

FIDELIS ZENDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 13 JUNE AND 23 JUNE 2016

Criminal Appeal

S. Siziba for the appellant
T. Hove for the respondent

MATHONSI J: After hearing arguments in this criminal appeal against conviction and sentence by the Regional Magistrates court at Bulawayo we dismissed the appeal against conviction and upheld the appeal against sentence reducing the sentence from 20 years imprisonment of which 5 years imprisonment was suspended for 5 years on condition of future good behaviour, to 15 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition of future good behavior. We said the reasons would be made available in due course. These are the reasons.

Following a conviction on one count of rape the appellant was, on 16 July 2012 sentenced aforesaid. The case for the state was that the then 47 year old appellant was a school teacher at Foundation College in Bulawayo. At the same time he was a private tutor for the 16 year old complainant. On 4 March 2012 the complainant had attended a lesson at his lodgings in Tshabalala suburb, Bulawayo and had paid her fees for the extra lessons in the sum of \$24-00 to the appellant.

At around 1300 hours the complainant was leaving the appellant's house when the latter called her back and asked her to formally hand in her assignment. This forced the complainant back into the appellant's house where she picked up the exercise book intending to hand it to the appellant but he took advantage to close the door and lock it. He fondled the complainant's

breasts before inserting his finger into her vagina and then pushing her onto the bed where he pinned her down using his knees and forcibly had sexual intercourse with her.

It was common cause that after the event the complainant left the appellant's home in a huff and was heard saying; "men are dogs." It was common cause that the appellant tried to give the complainant the \$24-00 she had paid him but she turned it down. It was also common cause that immediately after she left the complainant went straight home and reported the sexual attack to her mother, and that her parents immediately confronted the appellant at his home before a report was made to the police.

The appellant admitted the act of sexual intercourse with his 16 year old pupil but said that it was consensual with a girl who was prostituting herself, she having accepted a dollar airtime and \$3-00 on a previous encounter during the third week of February 2012 and \$4-00 on another occasion he could not particularise, in return for sexual favours.

The court *a quo* embraced the evidence of the complainant which found corroboration in that of her mother. It found that the state had proved its case beyond a reasonable doubt and convicted the appellant. The court's task was made easier by the medical evidence which was unchallenged. The medical doctor who examined the complainant a day after the event on 5 March 2012 confirmed not only that penetration had taken place but other evidence of forced entry. On evidence of penetration he remarked:

"Definite penetration effected as evidenced by bruising on onus and hymenal tears."

Mr Siziba who appeared for the appellant conceded that the medical evidence was not consistent with consensual sexual intercourse. He however insisted that the complainant had consented to sexual intercourse because she had not screamed to raise alarm which would have drawn the attention of other people who were nearby including Nicholas Hlatswayo who testified as a defence witness that he was seating "about 5 metres from accused's room." *Mr Siziba* submitted that the door and windows were open and as such if the complainant was not consenting she could have easily escaped. He added that the fact that the appellant was able to put on a condom in the presence of the complainant before the act also pointed to consensual sex. I do not agree.

While it used to be a requirement for the court trying cases of a sexual nature to apply the cautionary rule because of the danger of false incrimination by not only believing the complainant but also to seek corroboration or evidence excluding such danger, that approach was thrown out through the window by the Supreme Court in *S v Banana* 2000 (1) ZLR 607(S). The position of our law now is that it is no longer warranted to rely on the cautionary rule of practice in such cases.

However, the courts are still required to carefully consider the nature and circumstances of the alleged offence. One of the strongest evidence which the state may rely on is the medical evidence. Where the medical evidence led by the state shows injuries consistent with forced sexual contact that will be cogent evidence of the complainant's allegation of rape. I have already referred to the doctor's findings on the injuries sustained by the complainant, in particular the bruises to her anal cavity which are consistent with rape and completely at variance with what the appellant sought to suggest in court that he had routinely indulged in sexual activity with the complainant as he had done before on two other occasions.

In addition to that, the conduct of the complainant immediately after the sexual experience is consistent with absence of consent. As she left the appellant's house she was cursing and bitterly complained that "men are dogs." When the appellant offered her the \$24-00 she had paid for tutorial fees, she sharply rejected the money before finding her way to her home in another suburb, Nkulumane 12, which is a considerable distance away from Tshabalala.

Upon arrival at home she was still seething with anger. She reported the rape to her mother. That conduct cannot be said to be that of a naughty girl who took the initiative of soliciting for sex from her tutor and demanded payment for services rendered. If she was that kind of person, she would have accepted the money, but she did not. In fact the entire defence of the appellant constituted an unmitigated insult on the complainant whose trust had not only been betrayed by a tutor 31 years her senior but betrays immeasurable disdain, disrespect and lack of contrition by an unrepentant rapist deriving sadistic pleasure out of victimizing a girl young enough to be his last born daughter.

Lack of consent is not determined by the question of whether the complainant put up a bulldog fight to ward off an attack or whether she screamed herself hoarse during the attack. The appellant wallowed under that misapprehension as it is not all cases of rape where the victim has to express her disapproval by screaming. It will help those who engage in such activity to appreciate that when a woman says “No,” she means No. No can never be “yes but no.” See *S v Nyirenda* 2003 (2) ZLR 64 (H) 73E.

In our view the state managed to prove the commission of the offence beyond a reasonable doubt. The findings of the court *a quo* in that regard cannot be faulted. It is on sentence that the court *a quo* was found wanting. There is absolutely nothing in the record to suggest that the court ever considered the mitigating circumstances that were presented. In fact what transpired during sentencing is captured in only 13 lines of the record which read:

“BY DEFENCE (To court)

Accused is a first offender. It is appropriate and desirable that part of accused’s sentence be suspended: *S v Chirara* 1990 (2) ZLR (sic). Accused is a family man. He has 7 children the youngest being 2 years old. A harsh sentence will ruin accused’s family. Accused has been a law abiding citizen prior to the crime perpetrated. It is clear that accused will lose his employment. Accused’s conduct has been good in the past. Long imprisonment is likely to affect his life and family. Those are my submissions.

SENTENCE

By Court

Accused’s blameworthiness is very high given that he committed this crime against his pupil. Teachers are professionals who act as parents most of the time. Accused reduced himself to an ordinary rapist betraying not only the trust of the parents but that of his profession. Accused no doubt deserves imprisonment. Part of the imprisonment term will be suspended on condition of good behavior.”

What about the fact that the appellant is a family man with seven children the youngest of which was two years old and that he was a first offender? Or that he was certainly going to lose his teaching job as a result of the conviction, itself some form of punishment? It all counted for nothing in the mind of the court. In our view that was a misdirection. Although sentencing is the discretion of the trial court which the appeal court is loath to interfere with, where there is a misdirection, as in the present case where the sentencing court ignored all the mitigation, the

HB 167-16
HCA 294-12 'A'
XREF HCA 585-13
XREF BYO REG 169-12

appeal court will interfere with the exercise of that discretion. See *S v Chiweshe* 1996 (1) ZLR 425 (H) 429D; *S v Nhumwa* S -40-88.

In light of the misdirection we are therefore at large in so far as the sentence is concerned. Taking into account the fact that the accused is now 51 years old and has a huge family and he will lose his job as a result of his lack of self-control, we are of the view that an effective sentence of 10 years will meet the justice of the case.

In the result, it is ordered that:

1. The appeal against conviction is hereby dismissed.
2. The appeal against sentence is upheld.
3. The sentence of the court *a quo* is set aside and substituted with the sentence of 15 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition the appellant does not, during that period, commit an offence of a sexual nature for which, upon conviction, he is sentenced to imprisonment without the option of a fine.

Bere J agrees.....

Mweli Ndlovu and Associates, appellant's legal practitioners
National prosecuting Authority, respondent's legal practitioners