NZIMA MOYO

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND MATHONSI JJ
BULAWAYO 5 JULY 2010 AND 8 JULY 2010

Mr. G. Nyathi for appellant
Mr K. Ndlovu for respondent

Criminal Appeal

MATHONSI J: At the end of hearing this matter we dismissed the appeal against both conviction and sentence and said our reasons for dismissing it will follow. The following are the reasons:

The Appellant was convicted by the Regional Magistrates Court, Bulawayo on the 9th August 2007 of three counts of rape and sentenced to 18 years imprisonment of which 6 years imprisonment was suspended for 5 years on condition of good behaviour. He appealed to this court against both conviction and sentence on the following grounds:-

"1. ON CONVICTION
   (a) The trial magistrate erred in holding that the Appellant was guilty on the three counts of rape and ignored without any rational basis that:
      (i) the complainant had during the investigations told the police that she had been raped by one Alberto from whom a warned and cautioned statement had been extracted and one Jethiro a school mate.
      (ii) the complainant's evidence was manifestly contradictory. What she said in court was very different from what she told the police and was recorded in her statement.
   (b) The trial magistrate erred in holding that the Appellant was guilty on the three counts of rape in the basis of the evidence tendered by the

complainant and her mother in that it is manifestly inconceivable that the mother of the complainant would, having learnt of the rape on the first day of its alleged occurrence send back the complainant to school the following day to face her alleged molester instead of taking action instantly.

(c) the net result of the magistrate's judgment constitutes a serious miscarriage of justice which this Honourable Court should interfere with.

2. ON SENTENCE

(a) The sentence imposed on the Appellant by the trial magistrate is manifestly excessive as to induce a sense of shock considering that:

(i) the magistrate took all three counts as one for purposes of sentence.

(ii) the Appellant spent over a year waiting for the judgment. Judgment was supposed to have been passed on the 25th July 2006 but it was delivered on the 9th August 2007."

In our law, a young person under the age of 12 years is incapable of consenting to sexual intercourse and as such age alone vitiates consent. The complainant was a 10 year old grade 5 pupil at the material time while the Appellant was her class teacher. The evidence led in the court a quo established that the complainant had recently been raped because she was 10 year old who was incapable of consenting to sexual intercourse and yet the medical affidavit of Andrew Ndiweni, a clinical officer at Plumtree Hospital showed that she had recently been raped. This arises from the fact that she had bruises in her vagina, had a discharge and the hymen was absent. That report concluded that penetration had been "surely effected". It is important to note that the medical affidavit was produced by consent.

It follows therefore that somebody must have raped the complainant at the material time. In his judgment the trial magistrate found that the medical conclusions were consistent with the evidence of the complainant and her mother Regina Sibanda.

The rape was discovered by the complainant's mother on the very first day the rape occurred when she realised the complainant was having difficulties in walking. When she confronted the complainant, the latter pointed at the Appellant as being the perpetrator. Regina Sibanda inspected the complainant and found semen deposits in her vagina. This was corroborated by a neighbour Madeline Sibanda who also inspected the child.

Mr Nyathi, who appeared for the Appellant strongly attacked Regina Sibanda for failing to report the matter to the school authorities or the police immediately upon discovery and instead letting the complainant return to the school only to be raped two more times. He submitted that the pointed to the fact that both the complainant and her mother were not credible witnesses. The trial magistrate carefully analysed the behaviour of these witnesses at the time and found it to be normal and expected especially as they first looked for the neighbourhood watch people of the area who are expected to assist them file a report with the police in that locality. The trial magistrate also accepted that it was normal for a woman confronted with such a predicament to await the return home of her husband who was in South Africa and had instructed her to wait for him.

The law requires the court to apply the cautionary rule in examining the evidence of young children. However in doing so the court is entitled to take into account the absence of evidence suggesting the child is lying; see Hoffmann and Zeffertt, The South African Law of Evidence, 4th Edition 1992, Butterworths at p581 where the learned author said:-

> "The danger of acting upon such evidence (of young children) must be borne in mind by the trier of fact. It makes no difference whether the child's evidence has been sworn or unsworn. The court is entitled to take into account the falsity or absence of evidence by

> the accused or any other features which show that the child's evidence is unquestionably true and the defence story false".

See also *S v Banana* 2001(1) ZLR 607(S). The Appellant's biggest problem is that he is the first person to have pointed by the complainant as the culprit when she had just been raped and this report was made to the very person, the mother, to whom the report was expected to be made.

He has not shown why the young girl would have falsely accused him. The trial magistrate went to great length in evaluating that issue going through the evidence of the Appellant and his three witnesses none of whom could shed light as to why the complainant could falsely accuse the Appellant. It was also accepted that Regina Sibanda did not even know the Appellant. We are satisfied that the magistrate properly accepted their evidence.

Mr Nyathi also took issue with the fact that during investigations the complainant had mentioned two other people, a grade 5 pupil and classmate of the Jethiro and Alberto Moyo who was a Form 3 pupil at a neighbouring school. The manner in which the two school boys were mentioned was never clarified and all we know about them is contained in defence counsel's cross-examination of the complainant during the trial. *Mr Nyathi* could not explain why the statement allegedly made by the complainant presumably implicating the two boys was never produced in court and neither was it read into the record. It is still not part of the record. In his judgment the magistrate was believed the explanation given by the complainant and her mother that the police had threatened her to force her to mention other people besides the Appellant and that her mother had been asked to leave the office when this unfortunate event took place.

Mr Nyathi could not give a meaningful explanation of why the police officers who allegedly received the statement implicating those two boys, if ever if did, were not subpoenaed by the defence to testify. Nothing really turns on counsel's efforts in this regard especially as there is nothing in the record to even suggest that complainant was raped by any of the two school boys.

Regarding sentence, *Mr Nyathi* argued that it is so excessive as to induce a sense of shock because the Appellant is a teacher who had lost his job and therefore a lengthy term amounted to double punishment. He suggested a sentence of 12 years with 5 suspended considering that Appellant had spent a long time awaiting judgment.

Rape is a serious offence which currently carries a maximum sentence of life imprisonment. In considering an appropriate sentence in rape cases the court must have regard to a number of factors including the age of the victim, the degree of force used or violence used, the extent of physical and psychological injury inflicted, the age of the person who committed the rape and whether the culprit was in a position of authority over the victim.

In this case, the Appellant was the teacher of the victim, a victim who was only 10 years old and doing grade 5 and he took advantage of his position of authority to inflict a sustained attack on this helpless simple rural girl over three consecutive days using the same modus operandi. The degree of physical and psychological trauma suffered by the victim is immeasurable and yet the Appellant was unrepentant and in fact appeared to derive sadistic pleasure in castigating the innocent girl and painting her as someone of loose morals.

The aggravation is huge and we are satisfied that the trial magistrate properly exercised his discretion in imposing the sentence that was imposed in this case.

The appeal against conviction and sentence is completely without merit and is accordingly dismissed.

Mathonsi J.....

Cheda J agrees.....

Sansole and senda, appellant's legal practitioners
Crimical Divison Attorney General's Office, respondent's legal practitioners