Judgment No. HB 82/2003
Case No. HCA 125/2001

KHANYISO MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU J J
BULAWAYO 22 OCTOBER 2002 & 17 JULY 2003

S Mlaudzi for the appellant
Mrs M Moya-Matshanga for the respondent

Criminal Appeal

CHEDA J: This is an appeal against both conviction and sentence. Accused was jointly charged with one Brighton Ndiweni who is however not part of these proceedings. The facts as outlined by the state are that they indecently assaulted complainant on two occasions and also raped her once on 16 March 2000. The court *a quo* however, convicted him on one count of indecent assault and one count of rape.

The allegations by respondent are that complainant was aged 14 years at the time. She boarded a minibus (commuter omnibus) from Lutumba Growth Point (Beitbridge District) to Beitbridge town. On arrival complainant was asked to pay a fare for the travel but she did not have the money. She advised appellant, (Brighton Ndiweni), (his co-accused) and one Nkululeko that she did not have any money and that she had arranged with the bus driver that she was going to pay the following morning.

When she got to her destination appellant together with his companions accompanied her to her relatives' residence where she tried to raise the fare but failed to do so, resulting in her undertaking to pay the following day. As complainant was about to leave appellant and his companions held her by her arms and force marched

her to a bushy spot where they undressed her leaving her in the nude, this they did on two occasions. On the second occasion Brighton and appellant invited their friend Nkanyiso to have sexual intercourse with the complainant but he declined. They then dragged her further to a spot where she was tripped, she fell to the ground whereupon appellant and Nkanyiso pressed her to the ground while Brighton Ndiweni had sexual intercourse with her without her consent. After this act, she was given back her clothes and advised that she had "paid" her fare. Complainant left and made a report to the police.

Mr Mlaudzi for appellant has attacked the conviction on the basis that –

1. There was a contradiction relating to the issue of payment of a taxi fare.
2. That complainant changed her clothes before she went to report the matter to the police.
3. That complainant accompanied her friend when her friend went to visit appellant in the cells.
4. That complainant was of loose morals.

In as much as there are these contradictions in the evidence of the complainant and the police officer who received the initial report, I am of the view that they do not relate to the commission of the crime and are so irrelevant to such an extent that they do not come nowhere near the relevant issues which can result in one justifiably questioning the credibility of the complainant. Whatever the demeanour of the complainant was, the court should look at the larger picture, that is, how the trier of facts viewed her and the formation of his opinion thereafter. Of importance in this matter is the complainant's evidence and how she looked like when she appeared before Woman Constable Chibasa. Chibasa is a police officer who has certainly no

interest in this matter, observed that complainant was crying and distressed. The trial court found both her evidence and that of the complainant credible. Once the trial court notes a finding of reliability the appeal courts should not unnecessarily interfere unless it is alleged and is found that there was a misdirection. In the present case the arguments by appellant through his legal practitioner do not amount to a misdirection and as such the conviction was proper in both counts.

Mr Mlaudzi further argued that complainant was of loose morals. This may be so. However, it can only avail appellant perhaps in mitigation. The fact that she is a prostitute does not disentitle her to her right to chose who she wants to have sexual intercourse with or when and where. Society should be disabused of this misconception that a prostitute is game to every men at anytime. It is still necessary to obtain her consent. Therefore, that argument can not assist appellant.

In the light of the above I agree with *Mrs Moya-Matshanga* for respondent that there was no misdirection on the part of the trial court. The appeal against conviction is dismissed. There remains the question of sentence. The sentence of 1 year imprisonment for one count of indecent assault, bearing in mind the fact that it was in darkness and that the aim of undressing her was clearly a prelude to sexual intercourse albeit forcibly, should be regarded as mitigatory.

The following is the order is therefore made:–

1. The appeal against conviction on both counts is dismissed.
2. The sentence of 1 year imprisonment on count 1 is to run concurrently with that of 8 years imprisonment imposed on count 3.

Ndou J …….. I agree

Samp Mlaudzi & Partners appellant's legal practitioners
Attorney-General's Office respondent's legal practitioners