

THE STATE
versus
PREVIOUS NGWANZURA

HIGH COURT OF ZIMBABWE
MUSAKWA & MUREMBA JJ
HARARE, 2 March 2016

Criminal Review Judgment

MUREMBA J: The accused, a 25 year old man, was charged with the rape of an 18 year old girl as defined in s 65 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He denied the charge and was convicted after a full trial.

The standard of proof in a criminal matter is proof beyond reasonable doubt. In the present matter I do not believe that the accused's guilt was proven beyond reasonable doubt. The facts of this case are as follows. The accused and the complainant reside in the same village. The accused is a nephew of the complainant's mother, but it is not explained in what sense he is a nephew. On the fateful day which is 17 October 2015, the accused went to the complainant's place of residence. The complainant, in her testimony, said that the accused frequently visits her home to see her father whom he is friends with. She stated that she has known the accused since 2012. He is married and has a child.

When the accused came to visit on 17 October 2015, he sat with the complainant's father. The complainant's mother then asked the complainant to go and fetch some firewood. In compliance the complainant said that she left for the forest with her 4 year old brother. The complainant said that on the way her little brother tore his sandal and abandoned the journey. He returned home while she proceeded to the forest to fetch firewood alone.

The complainant said that as she was in the bush, the accused approached her from behind. She said that although it was around 6 pm it was still visible. The complainant said that the accused grabbed her and tripped her to the ground. She stated that she noticed that when he approached her he had already removed his trousers. He only had his shirt on. She stated that he lifted her skirt and pushed her pant aside before inserting his penis. He had sexual intercourse with her whilst he was mounting her.

It is not in dispute that as the accused was still on top of the complainant having sexual intercourse with her the complainant's mother got to the scene holding a switch. The accused who was on top, rose and ran away. The complainant's mother stated that after the complainant had left for the bush to fetch firewood, the accused remained at her home for a while and later bade farewell to the complainant's father. The complainant's mother said that she later left for the bush too in order to relieve herself. She told the court that as she was relieving herself she saw the accused making some coital movements a distance away. She said that she decided to investigate what was happening. She stated that she tiptoed to where he was and observed that he was having sexual intercourse with the complainant. She said that she also observed that he was gagging the complainant as he was having sexual intercourse with her. The complainant's mother said that she struck the accused with a switch and he ran away. She stated that after hitting the accused she passed out. She said that she did not see what happened next. She only came to when she was already at her home, meaning that she had been carried home from the scene.

The accused did not dispute much of the evidence of the complainant and her mother. Mainly what he disputed was that he raped the complainant. His defence was that the sexual intercourse was with the consent of the complainant who was his girlfriend. He said that previously they had had sexual intercourse at the same spot about 5 times. He further stated that on the fateful day they had made prior arrangements to meet and they had later met in the bush. He said that the complainant only cried rape because they were caught in the sexual act by her mother.

Looking at the evidence of the State, it is difficult to say with certainty that the sexual intercourse was without the consent of the complainant. I am saying so even if the complainant vehemently denied having been in love with the accused and having had consensual sexual intercourse with him before. The mother of the complainant said that when she got to the scene apart from seeing the accused gagging the complainant, there was no sign of struggle between the two. The complainant said that the accused was gagging her mouth when her mother arrived at the scene. She further said that when the accused fled the scene she followed her mother home crying. She stated that she was crying that she had been raped.

The facts of this case present a very difficult scenario. It is difficult to say with certainty that the accused raped the complainant. Whilst it is very possible that the accused and the complainant were in love and had sexual intercourse by consent, chances that the accused and the complainant were not in love and that the accused actually raped the

complainant are also there. The crying by the complainant after her mother had caught them in the sexual act can mean either of the following two things. She was crying either because she had been raped or because she was embarrassed and afraid that she had been caught by her mother having sexual intercourse with the accused. It is common cause that when the mother approached the scene of the sexual act, the complainant was not struggling with the accused. Both the complainant and her mother only said that the accused was gagging the complainant's mouth, but it is not explained how he was gagging her and with what. The prosecutor did not ask the complainant to fully explain why she failed to fight the accused or to raise alarm especially at the time he approached her from behind and tripped her to the ground up to the time he mounted her and then raped her. She was not asked to explain at what stage the accused gagged her. I do not believe that the accused managed to go through all these stages without her putting a fight or trying to raise alarm. It is well possible that the accused overpowered her, but then in the absence of evidence from the complainant to that effect we are left to wonder and guess.

I believe that it is in cases such as the present one that the State needs to go deeper in trying to prove its case against the accused. Complainants who are caught in the middle of a sexual act need to be treated with caution. They can use that to their advantage and cry rape even if they had consented to the sexual intercourse. This is even worse if they are caught by their parent. Generally speaking it is very humiliating for anyone to be caught in a sexual act. Even people who are lawfully married can find this very embarrassing if they are caught having sex. Therefore a person can lie that they did not consent to the sex when they actually did. It might well be the case that we are presented with here. For these reasons I am not satisfied that the accused's guilt was proven beyond reasonable doubt. There is still some doubt that the sexual intercourse was without the consent of the complainant. On one hand the accused could be telling the truth that the sexual intercourse was with the consent of the complainant. On the other hand it is also possible that the sexual intercourse was without with the consent of the complainant. Chances are half, half. With that the accused should benefit from the doubt.

Consequently, I quash the conviction. The sentence of 18 years imprisonment with 6 years thereof suspended on condition of good behaviour automatically falls away. The accused who is currently in prison serving a sentence of 12 years imprisonment is thus entitled to his immediate release. I will therefore sign his warrant of liberation for release from prison forthwith.

MUSAKWA J agrees.....