

Judgment No. HB 114/2002
Case No. HCA 39/2002
CRB REG 692/97

CHARLES NDONDO

versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 1 JULY & 10 OCTOBER 2002

M Khuphe for the appellant
Mrs I Nyoni for the state

Criminal Appeal

CHEDA J: The appellant was charged with one count of indecent assault and another of rape for which he was convicted and sentenced to one year imprisonment with labour on the indecent assault offence and eight years imprisonment with labour on the rape offence with the 2 sentences ordered to run concurrently of which sentence 2 years was suspended for 5 years on condition of good behaviour. The appellant now appeals against both conviction and sentence of the two counts.

The brief facts of the case as presented by the state are contained in the state outline which forms part of this record of appeal. The brief facts are that the appellant a member of the police force was at the relevant period stationed at Siabuwa Police Post in Binga. On 16 February 1997 he was requested by Chief Inspector Mpofu to give his girlfriend, the complainant, a lift to Kalangwizi Primary School. Appellant drove to Siabuwa Police post, did not proceed to the complainant's school but instead offered her a place to sleep in his house, in the kitchen.

When complainant was asleep appellant entered the kitchen, grabbed her by the waist, touched her private parts and kissed her.

The complainant protested and in turn bit appellant's tongue. She then ran into the bedroom with appellant in pursuit. Complainant went back to the kitchen, appellant continued to pursue her and she eventually went outside whereupon appellant followed her, grabbed her by the hand and pulled her back into his bedroom where he forcibly had sexual intercourse with her without her consent. A report was made on or about 2 March 1997 resulting in the appellant being arrested.

The state led evidence from the complainant. The gist of her evidence is that on the day in question, appellant gave her a lift to her school. They did not proceed to school as appellant advised her that he had received a report to the effect that the bridge they were supposed to cross had been swept away. Appellant took her to his house at the police station wherein she was offered wine which she drank and a meal was prepared by her. His friends came to the house and she was introduced as appellant's girlfriend, but she did not object to the introduction made in that manner. She was offered a bed in the kitchen. When they were preparing a meal appellant fondled her breasts at one stage. It was her evidence that while she was preparing to retire to bed appellant came into the kitchen with a towel wrapped around his waist. A scuffle ensued as he tried to kiss her and this resulted in her biting his tongue. She ran into the bedroom and locked herself inside. He, however, followed her into the bedroom. She ran back to the kitchen and eventually outside the house and back again. Appellant eventually had sexual intercourse with her against her will.

She was taken to her school the following day. At the school she told one Losie Dhinari that she did not like the way appellant had treated her namely, that he was making passes at her and that he had fondled her private parts. Complainant then wrote a letter to her fiance Chief Inspector Mpofu, wherein she was asking him to arrange transport for her for the following Friday and that appellant was an idiot whom she did not want to see again, but, she did not tell him about the rape and let alone the alleged fondling. She eventually saw Chief Insepctor Mpofu but again did not report the rape. Complainant also saw her sister but did not report the rape until at a later stage when she was persuaded to disclose what she had been complaining about regarding the appellant. When her sister asked her about her complaint against appellant she initially complained that appellant had fondled her breasts. She said she had not told her the whole truth as she felt embarrassed. When asked what she had said to her sister in relation to the appellant she said "I said he did it".

The state then called Loise Dhinari. Her evidence was that she is a teacher at the same school with complainant. On the morning following this incident complainant was dropped off by the appellant. Complainant told her that her journey had not been good because appellant had made advances towards her which she turned down. She did not tell her that she was raped.

Anna Burombo, complainant's sister also gave evidence. She stated that complainant told her that she did not like what appellant had done to her. When asked what it was complainant told her that she had been given a lift by the appellant, they got to a flooded river which they could not cross. She then spent a night at appellant's house and that he fondled her breasts. It was her boyfriend Mpofu who

took her, the witness and Loise Dhinari to the police station to make a report about the rape. At this juncture, this witness was not aware that complainant was going to make a report about rape.

Chief Inspector Mpofu also gave evidence which is largely common cause. He asked appellant to give complainant a lift to school which he did. He received a letter from her during the course of that week, wherein, she was asking for transport for Friday and that she did not like what appellant had done to her. She did not tell him that he had raped her or fondled her breasts. They eventually met on a Friday and again she did not mention "rape" all she said was that appellant had made a pass at her. She had mentioned to him that she had not been feeling well due to a bout of malaria. She only told him that he had attempted to kiss her and manhandled her later. He then advised her to go and make a report to the police as what he did amounted to "attempted rape". He then drove her to the police station whereupon she made a report about the alleged rape. This was a Sunday a week after the alleged rape took place.

The last witness was Enerst Zulu, a member of the Zimbabwe Republic Police. Nothing of significance turns on his evidence as it related to the questioning of the appellant about his trip to Harare without authority. The state then closed its case.

The appellant gave evidence. The good part of his evidence is common cause. His version of events is that he started cooking which complainant took over eventually as he was entertaining his friends. He denied ever offering her wine, making passes at her or touching her, let alone having sexual intercourse with her. Appellant maintained his story through out the cross-examination by the prosecutor.

There are a couple of factors which have to be taken into account in assessing the evidence of the state and that of the defence. The complainant:-

- (1) is a mature woman who had “a fiance” as she put it
- (2) was offered accommodation by a stranger who is her fiance’s junior in the police force.
- (3) was offered wine according to her evidence (which appellant denies).
- (4) told appellant that she only drank in the presence of her fiance but, however, broke that rule and partook the wine.
- (5) was introduced by appellant to his friends as “his girlfriend” but she did not object.
- (6) was kissed and had blouse unbuttoned by appellant
- (7) ran into his bedroom and not outside the house
- (8) stated that appellant caught up with her and she ran out of the house and came back again into the house
- (9) did she not scream when she was aware of the presence of other police officers at the police base
- (10) stated that she was eventually raped during the night
- (11) she did not report him at the police station where she spent the night or at least contact her fiance by phone or radio the following morning
- (12) agreed to be taken to her school by him
- (13) advised her roommate that she did not like what appellant had done to her. When asked what it was she talked of him fondling her private parts, she did not tell her about the rape.
- (14) wrote a letter to her fiance again she did not tell him about the rape but chose to refer to him as an idiot whom she did not want to see again.
- (15) saw her fiance after five days for a weekend, again she said nothing until he prodded her on a Sunday, seven days after the alleged rape.
- (16) did not even tell her sister exactly what happened but chose to say she did not like the appellant.

All these people heard about her alleged rape after she had been persuaded, coerced or asked to make a report to the police. Her explanation for this type of conduct is not convincing as she stated that she could not tell Ms Dhinari because she was not used to her, the question then is why did she not make a clean breast to her sister and/or boyfriend (Mr Mpofu).

The appellant told the court a quo that he was suffering from malaria and therefore was very weak to an extent that he would not have ventured into a sexual act. He denied offering her wine. His explanation for complainant's conduct is that she was probably upset that he did not take her to the school the same day.

It is well known that women become upset by man who attempt to sexually know them without their consent, it is therefore worse for them, when a stranger chases them around during the night and finally rapes them. This, in my view, is grossly traumatic for them. If the complainant went through such an ordeal, one wonders why she continued to be economic with the truth up to a point when her fiance prodded her that much. It is trite law that for the courts to believe a complainant's evidence in sexual matters, a report should be made at the first available opportunity. In this particular case this opportunity availed itself to the complainant on many occasions but she deliberately chose not to use it. This type of conduct indicates a great measure of reluctance and as such in my view casts doubt as to her credibility as a witness. By failing to report in time she deprived the court of weighing her evidence which could have been given due weight in her favour possibly by the production of a medical report which normally contains details of signs associated with rape cases. I find that the complainant was not a convincing witness about rape having taken place.

Her evidence was such that the trial court should not have accepted it in order to convict the appellant. In light of her unconvincing evidence it is doubtful if sexual intercourse took place and that if it did, it occurred without consent.

The court should have accepted appellant's evidence which was easy flowing and was without contradictions. In fact the state completely failed to prove its case beyond reasonable doubt that appellant raped the complainant. As the complainant's evidence should not have been believed it also follows that she should equally not have been believed when she told the court that appellant indecently assaulted her. The conviction and sentence imposed in respect of each count by the court *a quo* are hereby set aside.

The appeal against conviction and sentence on both counts is accordingly upheld.

Chiweshe J I agree