

CRISPEN TICHAONA CHIGUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 5 February 2020

Criminal Appeal (Reasons for Judgment)

C N. Mukwena, for the appellant
M Musarurwa, for the respondent

MWAYERA J: The appellant was convicted for Rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleged that on 29 January 2019 and at House number 2172 Messenger's Camp, Nyanga, the appellant unlawfully had sexual intercourse with Vincencia Mundida without her consent or realising that there was a real risk or possibility that Vincencia Mundida might not have consented to it. He was sentenced to 14 years imprisonment of which 4 years imprisonment was suspended for 5 years on the usual condition of future good behaviour.

Appellant noted an appeal on 15 October 2019 and outlined grounds of appeal against conviction as follows:

"Ad Conviction

1. The court *a quo* grossly misdirected itself at law by convicting the appellant in circumstances where Appellant's guilt had not been proved beyond reasonable doubt given Appellant's defence that the sexual intercourse was by consent.
2. The court *a quo* grossly misdirected itself at law by convicting the Appellant of rape in circumstances where the report was not made freely and voluntarily."

Background

Appellant was aged 33 years and employed as a soldier stationed at All Arms Battle School, Nyanga. Complainant was aged 30 years and appellant was her ex-husband although the marriage was not registered. During the time they were still together appellant borrowed US\$470-00 of which he made part payment back leaving a balance of US\$270-00. On 26 January 2019 appellant invited complainant to his house so that she could collect her money.

On 28 January 2019 complainant proceeded to the appellant's house and found appellant out. She waited for his return. Appellant later on that day arrived home at around 2300hrs and he invited the complainant into his bedroom to collect the balance outstanding to her. Whilst in the bedroom appellant attempted to fondle complainant's breast but complainant told him that she did not like that. Appellant did not relent, he forcibly made complainant to lie on the bed on her back. The complainant tried to scream for aid but appellant closed the complainant's mouth using his palm and went on to press her down. The appellant overpowered the complainant and pulled her dress up, tore her pant and forcibly had sexual intercourse with her once without her consent. After the rape complainant and the appellant slept on the same bed overnight. On 29 January 2019 that is the following morning the complainant reported the matter to ZRP Nyanga Police leading to the appellant's arrest.

In his defence outline appellant's version is that on the fateful day when complainant arrived at appellant's house from Harare, the two proceeded to appellant's bedroom. The complainant initiated and agreed to have sexual intercourse, however, before the intercourse the complainant bathed her private parts. After the sexual intercourse they both retired on the same bed sharing same blankets. Appellant denied forcing himself upon the complainant, according to the appellant, complainant participated in the sexual intercourse holding the appellant's body tightly. Appellant was surprised to hear rape allegations.

The question for determination by the court is whether the sexual intercourse between the parties was consensual. Secondly whether complainant did not freely and voluntarily report the matter?

It is necessary to look at the evidence of the complainant. On 29 January 2019 complainant does not deny going into the appellant's bedroom but did so upon the invitation of the appellant who had invited her there to collect the balance. Complainant told appellant that she intended to board the 12 midnight bus for Harare but the appellant dissuaded her. Appellant tried to fondle complainant's breasts and she protested. Appellant proposed to use condoms but complainant told appellant that condoms or no condoms she was not interested in the sexual adventure with the appellant. Appellant got up from the bed, procured a condom from the wardrobe and returned to where complainant was seated, still complainant clearly told appellant that she did not want. Appellant locked the bedroom, when the complainant was about to get up, appellant pushed her onto the bed, she fell on her back, and appellant got onto her top. She screamed, appellant gagged her, pressed the right leg, got between her legs took a

pillow and placed it between complainant and himself and then tore complainant's pant on the left side and raped her.¹ All this was uncontroverted evidence and the court *a quo* held the complainant a credible witness.

On the following morning she managed to escape from the appellant's house when he visited the toilet. She texted appellant's young brother on his mobile phone, she also informed the appellant's younger brother's wife. She made a further report to her elder sister and her husband and then went to the police. At the police she intimated that she initially did not want to report the matter but she had resolved to do so. She also admitted that aspect on the date of trial but insisted that she did not consent to the sexual act.

The appellant submitted that the complainant was advised by the police that she will not be assisted unless she has made a police report. Would one then say that report was not freely and voluntarily made? On her way to the police station to make a report about the rape, she told four different people, her sister and husband, appellant's brother and his wife informing them about the abuse. Those were the first complaints consistent with the absence of consensual intercourse. Why would complainant sneak out of appellant's house to go and lodge a complaint of rape? From the evidence of complainant whilst in the bedroom of the appellant it was apparent that she was not cooperating with the appellant's desire to have sex with her. She did so both through body conduct and verbally, appellant ought to have realised that the complainant was not willing to engage with appellant in the sexual act. We are satisfied that the sexual complaints were freely and voluntarily made. It was made without undue delay and made to close contacts to the complainant and accused. Complainant's evidence of what transpired is clear. Previous concession when appellant had an affair with her cannot be said to have been given for future uncontroverted violation. The complainant on the day in question did not consent to sexual intercourse.

The court *a quo* dealt with the aspect of complainant's credibility exhaustively and we see no legal basis to interfere with her findings on the aspect of credibility. The conviction is proper in our view and the appeal against conviction has no merit.

The appeal is dismissed.

¹ Pages 34-38 of the record of proceedings.

MUZENDA J agrees _____

Mupindu Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners