

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

“REPORTABLE”

Case No: AR579/2019

IN THE MATTER BETWEEN:

JABULANI EMMANUEL MBHAMALI

APPELLANT

and

THE STATE

RESPONDENT

This judgment was handed down electronically by circulation to the parties’ legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 12 October 2021.

ORDER

The appeal against conviction is dismissed.

JUDGMENT

Delivered on: 12 October 2021

Hadebe J (Moodley J concurring)

[1] The appellant herein appeared before the regional court, Inkanyezi, charged with rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (‘Sexual Offences Act’). Accused 2 (‘Mrs Phakathi’) was charged with failure to immediately report a sexual offence against a child in contravention of s 54(1)(a) read with s 54(1)(b), 56, 57, 58, 59, 60 and 61 of

the Sexual Offences Act and s 94 of the Criminal Procedure Act 51 of 1977 ('the CPA').

[2] On 16 August 2018, they were each found guilty as charged. On 19 November 2018, the appellant was sentenced to 18 years' imprisonment and Mrs Phakathi to 3 years' imprisonment in terms of s 276(1)(i) of the CPA. On 31 May 2019, the appellant was granted leave to appeal against conviction only by the trial court.

[3] There is no record of a petition to the Judge President before me on the issue of the refusal of leave to appeal against sentence. In the circumstances, this judgment deals with the appeal against conviction only.

[4] The application for leave to appeal against conviction is premised upon the following grounds:

- (a) there is enough basis to hold that when the appellant met with the complainant, in his mind he was meeting with his prospective wife who was consenting to all the activities they were engaging in, and this included sexual intercourse;
- (b) the complainant never told the appellant that she did not agree to be his wife nor that she did not love him;
- (c) that the complainant had come on her own to the appellant's home and that the appellant had not once gone to fetch the complainant from her place of residence. From this observation, the argument on behalf of the appellant is that the complainant gave consent to the proposed marriage and also to sexual intercourse;
- (d) the complainant's father is criticised for not having been a truthful witness in that he had told the court that he had no knowledge of any relationship between the appellant and the complainant but later on changed his testimony and stated that he was told by the leader (Mrs Phakathi) and that he had disapproved of the proposed arranged marriage;
- (e) that the complainant had gone to help with the chores at the appellant's house as a sign of her willingness to be a wife to the appellant;

- (f) it is submitted further that the trial court erred in finding that the complainant's visits to the appellant's rented premises were not indications that she was consenting to the marriage proposal and sexual intercourse with the appellant;
- (g) there is a concession in the submissions on behalf of the appellant that there was suspicion that the complainant was a child. However, the argument in this regard is that, given the fact that the complainant was nominated by the elders of the church and that the doctor recorded that she weighed 46kg and was 165cm tall, this was an indication that the complainant appeared to be of consenting age.

[5] In its response, the following has been submitted on behalf of the respondent:

- (a) the religious practice was not properly performed in the instant case. This is based on the young age of the complainant; her lack of consent; the fact that her parent was not involved and that, according to Christian values, sexual intercourse before marriage is forbidden. According to the respondent, what happened in this case bordered on human trafficking;
- (b) there is no justification of the appellant's conduct in that, in particular, the religious practice asserted by him did not negate the unlawfulness of his conduct. The other argument in this regard is that the appellant could not be said to have lacked mens rea in the form of intention due to his belief in his church practice of getting a wife;
- (c) there is sufficient corroboration implicating the appellant and thus sustaining the conviction;
- (d) the learned magistrate delivered a well-reasoned judgment. In the circumstances, it is submitted that the State proved the case against the appellant beyond reasonable doubt;
- (e) the appellant has failed to prove that there was any misdirection (by the trial court) in convicting him;
- (f) The respondent finally submits that the appeal against conviction stood to be dismissed.

The background facts

[6] The complainant, who was 14 years of age, was given to an arranged marriage proposal to the appellant who was 32 years old at that stage. The appellant, Mrs Phakathi, the complainant and her father all belonged to one church, the 12 Apostles Church in Christ ('the church'). They did not necessarily belong to the same branch of the church. The church encourages marriage amongst its members. Once a man is ready to settle down to marry, he approaches one of the female leaders in church and asks to be matched with a partner. The idea of this practice is that people should already be lovers and of a marriageable age.

[7] According to Mr Senzo Bernard Dlamini ('Mr Dlamini'), the overseer at the church where the complainant and her father were members, this practice of matching people for purposes of marriage had to be in keeping with the law and that even the ages of the two people to be matched should be in accordance with the legally recognised age of marriage. He, however, strenuously criticised the fact that the appellant had engaged in sexual intercourse with the complainant. This was so because, according to him, the church practice and belief did not permit for cohabitation and engagement in sexual intercourse before marriage even though the two people may have been introduced to each other.

[8] The complainant and her two younger siblings were being raised by their father as a single parent. At one stage, they had ended up staying at the house of Mrs Phakathi. According to the complainant, Mrs Phakathi had asked her to come and live with her as she had found a husband for her. She had dismissed this as a joke. According to the complainant's father, the reason was that whenever he would be working a night shift, the complainant, who was on TB treatment, would default on her medication. It was as a result of this that Mrs Phakathi approached him and offered to take care of the three girls to ensure that the complainant consistently took her medication. This was confirmed by Mrs Phakathi at the trial.

[9] It was during this stage that Mrs Phakathi started the matchmaking process. She took it upon herself to dispatch the complainant to the house of the appellant to be introduced as a prospective wife. According to her, it was only after this initiative that she involved the complainant's father in what was happening. Her version is

that, the complainant's father agreed to the arranged marriage. On the other hand, the complainant's father was adamant that when Mrs Phakathi introduced this topic to him, he was incensed and demanded the return of his children. Mrs Phakathi had thereupon apologised and she continued taking care of the children.

[10] The first visit of the complainant to the house of the appellant was the beginning of a series of such visits. According to the complainant, each visit would be approved by Mrs Phakathi. On at least three of these visits, the complainant was subjected to sexual intercourse by the appellant. She was not a willing participant. The appellant would threaten her with violence if she did not co-operate and refused to remove her clothing. At one stage, he had threatened to whip her with his belt. Each time after the sexual intercourse took place, she returned to Mrs Phakathi and made a report of same and noted her displeasure at what was happening. Mrs Phakathi would tell her not to worry, to hang in there as everything would be alright. At one stage, she personally escorted the complainant to the appellant's workplace and again sexual intercourse took place there.

[11] The appellant had started by giving money to the complainant to buy a phone after their first meeting. The phone was bought and was activated by Mrs Phakathi to facilitate communication between the appellant and the complainant. Other gifts followed in the form of a dress, jersey, takkies etc, sourced by the appellant and given to the complainant. The complainant would be called to the appellant's house for a variety of chores. At one stage, she was summoned to take care of the appellant's grandmother. She went there with a member of Mrs Phakathi's family. In yet another instance, she was called up to wash the appellant's blankets who was now referred to as her husband.

[12] According to the complainant's father, he only became aware of what was happening when the children visited him during school holidays. When it was time to return to Mrs Phakathi, the children refused to go. It was then that the complainant revealed what had been happening. He immediately approached the church leadership who summoned Mrs Phakathi to a meeting. She was chastised and blamed for what she had done. All she did was apologise. The social workers were

then involved and the police eventually arrested both the appellant and Mrs Phakathi.

[13] The defence raised by the appellant purported to show that he was not aware that the complainant was underage. This, however, paled into insignificance when it became apparent that the appellant actually knew, or ought to have known, that the complainant was a child. His mother indicated that the complainant was too young. Mrs Phakathi retorted, telling her that they should in fact be thanking her and querying if they would rather she brought them an 'old goat' for a bride for the appellant.

[14] The appellant himself could not disassociate himself from the fact that he was aware that the complainant was a child. At one stage, in his evidence-in-chief, this is what he responded to Mr Khuzwayo's (defence attorney for appellant) enquiry:

'Mr Khuzwayo: Your overall impression what, what comment did you make?

Appellant: My mother complained, your worship and she complained that the, this suitor, in as far as the lady leader was concerned was young and when she complained like that, she even told the lady leader in question, your worship, that found her for us, that, that child was young

Mr Khuzwayo: Yes, what was your overall impression? What did you say?

Appellant: Your worship, I also had a complaint

Mr Khuzwayo: What was your complaint?

Appellant: I also complained that that **thing** looked small and young' (My emphasis)

[15] It was only under cross-examination that the appellant tried to extricate himself from the knowledge that he obviously possessed that the complainant was a child. He started giving new versions of his impression of the complainant being young. He told the court that by saying the complainant was young he meant that the complainant had a slender body. This changed with the appellant extending the meaning of the word "young" to say that what he meant by this was that the complainant was skinny. This, however, did not assist the appellant as he had, in no uncertain terms, conceded that he was aware that the complainant was young.

[16] The defence witness for the appellant, Ms Ngiba, told the court that when she first saw the complainant at the appellant's rented premises she had asked her if her parents were aware she was there. She, however, denied that this was out of concern based on the fact that she could see that the complainant was a child. She gave a number of nonsensical explanations as to why she had asked that question. When the state prosecutor asked her if she would ask a grown man like him a similar question, she indicated she would not have. She started introducing the description of the complainant being skinny and tall, the very same explanation that had been given by the appellant, as an afterthought, might I add. It later transpired that she had been sitting in court whilst the appellant and his mother were giving evidence.

The legal position

[17] In terms of s 1(1) of the Sexual Offences Act, unless the context indicates otherwise, "child" means a person under the age of 18 years and "children" has a corresponding meaning.' The same description of the word "child" is given in terms of s 1 of the Children's Act 38 of 2005.

[18] Sections 15 and 16 of the Sexual Offences Act create a prohibition of any act of sexual penetration or sexual violation with a child who is 12 years or older but under the age of 16 years. The fact that such child might have consented to such an act is no defence. Simply put, a child who is 12 years of age or older, but under the age of 16 years, is incapable of giving consent to any act of sexual penetration or sexual violation on her.

[19] The description of a "child" is the same in terms of s 28(3) of the Constitution. In terms of s 28(1)(d), 'every child has the right to be protected from maltreatment, neglect, abuse or degradation' and in terms of s 28(2), 'a child's best interests are of paramount importance in every matter concerning the child'.

[20] In terms of s 12(1) of the Children's Act, 'every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being'. Section 56(1) of the Sexual Offences Act stipulates that 'whenever an

accused person is charged with an offence under section 3, 4, 5, 6 or 7 it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant'

[21] Under s 3(1) of the Recognition of Customary Marriages Act 120 of 1998, the marriageable age has been recognised to be 18 years for both girls and boys. A comparison of this section with s 25 of the Marriage Act 25 of 1961 creates a level of confusion in that, according to the latter Act, persons below the age of 18 years are allowed to get married as long as they have the consent of the Commissioner of Child Welfare. This is perceived as sending conflicting messages in respect of efforts to end child marriages in South Africa.¹

[22] In *Jezile v S*² the appellant, 28 years of age, had removed the complainant, who was 14 years at the time and had forced her by using the custom of ukuthwala to be his young bride. He forced her/removed her from her home, with the assistance of the complainant's uncles and grandmother to stay with him at his brother's place in Fillipi in the Western Cape. He kept her captive for a period of almost three months during which he forced himself on the complainant and had sexual intercourse with her several times. In the process the complainant was assaulted as she was being forced to engage in sexual intercourse with the appellant.

[23] After a number of failed attempts, the complainant finally managed to escape and report the matter to the police. In dismissing the appeals against convictions and sentences on the offences of trafficking and rape, the appeal court said the following: 'However, in our view, it cannot be countenanced that the practices associated with the aberrant form of ukuthwala could secure protection under our law. We cannot therefore, even on the rather precarious ground of assertion by the appellant of a belief in the aberrant form of ukuthwala as constituting the "traditional" customs of his community, which led to a "putative customary marriage" find that had he neither

¹ L Mwambene 'Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi' (2018) 18 African Human Rights Law Journal 527.

² *Jezile v S and Others* [2015] ZAWCHC 31; [2015] 3 All SA 201 (WCC).

trafficked the complainant for sexual purposes (as defined) nor committed the rapes without the necessary intention.’³

[24] Whilst noting that the trial court in *Jezile* had accepted ‘that the appellant’s moral blameworthiness was mitigated by the belief which he held concerning traditional practices and accepted that in his own mind, the appellant had not foreseen the catastrophic consequences to the complainant when he set in motion the course of events’, the court of appeal however, stressed that ‘blameworthiness must be clearly distinguished from the notion or perception that any aberrant form of custom or traditional practice can of itself constitute a **substantial and compelling circumstance**’ (My emphasis). The court further stated that this could not have been contemplated by the legislature, as it would fall foul of our constitution and would in any event defeat one of the very purposes for which s 51 of the Criminal Law Amendment Act 105 of 1997 was enacted.⁴

Other literature considered

[25] In a paper entitled ‘Religious Beliefs and Practices contributing towards child abuse and neglect’ published in the Child Abuse Research in South Africa Journal Vol 17 No2, a study was conducted by the University of Limpopo, which focused on the beliefs and practices of an Apostolic church in Zimbabwe (the case of Johanne Masowe Yechishanu Apostolic sect, Harare, Zimbabwe)’, the authors from the Department of Social Work: University of Limpopo⁵ delve deep into the beliefs and practices of the religious sect at the cited church, practicing the Apostolic beliefs. They state that while the study is based upon the Zimbabwean experience, it is, however, of relevance to all African countries who face problems as a result of cultural practices.

[26] The study found that ‘[c]ases of child abuse and neglect perpetrated in honour of religious beliefs and practices are prevalent in most African and Asian countries’.

³ *Jezile* para 95.

⁴ *Jezile* para 103.

⁵ J C Makhubele et al ‘Religious Beliefs and Practices contributing towards child abuse and neglect: The case of Johanne Masowe Yechishanu Apostolic sect, Harare, Zimbabwe’ (2016) 17(2) *Child Abuse Research in South Africa* 37.

It was further established that '[r]eligious beliefs and practices can nurture, encourage and justify child abuse and that religious inspirations for child abuse and neglect had been practically ignored in social science research'.

[27] The study further established that '[t]he problem of monitoring is thus more pronounced in the case of child abuse and neglect'. It further found that '[t]he advent of African initiated Apostolic Churches has further complicated the whole situation'. It found that '[i]n general, churches under the auspices of religious beliefs and practices, are considered to be protective of children's right and guard against abuse'. However, on the contrary, the study found that 'it had been unearthed that religious beliefs reinforced by some "men of cloth" are actually compounding some of the unacceptable practices of exploiting the innocent children in these churches'.

[28] The study found further that the issues of freedom of association in terms of religious beliefs in countries such as Zimbabwe and South Africa compound the problem of child abuse under the guise of religion. Because of this legal protection, the study found 'many mushrooming apostolic sects in Africa that are causing serious abuses and neglect of children had been largely ignored in the child abuse literature'.

[29] Under the subheading 'Apostolicism and Child Sexual Abuse' the study refers to a 2015 study by Kachere⁶ which reported that 'the majority of school going girls in Marange, some as young as ten, have been married to older men from their church, the Johanne Masowe Apostolic Sect;' which according to this study, 'is infamous for its following of the practice of polygamy'. In that study, Kachere pointed out that most marriages are arranged between adult men and underage girls. Makubele et al further found that 'religious beliefs and practices also facilitate child abuse in the form of rape under the guise of marriage in these churches'

⁶ J C Makubele et al at 40.

[30] A further reference is made in the study to an article by Langa⁷ wherein Langa quotes the then United States ambassador to Zimbabwe, Bruce Wherton, on his twitter chat on child marriages in Zimbabwe:

‘Can a child really be married at 13? No its rape.’

He is said to have gone on to indicate that the girls involved ended up in violent marriages, experiencing birth complications and that it was one of the causes of high maternal and child mortality rates.

Finally, the respondents to the study conducted by Makhubele et al told the researchers that forcing a girl into marriage with a man much older than she is before reaching 18 was to them ‘not abuse as long as it has been sanctioned by God and approved by the church members’.

[31] The study concludes by making the observation that ‘[t]hough the principles of non-judgmental, acceptance and self-determination should be highly respected in this regard, where the constitutional rights of children are undermined, justice should be sought and those responsible should be held accountable and uphold the rule of law in favour of children for their best interests’. It is further recommended that an ‘Afrocentric social work perspective should be applied when working with these churches since they have an African origin and roots’.

[32] Mwambene states in her article that in Zimbabwe, South Africa and Malawi, research has shown that child marriages are linked to harmful practices that are embedded in culture. As a result, she states, ‘law reform to end child marriage, therefore, is a difficult task since it presents a potential conflict between children’s rights and cultural rights’.

[33] Mwambene refers to paragraph 19 of the ‘Joint General Recommendation / General Comment 31 of the Committee on the Elimination of Discrimination against Women⁸ and 18 of the Committee on the Rights of the Child on harmful practices’ in which she indicates ‘it was considered that child marriage is a form of forced marriage given that one or both parties have not expressed their full, free and

⁷ Ibid.

⁸ CEDAW.

informed consent'.⁹ It is stated in the same article that all African countries are faced with the challenge of child marriages, whether with a high prevalence or a low prevalence as in South Africa where the prevalence is at 6%.¹⁰

[34] The article shows that child brides are most likely to be found in rural areas, amongst the poorest and most illiterate segments of the population. The study again found that in Zimbabwe, factors leading to child marriage included the persistence of deeply entrenched social attitudes, which support early and underage marriage; and religious beliefs, particularly amongst the Apostolic Church communities, which encourage girls between 12 and 16 years to get married in order not to sin by having sexual relations outside marriage.

[35] The study further found that in South Africa an estimated 6% of girls marry before the age of 18 years and 1% by the age of 15 years.¹¹ Be that as it may, the study concluded that the fact remains that child marriage in South Africa is a reality, which is a threat to the protection of children's rights.

[36] The study referred to the child marriages in South Africa as per 'Statistics South Africa "Marriages and Divorces" 2013'.¹² These statistics showed that in 2013, '14 grooms and 172 brides under the age of 18 were married according to civil law. In the same year nine grooms and 79 brides under the age of 18 were married according to customary law'. Statistics South Africa also released the 2016 Community Survey results indicating 'that more than 91 000 South African girls between the ages of 12 and 17 years are either married, divorced, widowed or living with a partner'. Of this figure KwaZulu-Natal ranked the highest at 25 205 and Gauteng with 15 929 young girls married before the age of 18 years. The 2016 UNICEF¹³ data revealed a rise in child marriages in South Africa.

[37] The study refers to the South African Law Reform Commission as having 'proposed the Prohibition of Forced Marriages and Child Marriages Bill, 2015 which

⁹ Mwambene, fn 3.

¹⁰ Mwambene, fn 4.

¹¹ Mwambene, fn 37.

¹² Mwambene, fn 40.

¹³ Mwambene, fn 43.

seeks to outlaw and criminalise all forced and child marriages as a result of, among other factors, ukuthwala.¹⁴ It also refers to the Gender Directorate¹⁵ where it is said to have 'stressed that South African values, beliefs and practices **must be consistent with the constitution which specifically guarantees the rights of children**'. (My emphasis)

[38] The study indicates that 'if the Prohibition Bill becomes law, it will be the first time that such child marriages will be criminalised in South Africa'. Besides this, the bill is expected to give effect to international law and the constitutional values of human dignity. As per this study, the Bill will also 'require that marriages are entered into freely and without any form of coercion and will provide for the prosecution and imposition of penalties on persons who commit offences'. Be that as it may, the Bill is criticised for not repealing the provisions that 'allow children to get married in terms of both the Marriage Act and the Recognition of Customary Marriages Act'. It is also further criticised for not amending the 'provisions in the Children's Act that are vague in relation to the minimum age of marriage and the betrothal of children'.

[39] The study resorts to international instruments (the Joint General Comment of the African Commission on Human and People's rights (African Commission; and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on Ending Child Marriage (2017)).¹⁶ The paper applauds the position adopted by the Joint General Comment in that it had 'effectively laid down a higher standard, reviewing all legislation that allows the majority age to be attained through marriage'.¹⁷

[40] These international instruments are commended for obliging 'state parties to enact appropriate national legislative measures that would guarantee that no marriage took place without the free and full consent of both parties'.¹⁸ The study refers to the ICCPR Human Rights Committee's General Comment 28¹⁹ which

¹⁴ Mwambene at 543.

¹⁵ Ibid.

¹⁶ Mwambene, fn 79.

¹⁷ Mwambene, fn 82.

¹⁸ Mwambene, fn 88.

¹⁹ Mwambene, fn 89.

‘elaborates on the obligation of state parties to eradicate harmful cultural practices that lead to inequality between men and women as follows:

‘Inequality in the enjoyment of rights by women is deeply embedded in tradition, history and culture, including religious attitudes...States parties should ensure that traditional, historical, religious and cultural attitudes are not used to justify violations of women’s rights to equality before the law and to equal enjoyment of all Covenant rights.’²⁰

[41] The study concludes that ‘early marriage is now understood to be harmful to the health of children’.²¹ It further states that the ‘international standards stipulate that **where cultural practices hinder or stand in the way of children’s rights, the cultural practice must give way**’. (My emphasis)

[42] Writing on the law and its people, Carmel Rickard (Rickard)²² laments the tragic death of a 14 year old Zimbabwean girl, M[....] M[....], who died during child birth in July 2021. She describes this as a ‘horrific death’ of this young girl. She persists that if that was not enough, her burial was just hours later by the Apostolic Church to which she and her family belonged. This apparently has stirred up many people in Zimbabwe. Her death came amidst many months of international and regional organisations warning about the dire consequences for child marriage of COVID-19, lockdown and the economic stress it causes. Rickard notes in this article that this young girl’s death and her ‘marriage’ might partly have resulted from ‘economic stressors related to COVID-19 since such marriages inevitably go along with significant bride price’.

[43] In her article, Rickard refers to the judgment of *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs N.O. and Others*,²³ a judgment of the Constitutional Court of Zimbabwe, wherein the lawful age of marriage for both boys and girls was set at 18.

²⁰ Mwambene at 539.

²¹ Mwambene, fn 92 (The Convention on the Rights of the Child was ratified by South Africa in 1995).

²² C Rickard ‘A matter of Justice’ (2021) *Legalbriefs*.

²³ *Mudzuru and Another v Ministry of Justice, Legal & Parliamentary Affairs N.O. and Others* [2016] ZWCC 12.

[44] In terms of *Mudzuru* 'no religious, cultural or other grounds could provide justification for child marriages'. *Mudzuru* further decided that 'there could be no special clause allowing a guardian, a judge, a cultural or church leader to give permission for an under-age girl to marry, nor could there ever be an "exceptional case"' and that under the constitution *Mudzuru* stated that there was 'an absolute prohibition on child marriage'. Section 78(2) of the Constitution of the Republic of Zimbabwe²⁴ provides that:

'no person may be compelled to enter into marriage against their will'

[45] The article suggests that according to Human Rights Watch director (HRW), Southern Africa, M[...] had been forced out of school into marriage at 13 years of age. It further states this is not uncommon in the widespread religious sect to which M[...]’s family belongs and which sects unite Christian beliefs with traditional cultures. According to the HRW in Zimbabwe, indigenous apostolic churches with such beliefs have 'millions of followers'; this strength in numbers in turn makes the potential for church sanctioned rape of underage girls disturbing. Despite the *Mudzuru* judgment and the dictates of s 78, according to HRW the practice continues. Based on the statement from the HRW director, founded on a pronouncement by a member of the apostolic church 'as soon as a girl reaches puberty, any man in the church can claim her for his wife'.

[46] The article by Rickard correctly laments the inaction of the Harare Government in failing to outlaw child marriages despite the enabling instruments, one of them being the Constitutional Court judgment in *Mudzuru* and its obligations under international law and the conventions to which it is a party. She further states that when the *Mudzuru* case was argued, the State had defended strenuously the law that was eventually found unconstitutional. The argument in this regard was that 'girls had to be allowed to marry at 16 and that a different minimum age for marriage had to be set for boys and girls because they came to physical and emotional maturity at different times'.

²⁴ Constitution of the Republic of Zimbabwe Amendment Act 20 of 2013 (came into force in May 2013).

[47] The article sadly states that all this inaction by the State is fuelled by the quest in numbers for voting purposes for the ruling Zanu PF Party. The traditionalists who practice child marriage are estimated to number in millions and they make up the indigenous apostolic churches to which the deceased's family belonged. The article states further that banning child marriage risks alienating the vote of the members of these churches. This is extremely sad, that political interests are allowed to supersede the constitutionally protected rights of the girl children in favour of political interests. Even more sad, as things stand, the relatives of M[....] as per HRW were quoted as saying 'the church is planning to "give" a nine-year-old girl as a "replacement" to the man who was regarded by the church as M[....]'s husband'.

[48] The article states that the family of M[....] is known as well as her church-sanctioned rapist. However, there have been no arrests despite the police having said they are investigating. Despite the constitutional reforms in the form of the *Mudzuru* judgment and the Zimbabwean Constitution, five years later nothing has changed and, it is doubtful that any investigation will ever take place into this tragedy. It is hard to understand the lackadaisical attitude of the Zimbabwe government where its children are concerned, considering that it is a signatory to quite a few international instruments. amongst these, are:

- (i) Committee on the Rights of the Child on Harmful Practices (CRC) ratified by Zimbabwe in 1990;
- (ii) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ratified by Zimbabwe in 1991;
- (iii) The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1964), ratified by Zimbabwe in 1992;
- (iv) The African Youth Charter (2006) ratified by Zimbabwe in 1994;
- (v) The African Women's Protocol ratified by Zimbabwe in 2008;
- (vi) The 2014 Declaration by the African Union (AU), urging all member states to set the minimum age of marriage at 18 for both boys and girls.

There are many other such Regional and International instruments which have not been incorporated in this judgment.

[49] It is sad, as noted by Rickard, that even though Lawyers for Human Rights have addressed the issues of the 'apostolic sect'; urging that the government stops child marriages 'as they expose young girls to sexual predators and (are) tantamount to rape and child abuse'; Lawyers for Human Rights are reported to have said nothing about government in-action. (It can only be hoped that more voices will join and move the Zimbabwean government to act in the interests of its children and to prevent the occurrence of more deaths like those of M[...] caused by its own inaction).

Findings by the trial court

[50] In a well-reasoned judgment, the trial court found that:

- (a) Despite the time lapse between the incidents of rape and her testifying in court (two years to be precise), the complainant was able to give a coherent and detailed version of the events and that her evidence had not broken down under cross-examination;
- (b) That whatever contradictions were found to exist in the complainant's evidence were not material to the issues in dispute and did not affect her credibility;
- (c) The evidence of other State witnesses corroborated parts of her evidence relating to the reasons and time spent at the accused's homestead;
- (d) The medical examination did not assist the State as the doctor was unable to reach a conclusion as the alleged incident or incidents (of rape) occurred one month from the date of the examination.

[51] In so far as the issue of consent by the complainant, the trial court found that:

- (a) The complainant was under the guardianship of Mrs Phakathi, and had unlimited access to her father;
- (b) One of the State witnesses, Mrs Mbhamali, was the mother of the appellant and had an interest in the outcome of the case;

- (c) Despite Mrs Mbhamali's concerns about the age of the complainant, she did not want to question the actions of her son, the appellant, and Mrs Phakathi, the church leader;
- (d) Mrs Phakathi had abused her authority over the complainant, and that, given the age difference between the complainant, the appellant and Mrs Phakathi, even if the complainant had refused (to be part of the arranged marriage) their authority over her, however, would have inhibited her resistance; and
- (e) the visits by the complainant to the appellant's homestead and his rented premises could not be construed as an indication that she consented to the arrangement made on her behalf.

[52] In evaluating the defence evidence, the trial court found that:

- (a) The appellant did not impress as a witness, that he had raised new issues in his evidence that had not been canvassed with the witnesses;
- (b) The tone of the appellant indicated that he knew that the complainant was young;
- (c) In so far as Mrs Phakathi is concerned, the trial court warned itself that the relationship between the appellant and her had soured. It thus warned itself that Mrs Phakathi's evidence had to be evaluated with caution and that she would possibly have a motive to tell lies;
- (d) That Mrs Phakathi had made a poor impression as a witness.

[53] In so far as the witness called in defence by the appellant, the trial court found that her evidence could not carry much weight as she had sat in court during trial.

[54] The court found it impossible that the complainant would complain about the sexual intercourse between her and the appellant when no one knew about it, and in the process risk the sanction by the church if it was found that the sexual intercourse had been consensual.

[55] The trial court found it impossible that the complainant would risk losing the gifts she received from the appellant by complaining about the sexual intercourse that had taken place.

[56] It further questioned the action of the complainant's father of complaining and laying a charge if he had indeed been implicit in this arranged child marriage. It also found that the father of the complainant was not aware of the arranged marriage otherwise the lobola payment would not have been arranged with the daughter of Mrs Phakathi, which daughter was also a party at the commencement of this arranged marriage. The court found that even if it were to be found that the complainant's father had consented to the arranged marriage, he was, however, at law, unable to consent on her behalf to sexual intercourse.

[57] The court further found that upon the evaluation of the totality of the evidence, it was satisfied beyond reasonable doubt that the complainant did not consent to sexual intercourse with the appellant and that there was no reasonable possibility that the appellant believed that she had consented.

[58] Further findings by the trial court were that the appellant could not rely on the defences raised by s 56(2)(a) of the Sexual Offences Act. This section provides as follows:

- '(2) Whenever an accused person is charged with an offence under-
 - (a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older.'

[59] In arriving at this finding, the trial court considered that from the evidence, it was clear that the appellant's mother did not believe that the complainant was old enough to be a partner for the appellant. The court further found that the appellant was aware of his mother's concerns and that he shared the same concerns. Further, it found that there was no evidence before it that the complainant had deceived the

appellant into believing that she was 16 years or older. In the circumstances, the court found that the evidence of the appellant and the defence witness that the appellant reasonably believed that the complainant was 16 years, could not be reasonably, possibly true.

[60] In the final analysis, the court found that after weighing all the evidence and applying the cautionary rules, and giving a careful consideration to the facts, it was satisfied that despite the defects in the complainant's case, she had told the truth. In the circumstances, it found the version of the appellant not to be reasonably possibly true and it accordingly rejected it as false. It consequently convicted the appellant and Mrs Phakathi, respectively, as charged.

[61] I can find no fault with the findings made by the trial court based on the evidence that was presented before it. The court warned itself of the inherent dangers in accepting the evidence of the complainant without due caution owing to the fact that she was both a single witness and a child witness. The court went through all the evidence with a fine comb. It raised its concerns where it found reason to be concerned with the evidence presented. It, with clarity, expressed the effects of the defects that it found to exist in each party's version. In the circumstances, I can find no misdirection in the court's reasoning and evaluation of the evidence and accordingly the verdict of guilty it returned in so far as the appellant is concerned.

Conclusion

[62] A consideration of the literature and works in this judgment goes to show that the problem of forced child marriages is a huge problem and has infiltrated most of the African Union countries in the Southern hemisphere. The Republic of South Africa has not been spared. If these undesirable child marriages are not achieved through what is referred to in *Jezile v S*²⁵ as the aberrant ukuthwala custom, it is done under the guise of the church as it is evident what happens in the Apostolic Church, as it has happened in the matter before us.

²⁵ *Jezile v S and Others* [2015] ZAWCHC 31; [2015] 3 All SA 201 (WCC).

[63] It is sad that in most instances of these marriages, the families of these young 'brides' are complicit in having their underage children sold in these forced child marriages. The patriarchal structure of the families plays a prominent role, as it is evidently clear in *Jezile*. The mother of the complainant in that case was not consulted. Her uncles, together with the grandmother of the complainant took the decision to get her off school at age 14 and get her married against her will to the appellant in that matter. Her mother's attempts to spare her the trauma were thwarted by her own family who returned the complainant to the appellant at every turn when she tried to escape. In the matter before us, the trial court correctly observed that the overseer of the church, Mr Dlamini, was not concerned with the fact of the arranged child marriage but rather that premarital sex had taken place.

[64] The unwillingness of the concerned countries to put in place and legislate on the enabling instruments to protect these young girls is worrisome. In countries like Zimbabwe and Malawi, the reasons proffered for such failure is a big concern. It suggests that as long as the powers that be are reluctant to implement the legislation that is available to them, despite all the conventions that are in place, these child marriages are going to continue unabated.

[65] It seems clear that the courts, especially the courts with higher jurisdictions, have to be the buffer between these young women and their families and the religious sectors that they belong to. The courts have to be relentless in this and they should continue cracking the whip until the law against these marriages is entrenched. The courts in *Mudzuru* and *Jezile* have to be commended in standing their ground in fighting these evil practices that perpetrate the abuse of these defenceless young girls.

[66] In conclusion, I borrow the following words from Rickard:²⁶

'August is Women's month in SA, a time to highlight issues particularly affecting women and girls; it would be hard to find a more urgent target for action than

²⁶ C Rickard op cit fn 23.

child marriage. The SA Government has recently published a paper on its updated, comprehensive marriage law proposals for comment; hoping to submit an official Bill to Parliament by 2024. Among the issues it addresses is a strict minimum age of marriage, proposing the 'complete removal of child marriages' in the country's planned new marriage regime.

But all that is in the future and meanwhile, given the prevalence of child marriage in many parts of Southern Africa, it is a chance that M[...] lived and died in Zimbabwe rather than SA.'

[67] I align myself with every sentiment in this excerpt. In the final analysis and based on the consideration of the evidence presented before the trial court, I am satisfied that the appellant was correctly convicted and that his appeal against conviction should fail. The evidence abundantly shows that he was aware that the complainant was underage. Despite his mother's concerns and his own concerns regarding the complainant's age, he went ahead and forced himself on the complainant and raped her on diverse occasions. The fact that his own church did not permit sexual engagement before marriage does not make the issues any better for the appellant.

[68] At any rate, the appellant's church's beliefs and practices cannot supersede the laws and the Constitution of this country which forbids sexual intercourse with underage girls. In the circumstances, I make the following order:

The appeal against conviction is dismissed.

Hadebe J

Moodley J

APPEARANCES

Date of Hearing: 13 August 2021

Date of Judgment: 12 October 2021

Counsel for the Appellant:

E. M. Chiliza
Durban Justice Centre
Ground Floor, The Marine Building
22 Dorothy Nyembe Street
DURBAN
Tel: 304 3290 / 304 0100
Ref: TP Pillay
Email: EMChiliza@legal-aid.co.za

Counsel for the State:

B. Vika
Director of Public Prosecutions
88 Joe Slovo Street
FNB Building
5th Floor
DURBAN
Tel: 031 – 334 5267
Cell: 074 588 3737
Email: BVika@npa.gov.za