

STATE
versus
OMEGA MUSHAMBA



HIGH COURT OF ZIMBABWE
MUREMBA & MUTEVEDZI JJ
HARARE; 18 October 2023

Criminal Review Judgment

MUREMBA J: The accused person who is aged 22 years was convicted of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] on 21 August 2023 after a full trial. He was convicted of raping a 12-year-old girl. He was then sentenced to 12 years' imprisonment with 3 years being suspended for 5 years on condition of future good behaviour. He was left with an effective 9 years' imprisonment.

I wish to point out from the outset that I found the reasoning of the regional magistrate in convicting the accused flawed. It appears to me that he forgot the cardinal principle in criminal law, that it is the duty of the State, not only to prove the guilt of the accused, but to prove it beyond reasonable doubt. To him, the mere mention by the complainant that it was the accused who raped her was enough to shift the burden of proof to the accused to explain why the complainant had implicated him. The failure by the accused to give a convincing explanation resulted in him being convicted. As will be demonstrated below, this is not a case which was timeously reported by the complainant to her mother. Besides, when the complainant eventually reported to her mother, she did not do so voluntarily. She revealed the purported abuse only after the mother had assaulted her and threatened to take her to the doctor for an examination to ascertain if she had not had sexual intercourse.

The complainant's mother who was the first to testify said the following. On 10 March 2023, she came to Harare from Cornerstone Business Centre in Mutoko where she resides and operates a shop and a bar. At around 9pm as she was on her way back home, she received a phone call from her younger sister advising that the complainant's hand had been twisted by one Allen. When she got home around 10pm, she found the complainant in pain and crying. When she asked her what had happened, the complainant explained that she and another young girl whom I shall call R went to the mountain to fetch firewood. They were followed by one Allen and another young man. R was followed by the other young man, whilst the complainant



remained with Allen who pulled her hand as he was trying to touch her breasts. He twisted her arm and she started crying. Allen's mother heard her cry and called her. Allen's mother asked her what had happened and upon the complainant explaining what had happened, she gave her some tablets to ease the pain and told her not to report what had happened to her mother. However, it was not possible to hide what had happened because the complainant's hand was painful and her mother's younger sister who had visited had become aware of what had transpired. The complainant's mother said that she asked the complainant if Allen had not done anything else to her. The complainant said that he had not done anything else. The mother then admonished the complainant to tell the truth so that they could go to the doctor for her to be assisted in case she could have been impregnated or infected with a disease. The complainant maintained that Allen had only twisted her arm. She however said that the person who had raped her was Omega (the accused). Apparently, the accused was working for Allen's mother although the nature of his employment was not made clear. When the complainant's mother asked the complainant when the rape had occurred, the complainant intimated that it had taken place at the time the mother had gone to South Africa. The complainant's mother had apparently travelled to South Africa two months earlier. She then asked the complainant why she had not reported the matter earlier. Her explanation was that it was because the accused had threatened to kill her and run away if she ever reported the matter. The complainant's mother added in her testimony that the complainant had proceeded to tell her that the accused had raped her in the shop behind the counter. He had lowered his trousers and pants and raped her before threatening to harm her if she made any report of the abuse. The mother said that she even tasked her brother's wife to interview the complainant about the matter and the complainant stuck to her story. She added that she then took the complainant to the police to make a report. On the way to the police station the complainant inquired from her whether the police would not arrest her. Her answer was that the police would only arrest her if she lied.

When the accused was afforded the opportunity to cross examine the complainant's mother, he alleged that she had not told the court what was contained in her statement to the police. This prompted her statement to be read to her in full. The learned regional magistrate recorded it in full. In the statement the mother said that when the complainant said that Allen had twisted her arm she suspected that the complainant was hiding the truth about the incident and assaulted her. The complainant then said that Allen had fondled her breasts as they were looking for firewood. The mother said she then asked her if she had had sexual intercourse with him and she denied and said that Omega Mushamba was the one who had had sexual

intercourse with her sometime in February 2023 when she had travelled to South Africa. The mother said that she then took the complainant to the police to report the matter on 13 March 2023.

What is clear is that when the mother testified in court, she omitted to disclose that she had used violence to wring out of the complainant the information that Allen had fondled her breasts. The complainant had only said that Allen had twisted her arm and the mother had not been convinced. So, had it not been for the assault, the complainant would not have disclosed that Allen had also fondled her breasts over and above twisting her arm. The complainant would also not have disclosed that she was raped. Further, had it not been for the accused who requested the court to have the complainant's mother's statement read out to her during cross examination, the court would not have known that the complainant had only told her mother that Allen fondled her breasts. It would not have been known that the complainant had only alleged that the accused raped her after she had been assaulted. The court would have also remained in the dark that the complainant's mother had only taken her to the police to report the matter on 13 March 2023. During cross examination the accused further took issue with the fact that the complainant's mother had delayed reporting the rape to the police. He wanted to know why his arrest was delayed, and why Allen was arrested first. No meaningful explanation was given by the complainant's mother to the accused's protestations. She could only say:

“The police followed the case as it had come out.”



It was not clear what she meant by that statement and she was not asked to clarify it. When the complainant testified she said that the accused had raped her in the shop in the evening when she was about to close the shop. She was by the door. The light was on. The accused arrived, grabbed her and dragged her behind the counter. He pushed her to the floor, removed his trousers and pants. He thereafter raped her after removing her skirt and pants. She said that she bled. He then threatened to kill her if she reported the rape. He further said that she would be arrested as well. The complainant said that as a result she did not report the rape out of fear. She added that before the accused had raped her he used to bother her saying that he loved her. The rape matter came to light on 10 March 2023, after Allen had followed her to the mountain where she had gone to fetch firewood with one R and her mother had asked her about the incident. It was her further testimony that her mother had assaulted her at the time she was asking her if she had not engaged in sexual intercourse with Allen. The mother had insisted that she tells the truth. She said that her mother said that if she was saying that she had



not engaged in sexual intercourse with Allen, they were going to the hospital for her to be examined. The complainant said that she then told her that it was Omega (the accused) who had raped her. She said that her mother then said that they were going to the police to make a report the following day.

When the complainant gave her evidence in chief, the prosecutor did not ask her when the rape had happened. However, during cross examination the accused asked her when it had happened. She said that it happened last year (in 2022) when she was in Grade six. The accused then queried why the State papers were saying that she was raped in February this year (2023). The complainant maintained that the rape occurred in 2022. In her view, the police had probably made a mistake because at the time the accused had raped her, her mother had gone to South Africa to buy wares for the shop. She added that in the absence of her mother she would close the shop at 8pm. The shop traded in groceries and beer. There are eight shops which also sell liquor at the same business centre. When her mother personally mans the shop, she closes it at midnight.

The medical report that the State produced indicates that there was visible evidence of penetration. The hymen was torn and stretched. The medical examination was done on 13 March 2023. It indicates that the time lapse between the alleged sexual abuse and the examination was one to three months. The doctor did not tick the box which indicates a time lapse of more than three months. The medical report also states the complainant's date of birth as 24 June 2010 which means that she turned 12 years on 24 June 2022 when she was in grade six.

The accused who said he is a shop attendant denied any knowledge of the offence. When he was asked what he thought was the reason for the complainant to falsely implicate him, he said that he thought that it was probably because of the complainant's uncle (the mother's brother) with whom he did not enjoy good relations as they once had an altercation. He said that the complainant and her mother were given money in order to fix him. It is however clear from the record that the accused had no evidence to show that it is the complainant's uncle who influenced the complainant to lie against him. The accused was just speculating. However, as I have already stated elsewhere above, in criminal law, the burden of proof is the responsibility of the prosecution to prove beyond a reasonable doubt that the accused committed the crime. This is because the accused is presumed innocent until proven guilty by the prosecution. It is not the duty of the accused to prove his or her innocence. In discharging the burden of proof, the prosecution has the obligation to present to the court

evidence which shows the guilt of the accused and to further convince the court that the evidence presented meets the required standard of proof, which is proof beyond reasonable doubt. The prosecution must therefore convince the court that there is no other reasonable explanation that can come from the evidence presented at trial other than that the accused committed the crime. In other words, the prosecution must present enough evidence to convince the court that there is no other reasonable explanation for what happened other than that the accused committed the crime.

What the learned regional magistrate did not do, which he ought to have done, was to determine whether or not the complaint of rape which the complainant made to her mother as the first recipient of the rape complaint, was admissible at law. In *S v Banana* 2000 (1) ZLR 607 (S) at p 616 the Supreme Court stated that a complaint of a sexual offence that is made soon after its occurrence is admissible to show the consistency of the complainant's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant fabricated the allegation. GUBBAY CJ explained that:

“The requirements for admissibility of a complaint are:

- (1) It must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature. See *R v Petros* 1967 RLR 35 (GD) at 39G -H.
- (2) It must have been made without undue delay and at the earliest opportunity, in all the circumstances, to the first person to whom the complainant could reasonably be expected to make it. See *R v C* 1955 (4) SA 40 (N) at 40G - H; *S v Makanyanga* (*supra* at 242G - 243C).”

An analysis of the rape complaint in this case, made to the complainant's mother illustrates its deficiencies. It hardly satisfies the requirements of admissibility for the following reasons. It was not made voluntarily but as a result of questions not only of a leading character but also of an intimidating nature. In fact the complainant only made the report after she had been assaulted by her mother. The mother had further threatened to take the complainant to hospital for an examination. It was only then that she disclosed or rather alleged that she had been raped. Needless to point out, the report was delayed. To her mother, the complainant alleged that she was raped in February 2023. In court she said that the accused raped her in 2022. Either way, the complainant was tardy in making the report to her mother. That delay, compounded by the involuntariness apparent from it, makes the complaint inadmissible because it raises the suspicion that it may have been fabricated. Therefore what the complainant told her mother about having been raped by the accused cannot be accepted as showing consistency on her part and that she did not consent to the sexual act.



It however does not follow that where a complainant delayed in making a report about a sexual abuse perpetrated against her, the accused escapes liability on that basis alone. Each report must be analysed in the context of the circumstances under which it was made because there could be many legitimate reasons why survivors or victims of sexual violence may not immediately report the abuse. The reasons include:

1. **“Fear of not being believed:** Victims may fear that they will not be believed, especially if the rapist is older, more powerful, or respected in the community.
2. **Fear of humiliation:** Victims may fear humiliation by family, friends, colleagues, or others.
3. **Society’s tendency to blame victims:** Society tends to blame victims, especially female victims, or to emasculate male victims of rape.
4. **Fear of retaliation:** Victims may fear retaliation by their rapist if he finds out he’s been reported, especially if he isn’t arrested and punished.
5. **Fear of endangering family:** Victims may fear that their family will be endangered if the rape is reported.
6. **Uncertainty about whether the sexual act constituted rape:** The victim may be unsure whether the sexual act actually constituted rape or not.
7. **Lack of faith in the justice system:** Victims may lack faith in the ability of the justice system to properly punish the perpetrator.
8. **Perpetrator denying rape:** The perpetrator may deny that he raped his victim, and people may believe him and not his victim.
9. Sexual assault is often perpetrated by men that the victim knows and loves, and who they don’t want to report, especially if they are dependent on him.”¹

In *S v Pedzisai Musumhiri* HH 404- 14 TSANGA J emphasised the same constraints faced by sexual abuse victims/survivors in the following manner:

“Research done in Zimbabwe through WLSA on cultural inhibitors to reporting gender based violence and sexual assault indicates that silence cannot be equated with acquiescence. Fear of lack of support from the family, fear of the consequences that might befall the complainant, which may range from being totally blamed for the event, being thrown out of the home to being forced to marry the rapist are some of what keeps many women from not reporting. (See Alice Armstrong, *Culture and Choice: Lessons from Survivors of Gender Violence in Zimbabwe* WLSA; Harare 1998 pp126-128).”



¹<https://www.mariestopes.org.za/10reasons-people-don't-report-rape-sexual-assault/> Accessed on 10 October 2023.



I also wish to add that there is belief that some victims may take time to process what would have actually happened to them and that there are often deep feelings of shame or guilt associated with sexual violence. As a result, some victims avoid talking about the abuse as a way of avoiding to relive the experience. They may choose to quietly carry on with their everyday lives and pretend as if nothing happened. That on its own is a self-protection mechanism. It is therefore never too late to report a sexual crime to the police. The perpetrator can be charged and convicted years or decades after the alleged sexual act(s). However, realistically, the longer the wait between the incident and the investigation, the more challenges the complainant will face as physical evidence would have been lost due to passage of time. The police must therefore be thorough in their investigation to ensure that prosecution has enough evidence to prove the case. If investigations are not thoroughly done, it can be challenging for the prosecution to prove the case against the accused beyond a reasonable doubt. The complainant's credibility may be questioned. The prosecution must prove that the accused had sexual intercourse with the complainant and that it was against the complainant's will or without their consent. The matter can be incredibly difficult for the State to prove. Therefore, the job of the prosecutor during trial is to present to the court, evidence which suggests that the complainant is telling the truth and that she is a credible witness.

Turning to the present case, I do not find the evidence of the complainant clear and satisfactory. I do not believe that she was a credible witness. According to the decision in the *Banana* case (*supra*), a court making a finding that the complainant is credible must carefully examine all the evidence in relation to the alleged sexual offence before convicting the accused. In *casu* the complainant's evidence was littered with some unsatisfactory features. To begin with, the complainant gave what can be regarded as a legitimate or valid reason for not immediately reporting the alleged rape when it happened. She said that the accused had threatened that he would kill her and that she would also be arrested if she reported the rape. If this is indeed what happened, the complainant had a legitimate reason for not reporting the rape timeously.

However, before accepting the complainant's explanation for not making a timeous report, the learned regional magistrate ought to have interrogated the evidence that was presented before him to see if it showed that the complainant had been truthful about, firstly, having been raped and secondly, if she had been raped, the accused was the perpetrator. Whilst the complainant could have kept quiet about the rape because she was threatened by the accused as she alleged, it is also possible that she kept quiet because she had consented to the sexual



intercourse. She told her mother and the police that she was raped in February 2023. If it is true that the sexual intercourse happened in February 2023, by that time she had already turned 12 years. At law she was capable of consenting to sexual intercourse, although she was regarded as a young person. If she did consent to the sexual intercourse, the accused person cannot be convicted of rape but of having sexual intercourse with a young person as defined in s 70 of the Criminal Law Code. It is difficult to say with absolute certainty that the complainant did not consent to the sexual intercourse because she was not even truthful about the time when she was raped. To her mother and the police she said it was in February 2023. During cross examination by the accused she said that it was in 2022 when she was in Grade 6. To the medical doctor who examined her she said that she was raped about 1-3 months before the date of the medical examination. Surely a thirteen-year-old girl who is in grade seven cannot be confused about an incident that happened barely a month before the report was made and one which could have happened a year back. The contradiction is material and significant. It can only mean that the complainant was not being honest about when the alleged rape incident took place. What makes things worse is that no explanation was given by the complainant for this seemingly glaring contradiction. This puts in doubt the complainant's credibility. There is a possibility that she did consent to the sexual intercourse hence her reluctance to report the alleged rape.

The possibility is strengthened by the fact that the complainant's breasts were fondled by Allen yet she was unwilling to disclose to her mother when she was being questioned about what had happened at the mountain. She only did so after her mother had assaulted her. The question is if the fondling of the breasts was done against her will, why was she hiding the truth? We are not told that Allen had threatened her in any way. Was it because she was trying to protect Allen? Was it because Allen's mother had asked her not to report this to her mother? It is unfortunate that the prosecutor did not seek to establish the relationship that was between the complainant and Allen and what caused him to follow her to the mountain where she had gone to fetch firewood. Besides, the complainant had not gone alone but with a friend, R. Allen did not follow alone. He followed in the company of another young man. Allen followed the complainant, whilst the other young man followed the other girl. Allen is said to have then fondled the complainant's breasts and twisted her arm. Unfortunately, the circumstances thereof were not interrogated. Is it possible that the two were in love? If so, what if Allen is the person who had sexual intercourse with the complainant?

False accusations of rape are rare, but they do happen and they do they often come with serious consequences for the person accused of the rape. Therefore, it is important for a court presiding over such a matter to thoroughly examine all the evidence presented before it to ensure that the accused person is not wrongly convicted. Judging by the complainant’s willingness to protect Allen who had clearly fondled her breasts at the mountain, it is possible that if Allen was her boyfriend, and the two had been intimate before, the complainant was less likely to report him as the rape perpetrator. It probably explains why the complainant did not report the ‘rape’ when it happened. The mother had cornered her when she threatened to take her to the doctor for an examination. It was obvious that her sexual activity would be discovered if and when the examination took place. That falsely implicating the accused could have been done as a way to protect her lover is a high probability. It neither occurred to the prosecutor nor to the magistrate. As a result, it was not interrogated. The prosecution did not present enough evidence to convince the court that there is no other reasonable explanation why the complainant would falsely implicate the accused. In the particular circumstances, there was a distinct danger that the complainant may have falsely implicated the accused in order to protect her lover. It is also possible that she consented to the sexual intercourse but she cried rape because her mother had assaulted her and was threatening to take her to the hospital. She might have lied that she was raped in a bid to protect herself when in actual fact she had consented to the sexual intercourse.

This is one case where one cannot say the guilt of the accused was proven beyond reasonable doubt. There is doubt as to whether the complainant was raped in the first place. Secondly, even if the complainant was raped, there is doubt as to the identity of the accused as the perpetrator. I am not satisfied that the conviction of the accused was proper. He deserves to benefit from the doubt that arises in the circumstances of the case.

In the result, the conviction of the accused is quashed and the sentence that was imposed upon him automatically falls away. A warrant of his liberation is hereby issued.

Emmanuel

[Signature]

MUTEVEDZI J: agrees.....



