THE STATE

Versus

GIVEN KWESU CHADEMOYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 JUNE 2008

W B Dube for the state
Accused in person

Criminal Review

NDOU J: This matter was submitted before me for automatic review. The accused was convicted by an acting Regional Magistrate sitting in Bulawayo of two counts of aggravated indecent assault as defined in section 66 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] in that "she had sexual intercourse with L.C. a male person with indecent intent and knowing that he had not consented to it or realising that there was a real risk or possibility that he may not have consented". For these two counts she was sentenced to 20 years imprisonment as both were treated as one for the purpose of sentence. The accused was also convicted of unlawful detention as defined in section 93 of the same Act and she was sentenced to 5 years imprisonment. Of the total 25 years imprisonment, 5 years was suspended on the usual conditions of good future behaviour. I queried the propriety of the conviction mainly on the reliability of the complainant's testimony. I did so because, from the prosecution's own testimony, the complainant was "dizzy and weak" as a result of the concoction allegedly administered on him by the accused. Further, I queried whether, from a medical point of view, it was possible for the complainant to have some erection or capacity to indulge in sexual intercourse as outlined in the facts. After the trial magistrate responded I referred the matter to the Attorney-General for his views. The Attorney-General does not support the conviction and has respondent in the following manner:

> "1. The main problem with the conviction on both counts of indecent assault is the lack of corroboration or support for the evidence of the complainant. This may have come in the form of medical evidence or some other pieces of evidence other than the say so of the complainant whose mental state at

the time of the offence is questionable.

2. …

In this instance, the complainant indicated that when the alleged incident took place, he felt dizzy and weak as a result of the concoction that was given to him. His claim of what took place in the room cannot, *prima facie* be said to be accurate as one would want it to be without further probing.

Dizzy [sic] in itself relates to lacking mental stability, confused or faint (see also Oxford Complete Word Finder 1993 at page 430). In that regard, it was important for the court and indeed the prosecution to establish what the complainant meant and whether or not he appreciated what was taking place around him. In the absence of such an explanation, it remains uncertain whether he indeed was in his sound and sober senses when the alleged indecent assault took place.

This was equally important to clarify as it may well have turned out that the complainant may have ascribed a different meaning to the word dizzy than the conventional meaning we all know.

Although it is not a requirement that there be corroboration of the complainant's evidence in such cases (see *S* v *Banana* 200 (1) ZLR 607 (S) it is important that where a child testifies, the court satisfies itself that the offence was indeed committed through some other evidence other than that of the complainant.

…

In this instance the court sought to rely on the description given of the accused's room and the alleged bottled of concoction which was found in he accused's room for corroboration.

This in my view was erroneous as the complainant had indicated to the court that this was not his first time to be at the accused's place. According to him, he had on occasions been sent by the accused person to her place in order to help carry the accused person's market wares into the house. It is submitted that the complainant had ample occasion on his numerous previous visits to the accused's place to note the surroundings and in effect describe the house and its contents.

For these reasons, it is important for the court to call for medical evidence to buttress the complainant's assertion. From the evidence in the record, the bottle from which the concoction was stored was still on top of the wardrobe where the complainant had seen it on previous occasions. Yet the contents were not subjected to any scientific testing to ascertain the effect of the contents on human beings.

In the same vein, it would have been proper again to establish whether it would have been possible for the complainant to engage in sexual intercourse bearing in mind that he had been administered with a concoction which made him weak and dizzy. A scientific finding on the effect of the concoction on the complainant, would have clinched the case either way.

It is submitted that the opportunities for independent proof of the offence other than through the complainant in this case are very few and it would be unsafe to rely on the evidence of the complainant to convict in this

instance. The conviction on the two counts of aggravated indecent assault cannot be supported."

I agree with the above observation. The brief facts are that the complainant used to frequent the accused's place of abode. On the "fateful" day, in count 2, she gave him a sip of the above-mentioned concoction. As a result of the sip the complainant said that he felt weak and dizzy to the extent that the accused carried him to her bedroom where she allegedly undressed him and thereafter removed her own attire and got on top of him and the two indulged in a sexual act. After they finished, she lifted him once more and placed him on a reed mat and sprinkled water in her bedroom and outside. The complainant said he could not do anything after the accused left the house as he was too weak. He gave the impression that he was obviously too weak to leave the accused's residence as he was left alone for most of the afternoon until the accused's return at 3.00pm. When she returned they shared an evening meal and he retired to bed. The accused left him alone the following morning around 4.00am. He did not go home because he "had no strength, could not get up, feeling weak."

There is a material discrepancy in count 1. In the state outline the accused gave the complainant the concoction even on this occasion. The state outline gives the impression that the accused used the same *modus operandi* in both counts of indecent assault. But in his testimony the complainant gives a different picture. This is what the record reflects:

> "Q You said it was a Wednesday, do you remember which month?
> A September
> Q The date
> A 19 or somewhere there
> Q Was this the first time you went to accused's house?
> A No
> Q When had you been there previously?
> A On several occasions after asking me to carry her market store [sic] into the house.
>
> Q Had a sexual activity happened previously? [This is a leading question that should not have been allowed]
> A No a daily basis but once did that in August
> Q What happened in August
> A … upon departure of her child, she took me, placed me on her bed, thereafter [said] if I refused she would beat me. I admitted. She did it
>
> and when she had finished I quickly got out of the house and went away

Q Did you tell anyone?
A No. I was afraid
Q Afraid of what
A To be beaten up." (emphasis added)

The highlighted portions clearly evince that in count 1 the concoction was not used to induce the sexual act, yet the state outline states that it was used. Obviously the complainant was either being untruthful or confused on what transpired. As alluded to above, the trial court allowed the public prosecutor to ask an unfair and leading question. The courts have insisted that criminal proceedings involving unrepresented accused persons be fair in substance as well as in form – *Powell* v *Alabama* 287 US 45 (1932) at 68-9; *Argersinger* v *Hamlin* 407 US 25 (1972) at 43; *S* v *Mutimhodyo* 1973 (1) RLR 76 (A); *S* v *Wall* 1981 RLR (G); *S* v *Nyoni* HB-248-86; *S* v *Manyani* HB-36-90; *S* v *Alexander & Ors* (1) 1965 (2) SA 796 (A); *S* v *Tyebela* 1989 (2) SA 22 (A) and *S* v *Garande* 2002 (1) ZLR 297 (H). These proceedings were not fair.

In her judgment, the learned trial magistrate misdirected herself on the question of the onus of proof. It is for the state to prove the whole of its case – *S* v *Kuiper* 2000 (1) ZLR 113 (S) at 118B-D; *S* v *Zvobgo* HB-136-05 and *S* v *Zuma* [2006] ALL SA 1 (SCA) and section 18(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. All the requirements or essential elements of the offence have to be proved by the state beyond reasonable doubt, any suggestion that the accused is obliged to convince or persuade the trial court of anything would be misplaced – *Chindunga* v *S* SC-21-02 and *S* v *Jama* 1989 (3) SA 427 (A). Even on the unlawful detention charge, there is no evidence that the complainant was kept against his will. He was left alone by the accused in the house. He had the freedom to leave, and eventually did so. All he said was that the concoction, and maybe combined with the sexual act, made him feel very weak. That is what prevented him from leaving when he wanted to do so. He did not say the accused prevented him from leaving. This matter was poorly investigated or poorly presented or both. To compound it, the accused was a simple person facing the prosecutor and an unsympathetic court. The trial was characterised by wanton disregard of proper procedures during the trial. These criminal proceedings were not fair in substance or in form.

It is clear that from the foregoing that the conviction cannot stand in the face of these irregularities. The conviction is therefore quashed and the sentence set aside. A trial *de novo* is ordered before a different Regional Magistrate.

Bere J …… I agree