

STATE
versus
STEADY BIMHA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO: 10 April 2018

Criminal review

MAFUSIRE J:

- [1] The accused pleaded not guilty to rape. Nevertheless, after a full trial, he was convicted as charged. The court sentenced him to twelve years imprisonment. Two years imprisonment was suspended for five years on the usual condition of good behaviour. Thus, ten years imprisonment remained effective.
- [2] However, after scanning the record of proceedings and the judgment of the court *a quo*, I have failed to appreciate what evidence convinced the trial court beyond reasonable doubt that the accused was guilty of rape. Plainly, he was guilty of having extra-marital sexual intercourse with a young person, in contravention of s 70[1][a] of the Criminal Law [Codification and Reform] Act, *Cap 9:23*["***the Code***"]. In the circumstances, the effective sentence of ten years imprisonment becomes so incongruous as to induce a sense of shock.
- [3] The court convicted only on the evidence of the complainant and her father. Ordinarily there would be nothing wrong with that. If the evidence was credible, and it was cogent enough to establish rape beyond any reasonable doubt, the court could legitimately convict. But in this case, the complainant was not credible. The father might have been. But the evidence as a whole was not doubt proof. There were several question marks. The accused's own version of events was not discredited. The trial court was most perfunctory in its assessment of the evidence and in its judgment. The focus and emphasis of the judgment was on wrong areas or irrelevant principles.

- [4] The facts were these. The accused was twenty years old. The complainant was fifteen. Both stayed with their parents in the small town of Mashava, but in different locations, their homes being about two to five kilometres apart. There was some form of social relationship between the two. The complainant said they were mere friends. The accused said they were more than just friends, but lovers. The evidence did not establish exactly which was which. But from the surrounding circumstances it was more likely they were lovers. Certainly the accused was not a stranger to the complainant or her family. He said he was a barber at a hair salon operated by the complainant's sister, and at which the father brought supplies from time to time. The father said he only knew the accused facially. Neither the complainant nor the father refuted his claim that he was a barber at the sister's salon.
- [5] There was much convergence on the evidence of the complainant and that of the accused on the actual circumstances of the offence. For example, on the momentous day they met at around 15:00 hours at some shops. The accused invited the complainant to his house. She agreed. She came on her own at around 17:00 hours. The accused's parents were not at home. So were the complainant's.
- [6] It was common cause that the complainant spent the night at the accused's place. For part of the night they slept together on accused's bed. Not only that, but actually in his blankets. The complainant said it was around 19:00 hours when the accused forced himself upon her and raped her. He left her after the act. She said for the rest of the night she slept in accused's kitchen until about 05:00 hours the following morning.
- [7] The accused, whilst admitting sleeping on the same bed with the complainant for part of the night, denied they had had sexual intercourse. He said they only kissed, snogged and caressed, as lovers are wont to do. He said at around 22:00 hours he left for some church prayers with friends. He left the complainant inside the house. He returned after mid-night. He expected to find the complainant gone. However, she was still there. He slept in the spare bedroom. The following morning she left for her parents' place.

- [8] According to the complainant, the intrinsic details of the rape were these. When she called at accused's place, he dragged her inside, blew off the candle and pushed her onto the bed. She fell face upwards. His one hand covered her mouth. The other pulled down her pant to knee level. He pulled down his trousers down to knee level also. He inserted his erect penis into her vagina and had unprotected sexual intercourse with her. Afterwards he instructed her to go and sleep in the kitchen.
- [9] The complainant further said she could not run away because the accused had locked the door. When the accused went out for prayers with friends the complainant said she could not leave for her parents' place because it was late in the night. The accused refused to take her home.
- [10] The complainant's father said on the night in question he had been at his rural home. He came back two days later. That was when the complainant reported the rape to him. But he said on the night it happened someone by the name of Ngonidzaishe who was at his Mashava house telephoned that same evening to report that the complainant had not come back home. In response, the father had cautioned Ngonidzaishe against rushing to make a police report. When he came back two days later, he questioned the complainant about having slept out. That was when she reported the rape. Eventually a report was made to the police, leading to the arrest of the accused.
- [11] The complainant's father said the complainant could not have reported the rape to the police earlier because there was a standing instruction by him that all sensitive issues concerning members of his household had to be reported to him first.
- [12] The accused was adamant he did not have sexual intercourse with the complainant as alleged, or at all. He was adamant he was in a love relationship with her. Although he was aware the complainant was only fifteen years old and was only in form two, he said he was prepared to wait and marry her later.
- [13] The accused claimed the complainant had once written to him purporting to terminate their affair but that after talking things over, their relationship had resumed. At one time during the proceedings, the court adjourned to let the accused go and collect the

complainant's letters which he claimed he had left at home. But when the sitting resumed the accused claimed he had failed to find the letters.

[14] The medical examination of the complainant was carried out within four to seven days of the alleged offence. It established definite evidence of penetration. The hymen was no longer intact. It was stretched. It was torn but had healed. However, it was also recorded on the medical report that the complainant had had previous sexual experience. In answer to the prosecutor's cross-examination on this aspect, the accused said he was surprised that the complainant was not a virgin when all along he had thought she was.

[15] On convicting the accused of the rape of the complainant the reasoning of the court *a quo* was as follows:

- that the complainant had told the court in no uncertain terms that it was the accused who had raped her, and that she had proffered no other name;
- that the complainant had reported the rape voluntarily to her father fairly quickly, i.e. within two days, and that this was in line with the guidelines in cases such as *S v Banana* 2000 [1] ZLR 609[S];
- that the accused was a poor witness who had lied to the court about the letters;
- that the accused and the complainant were in love but that when the sexual intercourse had taken place, the complainant had not consented

[16] The court *a quo* did not caution itself against the danger of false incrimination. Contrary to her denial, the court found that the complainant and the accused were in love. It is not that lovers cannot be raped. Even wives can be raped. It is not the type of relationship that determines whether the sex act is rape or not. It is the absence of consent to it by the female partner. In terms of s 65 of the Code rape is sexual intercourse by a male person with a female person without her consent. So even though the complainant and the accused had been in a love relationship the sex act on the night in question would be rape if she said no to it. But circumstantial evidence suggests she said yes. And this is what the court *a quo* did not explore.

- [17] The significance of the love relationship between the accused and the complainant, which she unwisely continued to deny, is on the question of credibility. This should have been considered with the rest of all the other surrounding circumstances. The complainant was not forced to come to the accused's house. The accused invited her. She readily agreed. That was at the shops. She first went home. Her parents were away. Thus, the coast was clear for a night out. She voluntarily went to her lover, the accused. Although she claimed the accused was her friend, her actions in this regard are explainable more by a love relationship.
- [18] At her lover's house, the coast was also clear. Only the accused was home. Apart from her say so, the evidence does not establish that there was any form of resistance by the complainant before the sexual act. It is true that resistance is not a requirement to negative consent. If a woman says no to the sexual intercourse, that should be enough. It should not matter that the man is her lover. But in this case, the surrounding circumstances do not suggest that the complainant said no. Among other things, the accused went out of the house leaving her alone. She did not walk out of the house to go back home, or to report to the accused's neighbours. She said she was waiting for the accused to come back and accompany her home. As the accused aptly asked her in cross-examination: "*Why would you want to be accompanied by a Rapist?*" It all goes to credibility. But that is not all.
- [19] The complainant claimed she bled during the alleged attack. She said the blood spilt onto her legs. None spilt onto the blankets or the bed. She claimed it was her first sexual act. But the medical evidence showed she had had previous sexual experience. That was a huge dent on her credibility.
- [20] Objectively, the court *a quo* should not have been readily impressed by the complainant's report of the alleged rape to her father two days later. Her absence from home on the night in question had been noticed. Not only that, it had been reported. The evidence does not say who Ngonidzaishe was. It does not say what sort of relationship existed between him or her and the complainant. This might have enabled an assessment to be made whether or not he or she was the kind of person in whom the complainant could reasonably be expected to have confided with such a sensitive

issue as rape, even despite the father's standing instruction. The point is, the complainant had to come up with some plausible explanation to her father on why she slept out on the night in question. It would not be plausible to confess consensual intercourse with the accused, her boyfriend, when she was only fifteen years old, and still in school. She therefore cried rape. Nothing said by her, or the father, refuted this version by the accused.

[21] The court *a quo* did not even consider the alternative verdict of contravening s 70[1][a] of the Code. This is rather strange. The clear tenor of the prosecutor's examination-in-chief of the complainant, and of his cross-examination of the accused, was manifestly towards proving this alternative verdict.

[22] Thus, in this case rape was not proved. The conviction and sentence are hereby set aside.

[23] However, the evidence established the permissible verdict of contravening s 70[1][a] of the Code, namely having extra-marital sexual intercourse with a young person. Therefore the accused is hereby found guilty of having extra marital intercourse with a young person in contravention of s 70[1][a] of the Code.

[24] In *Mharapara v State* HMA 42-17 the whole question of sentencing in a crime of this nature was canvassed. As with all other crimes, the court has to balance the interests of the accused; the interests of justice; the expectations of society where social mores and values have been breached; and all the other relevant factors.

[25] In this case the accused was twenty years old. The complainant was fifteen. The accused was single and unemployed. He was a first offender. He and the complainant were in love. He said he was prepared to wait for her and marry her eventually. But he did not wait. He had sexual intercourse with her knowing full well she was under age. And by denying sexual intercourse, he was just wasting time. He showed no contrition. The complainant was still going to school.

[26] This offence is quite prevalent. The rationale for its existence in the statute books; the aspiration of the Constitution and the various international Conventions on Children's Rights, as was noted in *Banda v State, Sate v Chakamoga* HH 47-16, are the protection of the girl child against sexual exploitation by adult male persons. There have been several calls to jail offenders so as to effectively protect the girl child.

[27] But at twenty years of age the accused was just barely into adulthood. At fifteen years of age [and some two months] the complainant was a few months shy of the age of consent. The age-gap between them was less than five years.

[28] Taking all the above into account, the accused should be spared jail, but just barely. He should be given a chance to reform. Jail will break him. The most reasonable punishment should be thirty six [36] months imprisonment with portions suspended on condition of good behaviour and community service. It is noted that the accused was sentenced on 30 January 2018 [to an effective 10 years imprisonment]. Therefore, to the date of this judgment he has already served more than two months imprisonment.

[29] In the circumstances, the accused is sentenced as follows:

- thirty [36] months imprisonment of which twelve [12] months imprisonment is suspended for five [5] years on condition that during this period the accused is not convicted of any offence of a sexual nature upon which he is sentenced to imprisonment without the option of a fine.
- The remaining twenty-four [24] months imprisonment is suspended on condition that the accused performs community service.

[30] The court *a quo* is hereby directed to recall the accused to pronounce to him the altered verdict and sentence above, and to assess the suitability of community service. The court shall take into account the period already served.

A handwritten signature in black ink, appearing to read "Tagu J.", written over a horizontal line.

Hon Tagu J: I agree _____