

THE STATE
versus
MUNYARADZI MUCHENJERI

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA & KWENDA JJ
HARARE 26, 27, 28 September 2018 & 4 October 2018

CRIMINAL REVIEW JUDGEMENT

CHIRAWU-MUGOMBA J: The accused a 45 year old man was charged with the rape of a 16 year old girl as defined in s 65 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He denied the charge. After a full trial he was convicted and sentenced to 18 years imprisonment of which 3 years were suspended on the usual conditions.

It is trite that the standard of proof in a criminal matter is proof beyond a reasonable doubt- *See The State v Ngwanzura* HH-162-16. Having reviewed this matter, it is my firm belief that the state failed to prove the accused's guilt beyond reasonable doubt. It was alleged by the state that on 31 May 2017, the accused had sexual intercourse with the complainant at Mugonhi Lodge without her consent. It was further alleged that the accused's wife assisted him to commit the offence by holding back the complainant's hands at the back. The accused person denied the charge. He stated that on an unspecified day, he found the complainant in their bedroom sitting on their bed holding his baby. He queried why the complainant was there and he was told that she wanted to obtain an identity document. He further inquired whether the parents of the complainant knew and he was told that they did not know and that the complainant instead of going to school had come to the accused's residence. He told his wife that this could later on cause problems as complainant was prohibited from going to the complainant's residence after allegations that she was in love with the accused. He suggested that they give the complainant some funds to travel to Kadoma. His wife stated that they should accompany her to Kadoma. They then travelled

first to Chegutu in the company of his wife, the sick child and the complainant. They then went to Kadoma. There, they left the complainant at the Registrar's offices and they went to the doctor with the sick child and were told to bring the child on the following day. The accused proceeded to the Ministry of Mines to get his mining permits. When he returned, he inquired if the complainant had finished her business and she advised him that she had not been served. Accused person suggested that the two proceed to Ingezi to put up for the night. He then paid \$15 at a lodge and left them there. He denied having sexual intercourse with the complainant.

In her evidence-in-chief the complainant stated that she and the accused stay in the same village and that he used to give her 'piece' jobs. She and the accused and his wife went to Chegutu first then to Kadoma to obtain a national identity document. She was unable to obtain it and they thus went to Mugonhi lodge with the two. She stated that the three of them together with the sick child shared the same bed and that is when the accused raped her. She tried to fend him off but he persisted. The accused's wife then held her by both hands as she lay on the bed and that is when the accused succeeded in raping her. After the rape, the accused person left her and went away. She remained in the company of the accused's wife. On the next day she went to the Registrar's office and managed to obtain the identity document. When she got home she narrated the rape to one Leona Chisora who is her aunt. Due to financial constraints she only managed to go for a medical examination four and a half days later. Leona Chisora gave evidence on behalf of the state. She narrated how the complainant made a report to her on the 1 June 2017.

The medical report which was tendered as an exhibit shows that the complainant's hymen was attenuated with healed notches. The medical examiner concluded that penetration was definite.

The accused person who had initially indicated that he wanted to be legally represented ended up conducting his own defence due to lack of funds to pay a legal practitioner. He asked the complainant whether there was any blood when he allegedly raped her and she responded in the affirmative. Upon asking her why she never mentioned this in her evidence-in-chief, the complainant's response was that she overlooked this aspect.

After the evidence of Leona Chisora, the state closed its case. During the defence case, the accused remained adamant that he had not raped the complainant. He stated that he believed the complainant and her parents connived to lay a

false charge of rape against him. The only reason why he travelled with the complainant to Kadoma was that his wife convinced him that if she was present, no allegations would be raised against him. When asked whether he would be calling any witnesses, the accused person stated that he would call his wife. It is pertinent to point out that the accused person had been remanded in custody. He provided her name and address. The matter was postponed and the police and prisons were directed to assist the accused person in locating the accused's wife. The state through the prosecutor tried to assist the accused to locate his wife through making a cellphone call but such efforts were in vain. The accused was granted a further 14 days to locate his wife but he failed. Constable Mapisa from ZRP Chingondo deposed to an affidavit stating that ZRP Kadoma Central checked for this witness and she could not be located. In the end the court proceeded with the case without hearing the evidence of the accused's wife.

In convicting the accused person, the Magistrate found both state witnesses to be credible. He accepted the medical report and also concluded that the accused wanted to call his wife as a witnesses but she was not located.

As stated in *State v Mubvumba* HH-338-18 by MUREMBA J, “Various *factors or reasons can motivate a complainant to lie about being sexually abused. These factors include fear of one's spouse or parent; the wish to protect a friend or a relative; wounded vanity and spite against someone who has rejected one's advances and the deceptive facility of a person who tells a convincing story, the only false part of which is the identity of the perpetrator*”. This observation finds resonance in the 2013 Constitution in section 69 (1) which states that, “*Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.*” (emphasis mine). Section 56 (1) of the Constitution also addresses equality before the law and the right to equal protection and benefit of the law.

Placing due consideration on the evidence led by the state, it is difficult to state with certainty whether or not the accused person raped the complainant with the assistance of his wife as claimed whilst a sick child was sleeping on the bed as well. The affidavit by Constable Mapisa did not give details of the efforts made by the police in trying to locate the accused's wife. The affidavit is lacking in detail and merely states that ZRP Kadoma checked the ‘accused Sekai Mapfumo’ at her place of residence several times and was not located. There are no details of which place of residence, how many people did they speak to, how

many times did they go to that place. With these scanty details it was imperative that the state should have called Constable Mapisa to the witness stand thus giving the accused person the opportunity to challenge evidence as *per* s 70 (h) of the Constitution. The state introduced this evidence and based on my observation above, without calling Constable Mapisa to the stand, an adverse inference that the accused's wife was on the run because she knew that she was an accomplice cannot be drawn. It is important to note that the accused's evidence that he went away after paying for the accommodation and did not put up with his wife and the complainant was never investigated and disproved. It could have been a simple matter of calling the personnel from the lodge who were on duty on the day in question. The complainant stated that she was raped whilst lying on the bed without putting her pants on and she bled because she was a virgin but there was no investigation as to what happened to the bed linen. It could also have been a matter of calling the lodge personnel to get clarity on this issue. The case is an example of one which raises more questions than answers. This falls into what MUREMBA J called "half-half" and where, "the accused should benefit from the doubt" – See *State v Ngwanzura (supra)*.

Accordingly I conclude that the conviction is unsafe and cannot stand.

In the result, it is ordered as follows:

The conviction be and is hereby quashed. The sentence imposed on the accused is set aside.

A warrant of liberation for the accused is hereby issued.

KWENDA J agrees.....