Judgment No. HB 143/04
Case No. HCA 74/03

NGQABUTHO MKANDLA

versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 17 MAY AND 9 DECEMBER 2004

Ms N Moyo for applicant
H S M Ushewokunze III for the respondent

Criminal Appeal

NDOU J: The accused, aged 19 at the time was convicted of two counts of rape by an acting Regional Magistrate, at the Western Division Regional Court sitting in Bulawayo. He was sentenced to a total of 20 years imprisonment with half suspended for 5 years on conditions of good behaviour. The complainant was aged 12 years at the time of the alleged rape. The facts established that on a date to the prosecutor unknown, but during the month of August 1999, the complainant went to visit her grandmother in Katasa area, Nkayi communal lands. During the same month on the date to the prosecutor unknown, the complainant was sent by her grandmother to the appellant's place of residence in the same neighbourhood to ask for mealie meal. On her way back home the complainant decided to catch some caterpillars and during that time, the appellant approached her and grabbed her by hand. The appellant pulled the complainant into the bush where he forced her to the ground and closed her mouth with an open hand. The appellant pulled off the complainant's pant, forced open her legs and "raped" her. Again on a date to the prosecutor unknown but during the month of April 2000, the complainant returned to Katasa area, Nkayi to visit her grandmother. During the same month but on a date to the prosecutor

unknown, the complainant was sent to Mzizi's homestead in the same area to ask for bicarbonate of soda. Whilst on her way back the complainant met the appellant who was walking along a stream. The appellant, on seeing the complainant, ordered her to stop and proceed to grab her by hand. The appellant pulled the complainant off the foot path they were on and tripped her felling her to the ground whereupon he "raped" her. After doing so, the appellant got up and ran away.

In the main, this case stands or falls on the testimony of the complainant. The learned acting Regional Magistrate made a positive finding on her credibility. The trial court enjoyed the advantage of seeing and hearing the complainant in the atmosphere of the trial. As a court of appeal, we are generally reluctant to disturb such findings of fact unless they defy reason, common sense or there is something grossly irregular in the proceedings to warrant interference – *Mbanda* v *S* SC-184-90; *Soko* v *S* SC-118-92; *S* v *Mlambo* 1994(2) ZLR 410(S); *R* v *Dhlumayo & Anor* 1948(2) SA 677(A) at 706-7; *Tazira* v *S* HB-47-04; *Masuku* v *S* HB-101-04 and *Kombayi* v *S* HB-27-04. From my reading of the record, there is no basis for interfering with the finding of the trial court on the question of credibility of the complainant. Having said that, I should, however, point out that the examination of the complainant on the question of the sexual act leaves a lot to be desired. The complainant did not say what actually happened after the appellant got on top of her. I am not advocating for graphic details from such a young girl but at least the question of penetration has to be canvassed. The court had, after all, to determine whether the appellant's acts constituted rape or attempted rape or indecent assault. The evidence on this issue is unclear and I will quote it in its entirety to illustrate the point-

> Count I: "… we were in the bush. He came and grabbed hold of me and fell me down. He started raping m.

> Q – What exactly did he do to you?
> A – He removed my skirt, got on top of me, closed my mouth with his hand so that I would not cry out. When he was through he got up and he went back to his homestead."
>
> Count 2: "… He dragged me to a sport under a tree. He asked me whether I had told anyone about the other incident and I said no. He then did to me what he had done on the first incident. When he saw Justin approaching he got up, put on his trousers and ran away."

I agree with Mrs *Moyo,* for the appellant that this evidence on its own I insufficient proof of the essential element of penetration. It is trite that state has to prove all elements beyond reasonable doubt. In other words the onus to prove the case beyond reasonable doubt lies on the state and not the accused. All that the accused needs to do is to put forward a defence which is reasonably true – *S* v *Dube* 1997(1) ZLR 225(S); *S* v *Nziradzepatsa* 1999(1) ZLR 568(H); *R* v *Mabole* 1968(4) SA 811(R); *Kombayi* v *S, supra* and *Masuku* v *S, supra*.

But, I do not agree that on this point alone the convictions should be quashed and trial *de novo* ordered as suggested on behalf of the appellant. The worst that can result from this poor presentation of evidence by the trial prosecutor is an alteration of conviction of rape to a lesser one of attempted rape. I say so because the appellant threatened the complainant with a knife, dragged her, fell her to the ground, removed her skirt, got on top of her and muffled her mouth. All these facts establish all the elements of attempted rape.

I think the convictions of rape should stand on account circumstantial evidence which point in the direction of penetration. The only inference that can be drawn from such circumstantial evidence is that there was penetration at least on the second count. The medical evidence shows that the complainant was penetrated. The only issue is the identity of the assailant. Further, the school teacher observed that

there was something wrong with the complainant and informed her aunt to take her to the clinic. Her aunt Boita Ndlovu said after the report from the class teacher she observed that the complainant "could not sit up straight, she would be fidgeting …" The complainant herself used the word "raped". All these proven facts lead to an inference that there was penetration at least on the second count. Such circumstantial evidence is not available to the state in count one. In count one it cannot be ruled out that after the appellant got on top the complainant he did not effect biological or legal penetration. But as alluded to above the essential elements of attempted rape are all present in count one. In count two, on account of the above circumstantial evidence all the essential elements of rape are present.

Accordingly, the conviction in count 1 is quashed and substituted with attempted rape. In count 2 the conviction of rape be and is hereby confirmed. In light of the above, we are at large as far as the sentence is concerned. These are serious forms of sexual abuse of a minor child. The appellant threatened the complainant and another juvenile witness with a knife to avoid detection. In *Chuma* v *S* SC-165-94, McNALLY JA said-

> "All cases of rape are horrible and sentences of rape have been increasing over the years …"

The sentence in count2 does not merit interference. Whilst it is admitted that the appellant was aged 19 years he unfortunately started life of crime at the deep end of the pool. These days such serious offences of violence are committed by young men of the appellant's age group. The sentence in the first count warrants interference as the conviction is being reduced to a lesser offence.

Accordingly, the conviction on count 1 is reduced to one of attempted rape and conviction on count 2 of rape is confirmed. The sentences imposed by the trial court are set aside and substituted as follows:

> "Count 1 - 7 years imprisonment
> Count 2 - 10 years imprisonment
> Of the total 17 years imprisonment 8 years is suspended for 4 years on condition the accused in that period does not commit any offence involving rape or an offence of a sexual nature and for which he is convicted and sentenced to imprisonment without the option of a fine."

Cheda J …… I agree

Moyo & Partners appellant's legal practitioners
Criminal Division, Attorney-General's Office, respondent's legal practitioners