

STATE
versus
HERBERT MATSIGA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 14 OCTOBER 2011

Criminal Review

MUSAKWA J: The accused was initially charged with three counts of contravening s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. However, the trial court, not being satisfied with the testimony of the complainant returned a verdict of contravening s 70. The accused was sentenced to four years imprisonment of which two years were suspended for five years on condition of good behavior. The remaining two years were suspended on condition accused completed 630 hours of community service at Guruve Clinic.

The accused and the complainant who was at the material time aged twelve years reside at different plots in Mvurwi. The offence occurred in 2007 when the complainant was doing grade six at Chiwe Primary School, Mvurwi. At the time of commission of the offence accused was twenty three years old.

Contrary to the outline of state case the evidence of the complainant was to the effect that on the first two occasions when it was alleged the accused raped her he had only knocked on the door and went away. On the third occasion the accused went to the complainant's home around midnight when the parents were away. The complainant was asleep and only woke up when the accused was raping her. She was then threatened by the accused who gagged her in the process.

The complainant's brother who slept in the same room testified that the accused opened the door and threatened the complainant before raping her. Apparently the brother who was eleven years old at the material time was not threatened despite witnessing the commission of the offence. Neither the brother nor the complainant reported the incident to the parents when they returned. The offence only came to light when the complainant's parents found a used condom in her blankets. After questioning her that is when she made the report of rape.

The medical examination that was conducted about a month later confirmed the probability of penetration. There were no extra-genital injuries although it was noted that the hymen was torn. The examination was painful and was abandoned.

In her verdict the trial magistrate noted that there was no evidence on which the accused could be convicted of the three counts of rape. In her reasons for judgment the trial magistrate clearly stated that-

“...& accordingly @ (sic) is convicted of one count of c/s 70 of the Criminal Code, CAP 9:23. There is no evidence on record to support 3 cts.”

However, upon sentencing the accused she treated all three counts as one. It follows then that accused was sentenced on the basis of having been convicted of three counts.

Whilst it appears the sentence imposed would have been too severe in respect of the one count accused was convicted of, its overall effect was also inappropriate. An effective custodial sentence was called for taking into account the aggravating factors which far outweighed the mitigating factors. In this respect a sentence in the region of 2 years imprisonment with a portion suspended on condition of good behavior would have been appropriate. The trial court should have taken into account the age disparity between the complainant and accused which was substantial. In addition the complainant was just above the age of consent. In this respect see the case of *S v Dube and Others* 1998 (1) ZLR 273 (H).

In light of these observations I cannot certify that the proceedings are in accordance with real and substantial justice.

Bere J agrees.....