DUMESHIOUS MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU & KAMOCHA JJ
BULAWAYO 26 SETPEMBER AND 13 OCTOBER 2011

Appellant in person
Ms A. Munyeriwa, for the respondent

Criminal Appeal

NDOU J: At the hearing of the appeal we held that the appeal was partially successful. We set aside the conviction on five counts of rape and substituted them with two counts of the unlawful performing indecent acts with young persons as defined in section 70 of the Criminal law (Codification and Reform) Act [Chapter 9:23]. We also set aside the sentence of 36 years imprisonment and substituted it with one of 10 years imprisonment i.e. 5 years imprisonment for each of the two counts. We indicated that our reasons will follow and these are they. The appellant was charged before a Bulawayo Regional Magistrate of five (5) counts of rape. He was convicted on all these counts and sentenced to 18 years imprisonment for counts 1, 2 and 4 and 18 years imprisonment for counts 3 and 5. Of the total 36 years imprisonment, 6 years was suspended on the usual conditions of good future behavior.

The allegations are briefly that the appellant raped the first complainant thrice and the second complainant twice. These complainants are siblings and were aged 7 years and 4 years respectively at the time of the offences. It is trite law that evidence of such children in sexual cases should be treated with great caution and care. The court should only convict where it is satisfied that the evidence in question can safely be relied upon and that the dangers inherent in such testimony have been eliminated – *S* v *Sibanda* SC-55-94.

In casu, the first complainant told the court in her evidence that she was raped by the appellant three times. She told the court that on the first two occasions she was with the second complainant and the two had gone to fetch firewood. On the last encounter she was on her own. But when she described the rapes that were perpetrated on her, she only described what amounts to one sexual act. The prosecution was very superficially and scant evidence was extracted from this complainant. The learned Regional Magistrate was not of assistance in this

regard resulting in the first complainant's testimony being characterized by gaps. The witness did not give any further details. The other counts are not described at all.

No efforts were made to probe the witness any further. Had the witness been probed further, the circumstances under which she was allegedly raped in the other counts would have been clearer. All that the testimony reveals is one sexual act. Unfortunately no medical evidence was adduced during the trial in respect of this witness. We cannot understand why a medical report was not produced in such a serious case of rape on a minor child. In any event this is the kind of case where the doctor should have been called to clarify the possibility of this child having been raped three times. Instead, the prosecutor chose to produce a document containing the doctor's notes. The document was not in affidavit form. This is a cavalier approach in the prosecution of such a serious offence. At the end of the day all we have is testimony that the appellant got on top of the first complainant and there was some form of contact by his male organ with her body around her private parts. Whether this contact was sufficient to constitute legal penetration is not clear. This could have been easily clarified if there was adequate probing of the witness or better still with the production of medical evidence. There is doubt as to whether there was legal penetration and the appellant is entitled to that doubt. Whether there was penetration or not, the evidence clearly establishes that the appellant got on top of the first complainant and there was some form of contact with her body via his male organ.

It is for that reason that we reduced the conviction to a permissible one in terms of section 275 as read with the Fourth Schedule of the Criminal Law (Codification and Reform) Act, *supra.* Section 70 is a competent verdict on a charge of rape. The sentence was also reduced to reflect that the appellant was convicted on one count of a lesser charge.

In respect of the second complainant she told the court that she was raped twice by the appellant when she was in the company of the first complainant. On page 15 of the record of proceedings she was asked:-

"Q - What did he do to you?

A - He made me lie down and mounted me. He put a stick in my tobacco and mounted me.

Q - Did you see where he took the stick from?

A - From a tree

Q - Where did he put it in you?

A - In my tobacco

Q - What do you use your tobacco for?

A - Urinating

Q - How did the stick look like?

A - It was big

Q - What did he do with it?

A - He put it in my tobacco and mounted

Q - What happened first mount or stick?

A - He first put the stick"

Further the witness says when the appellant was through, he went away and dug a hole, put the stick and covered with soil. She also went on to say that she later went there, dug and saw the stick. When she was asked to demonstrate to the court on the anatomically correct doll, she indicated by inserting her finger in between the thighs of the doll. When asked if she could see the stick on the doll, she pointed to the testicles on the doll and not the penis. The evidence as given by the second complainant also points to indecent assault on a young person. From the abovementioned dialogue, the second complainant mentions a stick and not a penis being inserted into her tobacco. When asked to demonstrate what the appellant had done to her, her demonstration pointed to something other than a sexual intercourse. On page 16 of the record, the second complainant's evidence was to the effect that she had been injured by the appellant with a stick at the back of the knee. No clarification was sought from the witness as to what she meant by that. It is not clear whether it was the same stick that was used on the back of the knees and on her tobacco. It was also important for the court to ascertain what sort of injury the complainant had suffered on the back of the knee and whether or not the injuries had been sustained on the same day or on a different day. As alluded to above, there was no medical evidence adduced apart from a "doctor's notes". Section 278 of the Criminal Procedure and Evidence Act [Chapter 9:07] provides for the production of an affidavit by a medical practitioner in lieu of oral evidence. Such affidavit must be properly commissioned. *In casu,* what was submitted were the doctor's notes on the history of the sexual abuse. In the said notes the doctor indicates that a proper medical affidavit will be filed. The court did not seek an explanation from the prosecutor why there was no proper medical affidavit. In any event the document makes reference to Nobukhosi and Ayanda Ncube. The complainants here are Talent and Ayanda Ncube. It is not clear how the court came to the conclusion that Talent

and Nobukhosi refer to the same person. The document shows that second complainant had old bruises on her thigh and it is the doctor's observation that it was difficult to tell whether penetration had been effected or not. The doctor also observed that there were no bruises on Nobukhosi but again it was difficult to tell whether penetration was effected. In light of this kind of evidence the doctor should have been called to give the findings in court in order for the court to make an informed decision.

Be that as it may there is evidence that the appellant got on top of the second complainant and inserted a "stick" into her tobacco or thighs. This is indecent assault on a young person as defined in section 70 *supra.*

It is for these reasons that we amended the conviction and sentence in the manner described above.

Kamocha J …… I agree

Criminal Division, Attorney General's Office, respondent's legal practitioners