THE STATE
versus
GILBERT CHAKAPFAVA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 2nd December 2004

Criminal Review

BHUNU J: The complainant was a toddler of 3 years of age at the material time. Sometime in August 2003 her father hired the accused to repair his car at his home.

The accused reported for duty at the complainant's home on the 18th August 2003. The complainant was in the company of a maid.

At one stage the maid went to bath herself leaving the complainant to play. It is alleged that whilst the maid was bathing the accused took the complainant into the motor vehicle he was repairing, placed her on his lap and raped her.

The accused denied that he raped the girl as alleged or at all. He alleged that the complainant's father was falsely implicating him to avoid paying him for the work he had done on his motor vehicle.

The complainant being an infant the trial magistrate properly warned herself against the dangers of relying on the child's evidence and proceeded with caution.

The complainant's evidence was that while seated in the motor vehicle the accused placed her on his lap and prodded her genitals with his finger.

That the complainant was sexually abused was established beyond question. This is because the complainant sustained bruises in her vagina. The crux of the matter is however what caused the injuries.

The complainant herself said it was the accused's finger. She made no suggestion that by finger she meant the penis. She was not asked to explain or indicate what she meant by finger. Apart from her version no one else witnessed the sexual abuse.

She was only examined by a medical doctor about 15 days later on the 3rd of September 2003. The medical examination revealed healing abrasions in her genitalia. Because of the delay there was no evidence of the nature of the instrument or organ used to inflict the injuries.

The learned trial magistrate decided to speculate that by saying finger, the child meant penis. That conclusion is however not backed up by the facts.

The complainant herself said that accused used his finger. There was no other evidence to suggest that anything other than a finger had been used to inflict the injuries. The trial magistrate's conclusion was therefore based on mere conjuncture and speculation with no sound basis from proven facts. Her finding was based purely on circumstantial evidence.

It is trite that to convict on circumstantial evidence the inference to be drawn must be the only reasonable inference to be drawn from the established facts.

In this case it cannot be said that the only reasonable inference to be drawn was that the injuries had been inflicted by a penis. This is because there is a reasonable possibility that the injuries could have been inflicted by a finger as alleged by the complainant.

In fact the trial magistrate's finding went against the grain of evidence. There was no basis for the trial magistrate to draw the conclusion that the accused used his penis when the only eye witness was telling her that he used his finger. That inference could not be drawn without first seeking clarification from the

complainant as to what she meant by "finger". There was no medical evidence to back up the trial magistrate's finding. There could have been merit in her finding for instance if medical evidence had established that accused's semen or pubic hair had been deposited o the complainant's clothes or body.

For the foregoing reasons I am of the view that the trial magistrate misdirected herself by coming to a verdict on the basis of her imagination to the exclusion of concrete facts staring her in the face.

That the accused sexually abused the complainant is beyond question because he was the only person in the car with the child on the day in question.

It is common cause that the child was sexually abused on that day. When questioned the complainant pointed an accusing finger at the accused. She had no reason to falsely implicate the accused.

It is highly unlikely and not in the least probable that the complainant's father could have sexually abused her child to avoid paying the accused his dues. Indeed there was no evidence of any payment dispute. The accused's defence in this regard was correctly rejected.

It not having been established that the accused used his penis to inflict the injuries he was entitled to a reasonable doubt. On the facts he ought to have been convicted of indecent assault instead of rape.

That finding warrants the setting aside and reassessment of the sentence.

The accused is a mature first offender aged 33 years. He is self employed as a mechanic although at the time of sentence he had no money nor savings.

He is a parent with one child as such he ought to desist from sexually abusing other people's children.

Sexual abuse particularly of young toddlers is always considered a serious offence regardless of the mode and method used. Offences of this nature are prevalent and on the increase. There is currently an outcry both in the print and electronic media against sexual abuse of women and young girls. That being the case the courts will be failing in their duty to protect society if they do not pass stiff and deterrent sentences.

It is accordingly ordered:-

1. That the conviction and sentenced by the trial court be and is hereby quashed and set aside and replaced by the following order:-
   - (a) That the accused be and is hereby convicted of indecent assault.
   - (b) That the accused be and is hereby sentenced to 7 years imprisonment of which 2 years imprisonment is suspended for a period of 5 years on condition the accused does not again within that period commit any offence of a sexual nature and for which he is sentenced to imprisonment without the option of a fine.

Uchena J, agrees…………………………