VITALIS NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND CHEDA JJ
BULAWAYO 8, 9 OCTOBER 2012 AND 1 NOVEMBER 2012

Appellant in person
Mr L Maunze for respondent

Appeal

CHEDA J: Appellant is a 16 year old boy who was charged, convicted of rape and sentenced to 8 years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions of good future conduct.

At the end of the hearing, we concluded that the appeal should be upheld and we ordered the release of the appellant with an undertaking that our reasons would follow and these are they.

The historical background and genesis of this matter is that appellant and the complainant are related in the form of step-brother and step-sister respectively. It is alleged that sometime in August 2008 when the two were visiting Johannesburg, South Africa, appellant forcibly had sexual intercourse with the complainant without her consent. She did not report the said rape to anybody in South Africa until a neighbour Thandiwe Moyo (hereinunder referred to as MaMoyo) notice some discharge on her pant in November 2008 when she had come back to Zimbabwe. She then quizzed the complainant who then told her that she had been raped by appellant.

MaMoyo gave evidence to the effect that one Khathazile informed her that she had noticed blood on complainant's pant. She then confronted complainant when she came back from school and complainant told her that appellant had raped her when they were in

South Africa. She further told the court that complainant told her that she did not report the incident to her mother as her mother would have thrown her out of the house.

The complainant was also called to give evidence. She is 13 years of age. She stated that while she was in South Africa appellant called her into a room and raped her. She did not tell her mother who was living with them because appellant had threatened to assault her.

In her evidence in chief, the following conversation between herself and the prosecutor took place:

"Q: How did this matter come about? (in relation to the discovery of the rape)
A: After we had come here in Bulawayo, Nomatter's mother saw some blood stains on my pant and went on to tell one MaMoyo. MaMoyo called me and asked if Vitalis had raped me. Initially I was denying but later admitted.
Q: Any reasons for you to have denied anything?
A: he had threatened to beat me up
Q: Any other persons you told?
A: No."

MaMoyo said the reason why complainant did not report the matter was that she feared that her mother would have thrown her out of the house. But, in court, complainant stated that appellant had threatened to beat her up. This is a clear contradiction on the evidence placed before the court *a quo*. This should have been noticed by the trial court as the contradiction is of a material nature.

She was then taken for a medical examination on the 25 November 2008 and the medical report states that there was partial penetration and she had no hymen. This was enough evidence that she indeed had been in some sexual activity.

Appellant is a self actor. He argued that the matter was not reported timeously and the he was not accorded an opportunity to call witnesses from South Africa.

Respondent has submitted that the conviction was unsafe taking into account the circumstances surrounding the commission of this offence. It is now settled law that our courts take a careful consideration when it comes to cases of rape. The Supreme Court in *S v Banana* 2000(1) ZLR 607 (S) stated that although corroboration is no longer a pre-requisite in complaints of a sexual nature, the courts should take a careful consideration with regards to

the circumstances and nature in such cases. What it comes out clearly in that authority is that the evidence of the complainant should:

(1) be made timeously, that is, at the earliest opportunity, and

(2) it should be made to the first person to whom complainant could have been reasonably expected to have reported to.

In casu the report was made three months after the alleged incident. Complainant was staying with her mother whom she is reasonably expected to have confidence in. Even when complainant came back to Zimbabwe, she did not promptly make a report, but, such a report if it was a report at all, emerged as a result of a leading question by MaMoyo.

A sexual report should not be solicited from the complainant, as doing so brings into question the *bona fides* of such report. Had complainant timeoulsy made a report, a medical examination would have been carried out on her when all the evidence of sexual molestation was present, if any.

Timeous reporting is very essential as it eliminates the suspicion of an ill motive which is a hybrid of fabrication.

Mr Maunze in his submissions vigorously, argued that the report was made timeoulsy and that the evidence of blood stains is corroborative of rape. During the hearing though, he, abandoned this line of argument and conceded that there was a misdirection on the part of the trial court. We are therefore grateful for his concession which we find to have been properly made.

While indeed a report was made, but sight should not be lost that it was made as a result of a leading question which indicated that it was appellant who did it. The vaginal discharge found by the examining doctor and blood stains seen by MaMoyo could have been as a result of complainant's sexual engagement with any other person other than the appellant. Rape being such a serious offence, the rigorous and stringent requirement of its proof should be strictly observed as failure to do so can easily result in an innocent man being imprisoned.

The other issue raised by appellant is that he was not afforded an opportunity to call witnesses from South Africa. An accused person has a right to be heard and defend himself. In that defence, he should be assisted by the state, where possible, to bring before the court any

relevant information and witnesses so as to enable the court to assess all the evidence before arriving at an informed decision. The failure by the state to assist him, on its own is a misdirection which enjoins this court to set aside the conviction. It should be borne in mind that the detects of justice are based on prosecution and certainly not persecution. Judicial officers should therefore not be under pressure to convict where there is a possibility that an accused person may not have committed the offence. Every doubt in a trial must be accorded to an accused's favour.

It is for these reasons that we released the appellant.

Order

The appeal against conviction is accordingly upheld.

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

Cheda J.....

Ndou J agrees.....