ANDILE NCUBE

AND

GODKNOWS MHLANGA

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND CHEDA JJ
BULAWAYO 6 JUNE 2011 AND 22 SEPTEMBER 2011

Mr S Mguni for applicants
Mr W. Mabhaudi for respondent

Appeal

CHEDA J: This is an appeal against the judgment of the Regional Court sitting at Tsholotsho handed down on the 17th February 2010.

The allegations against the appellants are that on the 25th October 2009, the two appellants together with three other accomplices assaulted and raped the complainant, one Bongani Ncube. Appellants were both aged 18 years while their accomplices were aged 17 years. Complainant was aged 14 years.

It is the state's case that on the day in question, complainant and her friend Gugulethu Moyo were proceeding to see their boyfriends when they met second appellant who was coming from the opposite direction. While they were still walking the two appellants together with their three accomplices approached them from behind running. They, without provocation started assaulting complainant all over her body with a leather belt and a sjambok. Gugulethu Moyo ran away. Complainant sustained injuries as a result of this assault.

During the assault complainant fell down and was dragged to the bush where they laid her down facing upwards. They all took turns to rape her after covering her face. They then left for their respective homes while she also proceeded to her own home. She did not make a

report immediately after the assault and rape as she feared reprisals from her parents and the threat from her assailants. She, however, made a report later after her father had confronted her upon receiving information about the incident.

They pleaded not guilty to both charges, but, were nonetheless convicted and sentenced to 18 years imprisonment of which 3 years was suspended on the usual conditions of future good behaviour.

It is their arguments that their identities were not positively established and as such complainant wrongly implicated them.

Complainant and all the appellants live in the same area. They know each other very well and it was therefore easy for her to identify them even in darkness.

Their identities were established with certainity. They did not dispute that complainant knew them prior to this day.

To me, the trial court made correct findings of fact regarding their identities. These courts will not easily interfere with factual findings by trial courts unless it can be shown that there was clearly no basis upon which a reasonable court applying its mind could have believed the assertions being submitted before it. This point was made clear in *S v Godfrey Nzira* SC 23/06 where CHEDA JA stated:-

> "I must point out here that an appeal court is very unlikely to go against factual findings of the trial court which had the opportunity to listen and actually see the witnesses and observe demeanour when giving evidence, unless it is shown that there is a clear misdirection on the part of the trial court."

In casu, no misdirection of any sort has been shown and as such the courts factual finding can not be faulted. The conviction is accordingly confirmed.

With regards to sentence, appellants have vigorously argued that the sentence imposed is so severe so as to induce a sense of shock. It is their arguments that as first offenders they should have been treated with leniency.

In as much as these courts are not keen to send first offenders to prison, a lot depends on the type of offence and the circumstances surrounding the commission of the said offence.

The Appellants met the complainant walking during the night with a friend destined for their boyfriends in the neighbourhood. They assaulted her and dragged her into the bush where they took turns to rape her. This was a ravenous attack designed to ensure submission in furtherance of forced sexual intercourse. The pain and anguish complainant went through when 5 young men exhibited their sexual process is hard to imagine. The attack was callous and can only be described as beastly. Rape by one person is abhorrent enough, let alone when being perpetrated by happy-go-lucky young men of appellants' ages. The prevalence of these offences as noted by the trial court is indeed correct. Communal lands have since time immemorial been regarded as peaceful havens were people can travel freely anytime without fear of molestations. If these lands are now turning into fearsome jungles, these courts have a duty to tame them.

Even if the sentence may appear on the harsh side, the fact that part of it has been suspended, that to me is an indication that the trial court had in mind the need to check their future conduct. A message should be driven home to those of like-mind that those who, even at a young age embark on unlawful sexual intercourse or orgies either out of adventure or genuine adolescence sexual desires without consent of the female species will be treated harshly.

This sentence therefore does not warrant interference. The appeal is accordingly dismissed.

Ndou J.....

Hwalima Moyo and Associates, appellants' legal practitioners
Criminal Division, *Attorney General's Office*, respondent's legal practitioners