Judgment No. HB 28/2002
Case No. HCA 78/2001
CRB 244/2001

NIKIWE NDLOVU Appellant

and

THE STATE Respondent

IN THE HIGH COURT OF ZIMBABWE
CHEDA JA & KAMOCHA J
BULAWAYO 29 OCTOBER 2001 & 11 APRIL 2002

C. P. Moyo for appellant
Mrs T. Mujaji for respondent

Criminal Appeal

CHEDA JA: The appellant appeared before a magistrate in Lupane, on a charge of attempted rape. He pleaded not guilty but was convicted and sentenced to 36 months imprisonment with labour of which 12 months imprisonment with labour where suspended for five years on the usual conditions of good conduct.

He noted an appeal against both conviction and sentence. The grounds of appeal were as follows:

1. The learned magistrate erred in law in finding that he attempted to rape the complainant.
2. The learned magistrate erred in fact in finding that appellant attempted to rape the complainant when even the complainant stated on oath that appellant did not try to have sexual intercourse with her.
3. The learned magistrate misdirected himself in law by finding that appellant assaulted complainant with the intention of raping complainant.
4. The learned magistrate erred in finding as fact the appellant's actions had gone beyond indecent assault into the realms of attempted rape.
5. The learned magistrate misdirected himself by refusing to accept appellant's contention that in customary law he was permitted to "play" with his sister-in-law as alleged.
6. The learned magistrate erred in law in finding that customary law is subservient to general law.

Ad sentence

7. The sentence imposed by the trial court is manifestly excessive as to induce a sense of shock.
8. The learned magistrate erred in law in placing excessive emphasis on the prevalence of the crime.
9. The learned magistrate erred in not looking at all the circumstances of the case including the customary law relationship between the parties when passing sentence.

10. The trial court failed to take into consideration the fact that appellant was a first offender when it was considering sentence. It is common cause that the appellant is the complainant's sister-in-law.

It is also common cause that the appellant fell on the complainant and positioned himself on top of her. When she screamed he got off and left. The issue to be decided is whether what he did amounts to an attempt to rape the complainant.

In my view, it does not. As long as the appellant's actions could be explained differently, it was wrong to rush to the conclusion that he attempted to rape her. There is no evidence of appellant trying to open his trousers or lift up her dress.

Although the state alleged that when she cried he closed her mouth, she said in her evidence that he did not do that. He only lay on top of her and fondled her breasts and she cried. She says he was teasing her. On the above evidence it is not proper to conclude that he attempted to rape her.

At the most his actions amount to an indecent assault on her person. Otherwise his actions do not go further than that. See R v M 1961(2) SA 60 and S v C 1965(3) SA 105.

Falling her down and then lying on top of her and fondling her breasts was clearly an assault of an indecent nature. The issue of brother-in-law teasing sister-in-law would need a little more evidence as a custom. In this case the appellant was not questioned in detail regarding the custom. The complainant was not asked about the custom. There is no evidence about the extent of the custom and which

people or tribes practise it, and whether the complainant is aware of it.

On the other hand there was nothing to refute what the appellant said about the custom. It would not be appropriate in the circumstances to make a specific finding on the custom without sufficient evidence on it.

The appellant's actions have to be taken together with what he intended to do.

The evidence in this case is not sufficient to show that he had an intention to rape her.

For these reasons the magistrate's judgment is set aside and I substitute a verdict of

Guilty of Indecent Assault.

In view of the above finding, which is a less serious offence than attempted

rape the sentence should in turn be reduced. A sentence of 36 months imprisonment

with labour is clearly excessive for this substituted verdict and the circumstances of

this case.

In his reasons for sentence the magistrate clearly misdirected himself in

concluding that if the complainant had not screamed the appellant would have raped

her. The evidence is insufficient to justify that conclusion. There is nothing to

suggest that penetration was even attempted.

The magistrate also said he needed to put an end to the appellant's rapist

tendencies. This was clearly a misdirection as no rapist tendencies were proved

against the appellant who was said to be a first offender.

Accordingly, this court is at large to alter the sentence. The sentence of the

trial court is set aside and substituted by the following.

A fine of $600 or in default of payment 3 months imprisonment with labour.

Kamocha J agrees

Sibusiso Ndlovu & Partners appellant's legal practitioners
Civil Division of the Attorney General's Office respondent's legal practitioners