

THE STATE  
versus  
AXEL SHAMBUYU BUNDUKI

HIGH COURT OF ZIMBABWE  
HUNGWE AND MAVANGIRA JJ  
HARARE, 03 October 2013 & 13 November 2013

### **Criminal Appeal**

*R. Muchirewesi*, for the appellant  
*J. Uladi*, for the respondent

MAVANGIRA J: The appellant was charged with the common law crime of sodomy. He pleaded not guilty but was convicted after a trial by the Regional Magistrate for the Eastern Division sitting at Harare. He was sentenced to 3 years imprisonment of which 2 years imprisonment was suspended for 5 years on condition of future good conduct.

The appellant appeals against both conviction and sentence.

The allegation against the appellant is that on 3 February 2006 at Strathaven, Harare, the appellant, then aged 16, unlawfully and intentionally and against the order of nature, had sexual intercourse per annum with the complainant, a 4 year old boy. The state outline states that the appellant and the complainant's mother rent cottages at the same house. On the day that the incident is alleged to have happened, the complainant went to the appellant's cottage to play. The appellant then removed the complainant's shorts and smeared vaseline on the complainant's anus after which he inserted his male member into the complainant's anus. There after, after completing his purpose the appellant took a pair of socks (stockings) and wiped the complainant's anus as well his male member. He placed the socks under his bed. The complainant later related this incident to his mother on the same day. A report was made to the police. The complainant told the police where the socks had been placed and the socks were recovered.

In his defence outline the appellant denied all the above details of the allegation. He stated therein that on that day he was at his brother's cottage when the complainant was left in his custody by his mother. He switched the computer on for the complainant to play games whilst he continued to prepare his breakfast which breakfast he also later served the

complainant. The complainant was later collected by his mother. He also states that there were some electricians who were carrying out some repairs in the living room.

The appellant raised twelve grounds of appeal against conviction. However the sixth ground is a verbatim repetition of the fifth ground. The eleventh ground is also a verbatim repetition of the tenth ground. The essence of the numerous grounds of appeal has to some extent been distilled in the appellant's heads of argument in the following terms. Firstly, that the trial court misdirected itself in finding a conviction in circumstances where the evidence of the little complainant did not substantiate or buttress the state allegations as his evidence did not support the state case. Furthermore, the evidence of the complainant's mother was inconsistent with that of the complainant and the inconsistencies were irreconcilable and it was therefore surprising that a verdict of guilty was returned. Another aspect that emerges from the grounds of appeal as set out in the notice of appeal is the contention that the forensic and medical evidence had glaring contradictions and inconsistencies and did not establish that the complainant had been sodomised. Furthermore, the complainant's evidence was not to the effect that the appellant had had sexual intercourse with him but rather that he had been injured on his male member.

State counsel filed a notice in terms of s 35 of the High Court Act, [*Cap 7:06*]. We were not satisfied that this concession by the state in not supporting the conviction was proper. We thus directed that the matter be set down for hearing in open court. During the hearing state counsel conceded that the concession earlier made was not proper or justified on a reconsideration of the evidence on record. State counsel's latter stance is supported by the evidence on record.

During his evidence in chief, the appellant said that he had masturbated in his brother's bedroom and had used a pair of socks to wipe off the semen that he ejaculated. He said that he then hid the pair of socks under the mattress. He further said that it was this same pair of socks that he had used to clean the complainant's hands and male member which were smeared with a body lotion. During his cross examination of the complainant the appellant merely suggested that the complainant had spilled some lotion and that he used a pair of socks to wipe off the complainant's hands and male member which were smeared with the lotion.

The forensic scientist who examined the pair of socks as well as the appellant's blood sample and saliva concluded that there was semen on the socks and that the semen could have originated from the appellant. The pair of socks was recovered from under the bed. This

conclusion accords with the appellant's indication that he used the pair of socks to wipe his male member after masturbating and ejaculating.

The record shows that the complainant gave evidence of the appellant wiping his male member. It also shows that the complainant at one stage pointed at his buttocks or anus as the part of his body that the appellant had tampered with. But sight should not and cannot be lost that the complainant was 4 years old at the time of the alleged incident and the trial took place some 3 years later. More importantly, however, the complainant made a report to his mother on the same day that the alleged incident occurred. She narrated to the court what the complainant said to her then. It then appears that what may be perceived as inconsistencies or contradictions in their respective testimonies is explicable or ought to be viewed in this light.

Considering the complainant's age at the pertinent time, the report that he made to his mother cannot be attributed to fanciful imagination or fantasy on his part. Furthermore, some of the details of what the complainant said happened were confirmed. One such detail pertains to the pair of socks which were recovered from where the complainant said they were put by the appellant and on which there was semen from the accused. The complainant's description to his mother as to what had transpired was a description of the appellant sodomising him. A day later a doctor who examined the complainant found on the complainant's body "laceration measuring 1cm x 0,5 cm x 0,5cm on the anterior aspect of the anal orifice". He opined that these injuries were likely caused by "tampering with the patients' anal opening." These findings were consistent with what the complainant had reported to his mother on the very day of the alleged offence. He told her that the appellant had placed his "wiwi" or male member on the complainant's back. He told her that the appellant wiped his male member with a pair of socks.

In his judgement the trial magistrate rightly stated. "This court should look at his evidence with caution. This court should look at the medical, scientific and her (his) mother's evidence holistically not in isolation".

On the basis of the evidence before it the court a quo properly convicted the appellant of sodomy. His appeal against conviction has no merit and will thus fail.

With regards to sentence it is noted that this offence was committed in 2006 in February, more than 7 years ago. The trial itself spanned over a period of some 3 years. The trial court rightly took into account that the appellant was a juvenile at the time of the commission of the offence and was still a youthful 19 years at the time of sentencing on 12

March 2009. However, a period of 4 years has elapsed since then. He has apparently since secured a job and is gainfully employed.

In *Joseph Fife v the State* SC132/88 KORSAH JA stated :

“----- one other factor has weighed heavily with us in this case. The appellant was convicted and sentenced on 22 October 1986. Shortly after his conviction he was granted bail pending the determination of his appeal. Almost two years have elapsed since he was convicted and sentenced for this offence. He is currently in gainful employment which will be effectively terminated by a confirmation of the sentence imposed. Bearing in mind that it is in the interest of society that the injury should be punished at the earliest possible time and it is in the interest of the offender that he should receive punishment while the memory of his transgression is upon him ..... I am of the view that a confirmation of the custodial term imposed will be most inappropriate so late in the day.”

Due to similar and mitigatory the factors pertaining to the appellant as discussed above it is this court’s view that it is not desirable in the circumstances that the sentence of the court *a quo* be confirmed as the result would be to negatively impact on the appellant’s life so late in the day. A wholly suspended custodial sentence will meet the justice of the case.

In the result the appeal against conviction is dismissed. The appeal against sentence is upheld. Consequently the sentence of the court *a quo* is hereby set aside and substituted with the following:

“3 years imprisonment wholly suspended for 5 years on condition the accused doe not during that period, commit ant offence of a sexual nature for which upon conviction he is sentenced to imprisonment without the option of a fine”

HUNGWE J agrees.

*Mushangwe & Company*, applicant’s legal practitioners  
*Attorney General Office*, respondent’s legal practitioners