HB 136-17
HCA 672-13
XREF HCB 02-14
XREF HCA 421-16

PROVIENCER NCUBE
**versus**
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 29 MAY 2017 AND 1 JUNE 2017

**Criminal Appeal**

*S Mguni* for the appellant
*W Mabaudhi* for the respondent

**MATHONSI J:** People who sexually abuse children and then come to court with fanciful defences hoping to get away with such despicable criminal conduct must know that courts of law will never be fooled by such excuses but will see through the façade and administer justice without fear or favour. The defence tendered by the appellant on two counts of raping a 12 year old cousin sister of his, that he was in love with her, that she was a prostitute and that she was not a virgin must surely rank as one of the most bizarre defences to confront a court of law. It only means that the appellant, quite unrepentant right up to the end, takes the court for granted and does not appreciate the gravity of the offence he committed.

The appellant was, on 10 December 2013, convicted of two counts of rape by the regional court sitting at Hwange. He was sentenced to 12 years imprisonment of which 4 years imprisonment was suspended on condition of future good behaviour leaving him with an effective 8 years imprisonment, a relatively light sentence indeed in the circumstances. He has appealed to this court against sentence only.

All the facts in this matter except the alleged rape were common cause. They are that on 11 November 2013 the appellant had arrived at the 12 year old complainant's homestead in Ndimakule village 2 under Chief Shana in Jambesi at about 1000 hours and found the complainant present. Also present were Nomathemba Mathe, a juvenile and Thenjiwe Mugela,

the complainant's aunt. The appellant asked the complainant to accompany him to another homestead, Lydia Mudimba's homestead, where he wanted to deliver some pills.

It was common cause that the complainant accompanied him to that homestead but upon arrival there he asked her to remain outside as he delivered the medication. The two of them then left proceeding, initially to another homestead but they did not get there. Instead the appellant led her through a path leading to Getrude's homestead. The complainant told the court that before they could get there the appellant held her by the hand and pulled her into a bush saying he wanted to have sex with her. When they heard people talking he dragged her further into the bush and felled her before undressing her and mounting her. As he failed to remove her panties he tore the panties at the bottom and forced himself on her without protection.

The complainant said after the first sexual attack, the appellant sat on her abdomen for a while preventing her from standing up. He then put on a condom and forced himself on her the second time. He then gave her a dollar to buy a drink and petitioned her not to tell anyone about the sexual assault. They left the bush together before parting ways at Mkhwananzi's homestead.

Upon arrival at home the complainant immediately made a report of the rape to Nomathemba Mathe another juvenile who urged her to tell her aunt Thenjiwe. She then made the report to her aunt resulting in a report being made immediately to the police leading to the arrest of the appellant. Thenjiwe examined the complainant and observed not only a gapping hole on her panties but also semen on her apparel.

While admitting all the other facts as I have said, the appellant denied the rape. His version was that although the complainant was her cousin sister (their fathers are brothers), he was in love with her after Thenjiwe had assisted him propose to her. She had indeed accompanied him to deliver medication and they had taken a stroll "chatting and whiling up time as lovers." He admitted that the complainant had obtained a dollar from him but said that she had helped herself to it after putting her hand in her pocket and taking it. He admitted that they had parted ways at Mkhwananzi's homestead at about 12:30 hours and that the complainant proceeded home on her own. He even admitted that there was no prospect of her having an encounter with another man between that spot and her home.

The appellant told the court that he was in good books with the complainant and he was surprised that she accused him of rape when they did not have sexual intercourse. As to why the complainant was falsely accusing him, he suggested that her aunt Thenjiwe may have had a hand in that because she was an MDC supporter while his own father belongs to Zanu PF. Therefore, although Thenjiwe is the one who arranged the affair, she may have done that in order to spite his father.

The appellant then suggested that the complainant was a prostitute who had once fallen pregnant. The dialogue between the appellant and the public prosecutor under cross examination went something like this:

"Q: How would your categorise her character?

A: She was a prostitute

Q: And you wanted a prostitute for a woman girlfriend?

A: That is correct

Q: Are you serious?

A: I did not know that I was being trapped.

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Q: What was your intention when you wanted her to accompany you?

A: On that day I had no motive".

The appellant could not have expected to be taken seriously at all. The complainant was 12 years old. She is his sister. As to how it was possible for him to be in an incestuous relationship with her little sister and how that little sister could be a prostitute at that age, which prostitute he still wanted for a girlfriend is the stuff for outer space.

In my view the evidence against the appellant was overwhelming. Considering all the facts that were common cause, the appellant basically corroborated all that the complainant said except the rape. But then immediately after arriving back home the complainant reported the rape first to Nomathemba and then to her aunt Thenjiwe. So the report was made contemporaneously and to the person expected to receive such report. Although the cautionary rule in sexual offences of this nature is no longer a requirement in our law (see *S* v *Banana* 2000

(1) ZLR 607 (S) 614 E-F), the position of our law as it now stands is that the evidence of a complaint in a sexual case is admissible to show the consistency of the complainant's evidence and the absence of consent.

For it to be admitted the following must be met;

(a) the complaint must have been made voluntarily, not as a result of questions of a leading and inducing or intimidating nature, and

(b) the complaint must have been made without undue delay at what is in the circumstances the earliest opportunity, to the first person to whom the complainant could reasonably be expected to have made it. See *S* v *Banana*, *supra* at 616 B-C; *S* v *Makanyanga* 1996 (2) ZLR 231 (H) 242G- 243C; *S* v *Mukuku* HB 337-16.

In this case the foregoing requirements were fully met thereby enhancing the credibility of the complainant. Therefore that part of the strong state case cannot be discredited by the fact that the complainant did not scream or that the doctor who examined the complainant a day after the attack observed that the hymen was missing, that she had no lessions and that there was no sign of bleeding the only factors which Mr *Mguni*, who appeared for the appellant relied upon. Rape is sexual intercourse with a female person without her consent. It is not sexual intercourse with a virgin. In any event, other scientific commenters have said that the absence of a hymen is not conclusive proof of previous sexual experience.

The appellant's case hinges entirely on the medical affidavit submitted by the state. Mr *Mguni* submitted that because the complainant testified that the rape was her first sexual experience and that she had bled during the encounter this contradicted the medical evidence to the effect that the hymen was missing and that there was no evidence of bleeding. In my view that cannot possibly disprove rape which was established by the evidence of a credible complainant corroborated by another credible witness.

The fanciful explanation given by the appellant that there was bad blood between his father and Thenjiwe due to political differences even if it were true is not enough to disprove rape either. In any event the allegation of bad blood does not sit well with and is in fact at

variance with the undisputed actions of the actors. If there was such bad blood, surely the complainant would not have agreed to accompany him on the fateful day. Still less would Thenjiwe had suffered that excursion to happen as she had voiced her disapproval anywhere.

The appeal is clearly without merit. It constitutes the misadventure of someone who certainly does not see anything wrong with the blood curdling circumstances under which the young girl was violated and continues to fuminate even after conviction without being contrite.

Accordingly the appeal is hereby dismissed.

Bere J agrees……..

*Dube, Mguni and Dube*, appellant's legal practitioners
*National Prosecuting Authority*, respondent's legal practitioners