



The Zimbabwe Electronic Law Journal

Commentary on Contemporary Legal Issues

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The Editorial Board of this new electronic journal comprises:

Dr T. Mutangi, Professor L. Madhuku and Dr. I. Maja (co-Chief editors) and Professors J. Stewart and G. Feltoe.

The primary objective of this journal is to post regularly online articles discussing topical and other important legal issues in Zimbabwe soon after these issues have arisen. However, other articles on other important issues will also be published.

The intention is to post at least two editions of this journal each year depending on the availability of articles.

We would like to take this opportunity to invite persons to submit for consideration for publication in this journal articles, case notes and book reviews.

Articles must be original articles that have not been published previously, although the Editors may consider republication of an article that has been published elsewhere if the written authorization of the other publisher is provided. If the article has been or will be submitted for publication elsewhere, this must be clearly stated. Although we would like to receive articles on issues relating to Zimbabwe, we would also encourage authors to send to us other articles for possible publication.

Case note on the case of *Mapingure v Minister of Home Affairs & Ors S-22-14*

By G. Feltoe

The facts

The appellant was raped by robbers at her home. She immediately lodged a report with the police and requested that she be taken to a doctor to be given medication to prevent pregnancy and any sexually transmitted infection. Later that day, she was taken to hospital and attended to by a doctor. She repeated her request, but the doctor only treated her for an injured knee. He said that he could only attend to her request for preventive medication in the presence of a police officer and that the medication had to be administered within 72 hours of the sexual intercourse having occurred. She went to the police station the following day and was advised that the officer who dealt with her case was not available. She then returned to the hospital, but the doctor insisted that he could only treat her if a police report was made available. Three days after the rape, she attended the hospital with another police officer. At that stage, the doctor informed her that he could not treat her as the prescribed 72 hours had already elapsed.

Eventually, a month after the rape, the appellant's pregnancy was formally confirmed. Thereafter, the appellant went to see the investigating police officer who referred her to a public prosecutor. She told the prosecutor that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. Four months after the rape, acting on the direction of the police, she returned to the prosecutor's office and was advised that she required a pregnancy termination order. The prosecutor then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate nearly six months after the rape, but the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure and declined to do so. Eventually, after the full term of her pregnancy, the appellant gave birth to her child.

The applicant brought an action against the Ministers of Home Affairs, Health and Justice for damages for physical and mental pain, anguish and stress suffered and for maintenance for the child until the child turned 18. The basis of the claim was that the employees of the three Ministries concerned were negligent in their failure to prevent the pregnancy or to expedite its termination. The particulars of negligence were itemised. Her claim was dismissed.

The questions for determination on appeal were whether or not the respondents' employees were negligent in the manner in which they dealt with the appellant's predicament; and if they were, whether the appellant suffered any actionable harm as a result of such negligence and, if so, whether the respondents were liable to the appellant in damages for pain and suffering and for the maintenance of her child.

Legal consequences for the failure of the woman to obtain contraception to prevent the pregnancy

There was a professional relationship between the appellant and the doctor. His duties required him to attend to all the physical injuries arising from the sexual assault inflicted upon

her. Consequently, he was under a special duty to be careful and accurate in everything that he did and said pertaining to his relationship with her. He should have exercised that level of skill and diligence possessed and exercised at the time by the members of his profession. A reasonable person in his position would have foreseen that his failure to administer the contraceptive drug, or his failure to advise the appellant on the alternative means of accessing that drug, would probably result in her falling pregnant. He should have taken reasonable steps to guard against that probability. However, despite the appellant's quandary and persistent pleas for treatment, he stubbornly failed to take any steps to mitigate her condition.

The situation before the police was that of a victim of sexual violence requiring their urgent assistance. They were called upon either to compile a report on the assault or to accompany the appellant to the doctor within a specified period. The circumstances were such as to create a legal duty on the part of the police to assist the appellant in her efforts to prevent her pregnancy. They failed to comply with that duty, which they could have done with relative ease. Their inaction amounted to unlawful conduct by reason of their omission to act positively in the circumstances before them. They were under a legal duty to act reasonably and they dismally failed to do so.

The Ministry of Health and the Ministry of Home Affairs were held delictually liable for the negligent failure by the doctor and the police officer respectively in respect of the failure to avoid the pregnancy. Although the originating cause of the appellant's pregnancy was the rape, its proximate cause was the negligent failure to administer the necessary preventive medication timeously. But for that failure, the appellant would not have fallen pregnant. The police and the doctor failed in their duties. These unlawful omissions took place within the course and scope of their employment with the first and second respondents respectively, who must be held vicariously liable to compensate the appellant in respect of the harm occasioned through the failure to prevent her pregnancy. The appellant's claim for damages must be limited to the period between the date of her rape and the date of confirmation of her pregnancy. The matter would be remitted to the trial court for assessment of the damages to which the appellant was entitled.

Legal consequences of the failure of the woman to obtain a termination of her pregnancy

The court held, however, that there was no delictual responsibility arising out of the conduct of the prosecutor and the magistrate in respect of the matter of the obtaining of a termination of pregnancy. In terms of sections 4 and 5 of the Termination of Pregnancy Act [*Chapter 15:10*] permission for the termination of pregnancy pursuant to unlawful intercourse may only be granted by the superintendent of a designated institution. The precondition for that permission is the production of a certificate from a magistrate within the same jurisdiction. The issuance of a magisterial certificate is preceded by a complaint having been lodged with the authorities and the submission of relevant documents by those authorities. The term "authorities" is not defined in the Act but, in the context of unlawful intercourse, *i.e.* rape or incest, it would ordinarily apply to mean the police authorities.

The critical question was whether the responsibility for instituting proceedings in the magistrates court lies with the relevant authorities or the victim of the alleged unlawful intercourse. On a correct reading of the Act and the case law, the victim of the alleged rape

must depose to an affidavit or make a statement under oath *in addition* to being present for possible interrogation by the magistrate. Given the *ex parte* nature of the procedure, an affidavit on its own may not always suffice to enable the magistrate to make the necessary determination, on a balance of probabilities, that the applicant was raped and that her pregnancy resulted therefrom.

However, the applicant's affidavit or statement under oath is essential and required in every case, whether or not the magistrate decides to examine the applicant or any other person as he may deem necessary. It is the responsibility of the victim of the alleged rape to institute proceedings for the issuance of a magisterial certificate allowing the termination of her pregnancy. The role of the police and the prosecutor, upon request by the victim or in response to a directive by the magistrate, is to compile the relevant reports and documentation pertaining to the rape for submission to the magistrate. The role of the magistrate is to issue the requisite certificate upon being duly satisfied in terms of s 5(4), while that of the superintendent of the designated institution is to authorise its medical practitioner, upon production of the certificate, to terminate the unwanted pregnancy.

Even on the broadest interpretation of the Act, taken as a whole, it is not within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy. It was for the appellant to have sought that advice *aliunde*, as soon as possible after she became aware of her pregnancy. The prosecutors and magistrate could not be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate. In coming to this conclusion the court adopted the approach in the South African case of *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A).

The Appeal Court was clearly correct about the prescribed roles of the prosecutor and magistrate under the Termination of Pregnancy Act and that the Act did not impose upon them a duty to provide legal advice to a victim. But the facts show that advice was indeed offered to the victim by both the prosecutor and through the magistrate and the advice offered was erroneous. She was told by the prosecutor that she would have to wait until the rape trial had been completed for her pregnancy to be terminated. When she returned to the prosecutor to the direction of the police, she was advised that she required a pregnancy termination order. The prosecutor in question then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. By the time the victim obtained the termination certificate, it was too late to carry out a safe termination.

Reliance on this erroneous advice could well have caused the victim to delay initiating the proceedings for the issuance of the magisterial certificate for authorising the termination of the pregnancy, leading to the issuing of the certificate when it was too late to have a safe termination. If it had been established that this is what had in fact happened, the appellant would have had a basis for her claim based upon reliance upon completely misleading advice which led to her not being able to have a termination of pregnancy in time.

Although the prosecutor and magistrate had no legal obligation to offer advice, once they decided to do so, they had a duty to give proper advice and not to give advice that may have led to the denial of a termination of pregnancy in time. If this was the situation there would have been no danger of opening up the floodgates to a deluge of claims.

It is regrettable that this issue was not properly investigated by the trial court leading the Appeal Court to state that there was insufficient evidence on record to show what had occurred between the appellant and these functionaries. The Appeal Court could also have referred the matter back to the trial court for the production of further evidence on this matter.

Amendments to the Termination of Pregnancy Act

The *Mapingure* case clearly points to the urgent need to amend the Termination of Pregnancy Act as soon as possible to place the duty squarely upon the police and other authorities dealing with rape victims to guide and assist rape victims through the processes necessary to obtain contraception to avoid pregnancy or, where the victims wish this, to obtain termination of pregnancies. The amendment should require the authorities to act with expedition in this sort of case.