Judgment No. S.C. 8/02
Crim. Appeal No. 56/01

GODWIN NYAKABAU v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE, JANUARY 17, 2002

G Mabuye, for the appellant

N J Mushangwe, for the respondent

CHEDA JA: After hearing submissions on this appeal we dismissed it and said the reasons would follow. The following are the reasons.

The appellant is a schoolteacher in the Mutoko area. At the time of this offence he was teaching a Grade Seven class and the complainant was his pupil.

He was charged with contravening s 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*]. He pleaded guilty. He was convicted and sentenced to sixteen months' imprisonment with labour of which six were suspended on conditions of good conduct.

The appellant appealed to the High Court against both conviction and sentence. His appeal was dismissed. He has now appealed to this Court against the decision of the High Court dismissing his appeal.

The following facts are common cause –

1. The appellant was the class teacher for Grade Seven;
2. The complainant was his pupil;
3. She was fourteen years old at the time;
4. The appellant was thirty-three years old;
5. The appellant and the complainant fell in love and subsequently had sexual intercourse;
6. On being arraigned, the appellant pleaded guilty to the charge.

The appellant noted an appeal to the High Court on the following grounds –

1. The learned trial magistrate misdirected himself by failing to explain the statutory defences to the appellant at the inception of the trial or during the canvassing of the appellant's guilt as part of the essential elements of the offence;

2. The fact that the complainant was a rural girl and in love with the appellant prior to the commission of the offence was an indication that she might have been physically developed, passing herself off as an adult female, hence the need to explain s 3(a) to the appellant to give the appellant a fair trial;

3. The medical report that the complainant's vagina admitted one, two and three fingers suggested an active sexual life and supported the statutory defences;

4. Section 271(3) of the Criminal Procedure and Evidence Act was fatally cursorily complied with;

5. There was no pre-sentence inquiry on the need for a sentence of community service before passing sentence;

6. The sentence therefore induces a sense of shock.

These grounds of appeal were dealt with in the judgment of CHIDYAUSIKU JP (as he then was) and CHINHENGO J, who heard the appeal. They dismissed the appeal.

The appellant's grounds of appeal to the Supreme Court are as follows:

1. The honourable judges misdirected themselves by holding that the trial magistrate did not err by refusing the appellant a postponement to allow the appellant to be legally represented;

2. The honourable judges misdirected themselves by holding that the essential elements were correctly canvassed, when it was clear that the question "Do you appreciate she was below the age of sixteen years?" put the inquiry at the time of trial instead of the commission of the offence.

The first ground of appeal was dealt with in the High Court and dismissed.

In this Court, the appellant's counsel submitted that the magistrate should have granted a postponement to allow the appellant to be legally represented,

and that the failure to do so vitiated the resultant trial. A number of the cases he referred to are distinguishable.

In *S v Sibanda* 1989 (2) ZLR 329 (S) the right to legal assistance referred to was that of a detained person. In this case the appellant was not detained, In fact, he was not denied access to legal assistance, but it was his legal practitioner who did not act properly regarding arrangements for his client's case.

In *Wheeler & Ors v Attorney-General* 1998 (2) ZLR 305 (S) the trial court was criticised for not allowing a postponement after some serious additional charges were added only ten days before the trial and there was insufficient time to prepare the defence case on the additional charges.

In *R v Second* 1969 (2) RLR 285 (AD), it was held that a postponement for the accused to obtain legal representation is necessarily one for the discretion of the court, and that in such a case the question is whether the accused has had sufficient time to arrange for such representation. Where the question is raised on appeal, the Court must be guided by considerations such as whether the trial court exercised its discretion judicially and for substantial reasons, and whether the refusal of a postponement has in fact resulted in a substantial miscarriage of justice. The appellant in this case pleaded guilty and admitted all the essential elements of the charge. There was therefore no miscarriage of justice at all.

In *Nhari v Public Service Commission* 1999 (1) ZLR 513, the appellant's legal practitioner had renounced agency just a few days before the hearing.

It was therefore necessary for the appellant to engage a new legal practitioner to represent him. I should point out that in *Nhari's* case the matter was contested and was for trial, unlike in the present case where the accused person was pleading guilty. The appellant in the *Nhari* case had consulted another legal practitioner on the morning the inquiry was due to begin. The magistrate had refused the postponement, saying the appellant had already prepared his defence, yet it was the legal practitioner who was to present the defence who had just withdrawn his services.

Regarding the second ground of appeal, *S v Sibanda supra* shows that where there is a legal element of the charge which an ordinary person might not understand, that element needs to be explained. In fact in *Sibanda's* case the questions put to the accused did not deal with, or include, all the essential elements of the charge. In the case before this Court, all the essential elements were embodied in the questions put to the appellant.

As for the age of the complainant, I am not persuaded that the appellant did not know her age at the time. He was her class teacher. She was in Grade Seven. He is the person who knows best the ages of the children he was teaching. He cannot be believed when he suggests that he did not know the complainant's age.

The High Court considered all these points on appeal and concluded thus:

> "He was a schoolteacher who was a teacher of Grade Seven and he was teaching the pupil in question. One cannot say he admitted to an offence whose elements he did not fully appreciate."

Taking into account the above reasons, we came to the conclusion that there was no merit in the appeal and we dismissed it.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Mabuye & Co, appellant's legal practitioners