife and children a couple of beatings.

He maintained that the allegations against him were contrived by complainant's mother as a ruse to secure the custody of the minor children. What is clear from the evidence led in court is that both children told the court that they were not told by anyone what to say in court. Their mother also denied tutoring them. There is merit, in my view, in what the witnesses said. If the complainant and her mother had wanted to lie they would have said the appellant effected penial penetration many times instead of mentioning just the one occasion. The mother would have told the complainant to allege that the appellant had raped her many times in order to make her case for custody stronger since there was already medical evidence showing the enlarged orifice suggesting repeated penetration.

It was also the appellant's assertion that the complainant could have raptured her hymen sometime ago. Medical evidence rebuts that claim. Dr Idenburge was emphatic that no masturbation by the child herself or clumsy examination by a relative on the child's genitalia could have caused a complete tear she observed on the child's hymen or the enlargement of the orifice. The injuries she observed were not self inflicted at all.

The trial court, in my view, cannot be faulted for disbelieving the appellant. It was justified in rejecting the appellant's story. It was further correct in finding that the State witnesses were all worth to be believed. It found that none of them exaggerated. It also observed that the mother and both children broke down as they gave their testimony. The court correctly, in my view, observed that the mother could not have tutored the two children to break down when testifying on emotional issues.

Apart from the suggestion that what was observed by doctor Idenburge could have been self inflicted or could have resulted from a clumsy examinations by a relative of the complainant's private parts (suggestions which were rejected by the doctor) it was never suggested that some one else other than appellant could have sexually abused the complainant. The trial court was, therefore, justified, in the light of the evidence before it, to conclude that it was the appellant who effected repeated digital penetration and a single penial penetration of the complainant's vagina. It was therefore justified in convicting the appellant on both counts.

In so far as the sentence is concerned it was submitted on appellant's behalf that the trial magistrate had misdirected herself in not taking both counts as one for the purpose of sentence since the allegations formed one part of a single course of conduct. The court should have imposed a single sentence as opposed to two. It was further submitted that the sentence imposed was so harsh as to induce a sense of shock.

Mr *Tokwe* representing the State conceded that the trial court should have taken both counts as one for sentence but he still submitted that the sentence imposed by the trial court was not out of line with sentences normally meted out for this type of crime. He cited the case of *Bennie Machowa v The State* S.C. 14-99 in which a school teacher raped a grade six pupil aged 11 years in 1996. During that same year he had on many occasions indecently assaulted her by fondling her breasts and inserting his finger into her vagina.

The complainant could not remember the date on which the rape took place. The rape and indecent assaults only came to light at the end of the year. The trial court however, accepted the complainant's reasons for failing to report earlier as reasonable and understandable in that she was afraid of the appellant's threats.

The Supreme Court found appropriate the sentence of 7 years imprisonment with 18 months imprisonment suspended for 5 years on the customary conditions. In *Zulu v The State* S.C. 228-97 the Supreme Court could not interfere with an effective sentence of 9 years imprisonment for rape of a pupil by her teacher.

In *Mutongi v The State* S.C. 7-97 KORSAH J.A. made the following remarks about the rape of children.

> "I am of the view that people who stand *in loco parentis* to their youthful victims, if convicted of rape, must endure a lengthy period of incarceration so as to allow their victims, if possible to overcome the trauma as well as grow in stature to defend themselves against such abuse by the culprit in the near future."

This court has repeatedly stated that rape is the most heinous invasion of one's body, one's personality and dignity, the more so when it is perpetrated on young people. In *Thomas Amuvet Nyamimba vs The State* HH 204/02 where a 44 year old man raped a 6 year old girl GUVAVA J with the concurrence of HLATSHWAYO J when dismissing the appeal against both conviction and sentence suggested that a rape perpetrated on a young girl should attract a sentence of at least 10 to 15 years imprisonment.

In casu the rape and indecent assaults were particularly reprehensible. The appellant is the father of the complainant to whom she looked for protection more so when the mother was away. This is different from a person who just stands *in loco parentis* to the child. The crimes are aggravated by the fact that they were committed by a father on his child. He deserves to endure a lengthy period of imprisonment so as to allow the daughter, if possible to overcome the trauma as well as grow in stature to defend herself against such abuse by the father in the near future.

The trial court was criticised for not taking both counts as one for the purpose of

sentence. Failure to take counts as one for sentence becomes a misdirection warranting interference by an appeal court or review court where the resultant sentence is excessive. In the present case appellant was sentenced to 5 years imprisonment on the first count and 8 years imprisonment on the second. The commulative sentence is 13 years imprisonment which is within the range of 10 to 15 years. The failure to take both counts as one for sentence does not in the circumstances, warrant our interference with the sentence imposed. The appeal against sentence consequently must also fail.

In the result there is no merit in the appeal against both conviction and sentence and it is accordingly dismissed in its entirety.

GOWORA J: I agree.

Atherstone & Cook, appellant's legal practitioners
Criminal Division of the Attorney-General's Office, respondent's legal practitioners