HAZEL RUSIKE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 28 July 2015 & 7 December 2016 2016

Criminal Appeal

B Maruva, for the appellant
E Makoto, for the respondent

HUNGWE J: The appellant was convicted of aggravated indecent assault as defined in s 66 (1) (a) (i) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. He was sentenced to 13 years imprisonment of which 3 years imprisonment were suspended on condition of good behaviour. Dissatisfied with both conviction and sentence, the appellant appealed to this court against both the conviction and sentence.

Appellant raised five grounds of appeal which can be summarised as follows. Firstly, it is contended by the appellant that the court misdirected itself in ignoring his *alibi.* Secondly, it is contended that the State witnesses did not corroborate each other in respect of where one Brighton Mugabe was standing during the commission of the offence. Thirdly, the appellant states that the court *a quo* erred in accepting the State witnesses' evidence as credible and rejecting his defence as a fabrication. It is also contended by the appellant that the failure to call as a witness Brighton Mugabe constituted a misdirection that undermined the conviction. Finally, the appellant contends that the failure to produce as an exhibit the complainant's torn jacket rendered the conviction unsafe.

Complainant gave evidence of what led to the charges in the following manner. It was around 1100h in the morning on the day in question. Appellant, who was unknown to her entered the shop where she was employed as a shop-keeper in the company of one Brighton Mugabe who she knew. He called her by name and professed his love for her. She responded

by announcing that she did not love him. He asked her why she did not love him. She did not respond to this question. He then jumped over the counter and came to where she was. He then took her to task asking her why she would reject her when other better off women accepted his advances. He grabbed her and pushed her against the wall. He thrust his hand into her brassiere and began to fondle her breasts whist quizzing her as he pinned her against the wall. He then lowered his hand and told her that he wanted to find out if she was a virgin. Her blouse buttons flew off in the struggle as she tried to free herself from his grip. Her jacket also got torn. The appellant then showed her his index finger and told her that he wanted to find out how far it would go inside her vagina. Whilst pressing her against the wall using his knee over the stomach, the appellant inserted his finger into her vagina. After he took away his hand he told her that she was lucky as he intended to injure her. One Brighton Mugabe was present inside this shop as the appellant assaulted the complainant in broad daylight but he did not lift a finger to restrain his friend. The complainant told the trial court that the appellant told her his name during her ordeal. She maintained her evidence that the appellant indecently assaulted her without any restraint from his friend. She disputed that this was part of a plot to fix him as she was new in the area having recently assumed her duties as a shop assistant at this centre. She told the court that she had called her mother over the mobile phone and advised her of the ordeal. She reported to the police some four days later but her mother had by then reported to police. The police asked her mother to bring her. She had no-one to leave at the shop hence the delay in reporting to the police. The trial court believed her.

Complainant's report was confirmed by the person to whom she reported, one Chipo Sibanda. She told the court that the complainant identified her assailant as a kombi driver who had come in the company of one Brighton Mugabe.

The primary thrust of the appellant's attack against the conviction before us concerned the question whether the State had proved beyond reasonable doubt that the appellant committed the offence charged. In this regard the appellant's counsel place heavy emphasis on supposed lack of corroboration of the presence of the appellant at the scene of the crime. These contentions are devoid of merit. The trial court's findings that the complainant and her mother were honest, credible and trustworthy witnesses are in my view unassailable. But one must of course be mindful of the fact that the complainant was a single witness in respect of the indecent assault incident itself. But she is not a child. Section 269 of

the Criminal Procedure and Evidence Act, [*Chapter 9:07*], provides that a single witness' evidence is adequate to sustain a conviction, provided that it is satisfactory in all material respects. It is further trite that the evidence of complainants in sexual offences must be treated with circumspection. It would therefore not have been safe to convict on her evidence alone.

The thrust of the appellant's argument was that as there was no corroborative evidence which was available from a person who was said to be present, the mere omission to call that person as a witness detracted from the truthfulness of the complainant's evidence. That argument is based on an outmoded view of complaints of a sexual nature. The old approach required independent corroboration of the complaint and was based on the assumption that the victim was a potential liar. ***S* v *Banana*** 2000 (1) ZLR 607. Yet in the present case, the fact that the complainant herself placed at the scene the appellant's companion, in our view, tends to confirm her credibility as a witness for the truth. There is no basis for attacking the court a quo for failing to subpoena Brighton once it was satisfied that the state witnesses were truthful. But there was sufficient corroboration for the complainant's testimony: first the undisputed evidence that the appellant met the complainant at the shop on the day. He only challenged the time of their encounter. Secondly the appellant's utter inability to explain why the complainant would lay such an allegation against him in the circumstances that she says the crime was committed. When asked in cross-examination for an explanation, the appellant was unable to do so. He feebly suggested the existence of an imaginary plot to fix him. Whilst there is no obligation for an accused to prove his innocence of the truthfulness of any explanation he may give, one must also consider why he did not call his friend Brighton to testify to the events inside the shop.

The court *a quo*, in a well-reasoned judgment, analysed the evidence of each witness thoroughly and come to the conclusion that the State had proved its case beyond a reasonable doubt. It disbelieved the appellant's claim about a plot to fix him for good reasons. Complainant's mother had never been to the township where this incident occurred. She did not know the other "co-plotters" at all. His version was correctly rejected as false. When the evidence is assessed and considered in its totality by the court the inescapable conclusion is that the appellant committed the crime charged. In the event there is no basis for this court to upset the conviction.

As for the sentence, in order for this court to interfere the test is not whether this court, on the facts, would have preferred a different sentence. It is whether in assessing the

sentence and arriving at that sentence the trial court committed an error by taking into account factors which it should not have or ignored those factors which it should have considered thereby acted on a wrong principle. The complaint against the sentence is that the sentence induces a sense of shock in its severity. The appellant came nowhere near meeting this threshold. In light of the circumstances of the commission of the crime and the penalties set out in the Act, we are unable to find that the sentence induces a sense of shock.

In the event there is no basis to interfere with the sentence.

Consequently, the appeal is dismissed in its entirety.

BERE J authorises me to state that he agrees with this judgment.

Mugwadi & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners