

**CONSTANTINE PASVANI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU & CHEDA JJ  
BULAWAYO 28 FEBRUARY & 23 JUNE 2011

*B Dube* for the appellant  
*T Hove* for the respondent

Criminal Appeal

**NDOU J:** The appellant was convicted by a Gweru Regional Magistrate of two (2) counts of rape as defined in section 65(1) of the Criminal Law [Codification and Reform] Act (Chapter 9:23). He was sentenced to ten (10) years imprisonment of which 2 years were suspended on the usual condition of good future behavior. The appellant protests his conviction in this appeal. The background facts are the following. The appellant was aged 33 years at the time of the alleged rape. He was a Catholic priest based at Moyomusande Catholic Church, Siyahokwe in Chirumanzu. The complainant was aged 23 years resided in the area where this church was situated and she is a parishioner at the above mentioned church. The complainant was also a girlfriend to the appellant's young brother Vitalis.

It is common cause that the complainant was at a church service on 17 September 2006. The appellant approached the complainant and said he had some issues to discuss with her in private. The appellant invited the complainant in writing to report at the parish the following day i.e. 18 September 2006. It is important that this note is quoted in its entirety. This is what the appellant wrote:

*"Sunday is not a good day to see me on personal grounds. Come tomorrow woga tizotaurirana. People are looking/watching every step of yours. Force between 8 & 10."*

The following day the complainant went to the appellant's place of abode at the parish. The appellant's and complainant's version differ from this point onwards. It is the appellant's case that he wanted to ask the complainant about the rumours that was doing rounds in the parish and the locality that she was having an affair with him. This concerned him because it affected his reputation. He was also worried about her alleged previous relationship with man

who has since passed on yet she was involved with his brother at the same time. Appellant denies raping her or having sexual intercourse with her.

On the other hand, the complainant's version is that on 17 September 2006 after the church service the appellant approached her and stated that she had offended him, presumably by being in love with his young brother. She later, after 15 minutes, approached him at his office and enquired why he was alleging that she offended him. The appellant told her that he needed more time with her and he wrote the abovementioned note. She placed the note in her handbag and left. When she got home she showed the note to her sister [in the state outline it is said her mother]. In the morning of the fateful day she proceeded to the parish after notifying her sister-in-law. The parish is about 5 kilometres from her homestead so she walked there. She got around 8 a.m. The appellant invited her into his dining room. Once inside the appellant sat on a sofa opposite where she was seated. The appellant accused her of having an affair with one teacher (name withheld) who was H.I.V. positive whilst at the same time having a relationship with his brother Vitalis. There was a knock on the door and the appellant went to attend. When he returned he accused her of not being in good books with Beauty and other children. He proceeded to grab her. She tried to stand and a struggle ensued. The appellant eventually overpowered her. He fell her on a bed and appellant raped her once. In her evidence-in-chief and under cross-examination she testified of one rape only. When the prosecutor re-examined she said the appellant raped her twice. She said the second rape occurred when she was about to depart from the bedroom. He grabbed her and raped her again.

After the rape she said the appellant gave her water and soap to bath. He ordered her to bath before she left. After she had taken the bath he gave her lotion which she applied on her body. She left the appellant's house. She was not crying when she left. The appellant threatened to cut her neck if she told anyone what had happened. She said that she had previously been to the appellant's place of abode to visit his brother Vitalis. As she left the appellant asked her where she was headed to. She told him that she was going to phone her mother at the shops. The appellant advised her against saying bad things about him. She proceeded to the shops and indeed phoned her mother but did not tell her about the rape. She only told her mother about death in the family. Thereafter she proceeded home. She told her sister that she had stomach pains. She did not tell her about the rape because the appellant had told her that he knows the law and nothing was going to happen to him. She believed what he said. On 22 September 2006 she wrote a letter to her uncle Alex Jachi who stays in Gweru and is a police officer. She gave him the letter on 25 September 2006. The letter contains, *inter alia*, the rape allegations subject matter of these proceedings. She testified that she conceived as a result of the rape and gave birth on 13 June 2007.

Under cross-examination she conceded that she had written a letter to the appellant in August 2006. The complainant was not asked the circumstances under which she wrote this letter even though there was an allegation that she was in love with the appellant. Why would she write such a letter a month before the alleged rape? This issue was not at all canvassed during the trial. Be that as it may, this is what the complainant wrote in the letter addressed to appellant:

“Boma Res Area

Obsessed father (Constantine)

I have taken this initiative to let u know that I am still living. Well let me say whats up? My dear father as u claimed that I am your daughter. Back to me I'm not all that okay. Yes as I promised to visit your area today it's very unfortunate due to the fact that I'm under pressure I didn't manage to fulfill the promise. Pardon me! I heard a good comment from my mother she really appreciate the way u preach. It is something which is good to justify your behavior. I am still having glimpse o your laughing-tomes. How is ever smiling Liberty? I am missing that boy greet him but u I'm not missing you at all (jokes). I was suppose to be out for my Beauty Therapy studies this month but I understand that there is conflicts & misunderstandings here and there. So everything is boring.

Please can u sent back my photo w grey outfit I need it for reprint. As for the one w red top I have done e enlargement to A4. Pliz reply this note *mukarega munochema chete*. Today I'm going out for an active immunization for (Black quarter) around 3pm. If you are to go to Gweru pray for us. STAY AWAY FROM TEMPTATIONS.

I am running in short o time

More time

Daughter Hazy Boma

Reply today”

As alluded to, the court *a quo*, the prosecutor and defence counsel never bothered to canvass the context under which this letter was written. Why would a young woman write such a letter to her priest? From the contents of the letter she had given the appellant at least two of her photographs why? All the details in her letter are not what one would expect in a communication between a priest and a member of his parish whom he is not close to. The court *a quo* did not bother to enquire as to whether it was usual for parishioners to write

letters to their priest especially with patronizing contents of this kind. Even without seeing this letter, the evidence shows that the people had already started speculating about a possible love relationship between the appellant and the complainant. The source of such speculation was not canvassed during the trial but would such speculation be strange in light of the contents of this letter?

In response to questions by the court, *Mr Hove*, for the respondent conceded that he did not apply his mind to the contents of this letter. With the benefit of hindsight and having gone through the letter in court, he conceded that the letter seems to suggest the existence of a relationship between the appellant and the complainant. The complainant's letter to appellant is characterized by histrionic contents. The contents suggest that the complainant liked hobnobbing with the appellant beyond the parishioner and priest relationship. That is why she gave him her photos. The letter speaks for itself. The issue of this letter should have been carefully canvassed during the trial. The trial magistrate should have realized that it is not safe to convict in the face of such evidence. Despite the abandonment of the cautionary rule, however, the courts must still carefully consider the nature and circumstances of alleged sexual offences – *S v Banana* 2000(1) ZLR 607 (S) a 613-4. In *S v Magaya* 1997 (2) ZLR 139 (H) at 142A it was stated-

“Human experience has shown that in courts girls and women do sometimes tell entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons ... and sometimes have no reason at all.”  
See also *S v Chamunorwa and Anor* 2001(2) ZLR 404 (H)

From the foregoing the conviction of the appellant is not safe. Accordingly, the appeal against conviction succeeds and the conviction is quashed and the sentence set aside.

Cheda J ..... I agree

*Gundu & Dube c/o Dazinger & Partners*, appellant's legal practitioners  
*Criminal Division, Attorney General's Office*, respondent's legal practitioners