THE STATE

versus

BRIAN DHLAMINI

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 19 January 2018

Criminal Review

MAWADZE J: The issue in this matter which should have exercised the mind of the trial court is whether the sexual act between the accused and the complainant was consensual. While the learned Regional Magistrate properly identified this issue she seemed to have somehow allowed her mind to wander rather aimlessly and failed to properly analyse the evidence placed before her. The judgment by the learned Regional Magistrate is rather perfunctory.

After realising that there is a potential grave miscarriage of justice in this matter when the record was referred to me for automatic review I decided to seek the Prosecutor General's views on the propriety of the conviction in accordance with the provisions of s 29 (1) (c) of the High Court Act [*Chapter 7:06*]. It provides as follows;

29. *Powers on review of criminal proceedings.*

(1) For purposes of reviewing any criminal proceedings of any inferior tribunal, the High Court may exercise any one or more of the following powers ----------

(a) Irrelevant
(b) Irrelevant
(c) *Where the proceedings are not being reviewed at the instance of the convicted person, direct that any question of law or fact arising from the proceedings be argued before the High Court by the Prosecutor General or his deputy or any legal practitioner appointed by the High Court*".

I am indebted to Mr Zvekare of the National Prosecuting Authority for his well-researched and presented response. Indeed, my fears were confirmed. Mr Zvekare believes there is a miscarriage of justice in this matter.

I now turn to the matter in question.

The 22-year-old accused was convicted after trial by the learned Regional Magistrate sitting at Masvingo for raping a 20-year-old complainant in contravention of s 65 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23]*. The offence is said to have been committed on 23 September 2015 at Chamakani Village, Chief Chikwanda, Gutu in Masvingo.

The accused and the complainant are fellow villagers and they fell in love in July 2015. The complainant who is an orphan stayed at her uncle's homestead but was alone most of the time as the uncle and his wife would be away at work at some school where the uncle teaches. The accused had therefore unlimited access to the complainant except over the weekends when complainant's uncle would be at home. The complainant had completed her 'O' level but it is not clear when this was.

The State case is that on 23 September 2015 during the night the accused visited the complainant in the company of the complainant's cousin Denis Nyamukamba and another boy called Chamuka Majoni at about 20.00 hrs. After some time accused remained with the complainant. The State alleges that accused caused the two boys to leave. The accused is alleged to have unsuccessfully requested to be intimate with the complainant. The complainant remained disinterested and told the accused to leave. The accused is said to have refused to leave and instead followed complainant who had gone to her bedroom where he continued to beg to be intimate with the complainant to no avail.

It is the State case that after accused realised he was unable to convince the complainant otherwise and obtain her consent he resorted to brute force in order to prevail upon the complainant and satiate his sexual desires. It is alleged he forcibly removed the complainant's blouse, bra and pants. Accused also removed his trousers and pants. Again using brute force, it is alleged accused separated the complainant's legs and forcibly effected penile penetration. It is said after the forced sexual act the accused locked complainant inside the house, took the keys and went to his residence.

It is alleged that on an unspecified date the complainant fell ill. She was taken to Harare for medical attention. It was thereafter discovered that she was pregnant. It is at that stage the complainant revealed that she had been impregnated by the accused and that the preceding sexual act was non-consensual on 23 September 2015. This resulted in accused's arrest.

As per the medical report the complainant was examined on 4 December 2015 and found to be 3 months pregnant. Needless to state that her hymen was found to be not intact and that indeed penile penetration was confirmed. At the time the matter was tried the complainant had given birth to twins.

The accused's basic defence which he maintained throughout the trial is that he had consensual sexual intercourse with the complainant who was his girlfriend. In fact, the accused revealed that he had several sexual acts with the complainant after 23 September 2015 as complainant's relatives who stayed with her would be away. The accused said what led to his arrest is that when it was discovered that the complainant was pregnant he declined to marry her. A report of rape was then made to the police. The accused said on 23 September 2015 when he had consensual sexual intercourse with the complainant he never chased away the two boys who were in his company but they left in order to allow him to have quality time with his girlfriend.

The issue which should have loomed large in the mind of the trial court is to exclude the possible danger of false incrimination in this case. This is so because accused and the complainant were in love. The matter only came to light when complainant fell ill and or was pregnant. No timeous report of rape was made. The date the report was made is not even clear. The accused gave a possible motive for the complainant to allege non-consensual sexual act. These are the critical issues the court should have grappled with to ensure that the danger of false incrimination was eliminated.

The State led evidence from two witnesses only being the complainant Melody Matereke and her aunt Pettie Tigere who resides in Hopley, Harare. The accused gave evidence. He intended to call the two boys who were in his company but it is not clear why these two boys did not testify.

It is useful to summarise the evidence placed before the trial court in order for one to appreciate the deficiencies of the state case.

The complainant

According to the complainant she fell in love with the accused in August 2015. Most of the time she would be alone at home as her uncle and his wife would only be available during weekends. Accused would visit her to while up time as he did in the company of the two boys on the night of 23 September 2015.

It is complainant's evidence that the accused asked the two boys to leave as accused wanted to discuss certain issues with the complainant. She said after the departure of the two boys the accused asked to be intimate with her but she told the accused that she would only be intimate with him after marriage. An argument then ensued between the two until she told accused to leave as she wanted to retire to bed. The complainant said a she was holding keys to her bedroom the accused snatched them and put them in his pocket. She proceeded to her bedroom to retire leaving the accused outside.

The complainant said after a while the accused followed her in the bedroom and locked the door. She said the accused joined her on the bed and started to caress her. She inquired from the accused what he was up to.

The complainant explained how she said the accused raped her. She said the accused proceeded to tear her skirt as he pinned her down on the chest. She in turn proceeded to bite the accused on his hand but did not inflict any visible injuries. She tried to push away the accused but he over powered her and inserted his penis into her vagina after pulling down her pants. It was her first sexual experience, and felt pain inside her vagina. She bled from the vagina. Accused told her not to scream. She did not scream. The accused completed the sexual act, stopped on his own and wore his clothes. Thereafter the accused locked her inside the bedroom from outside as he went to his residence and left with the keys. She said the accused later gave one of the two boys Denis the keys but by then she had used spare keys to open the bedroom. The next day she said she washed the blood stained blankets.

The complainant explained how the matter came to light. Without giving dates she said she fell ill and was taken to hospital where she was given tablets. She said she only revealed the rape to her aunt in November 2015 after she had been taken to Harare because of her illness. She said she was vomiting and after being questioned by her uncle and aunt in Harare who told her not to waste resources she decided to reveal the rape.

The evidence of the complainant is rather unclear on why she did not make a timeous report. Her explanation is that she was staying alone at the homestead and the uncle she stayed with only came home with his wife during weekends. She said when her uncle came home during the weekends she could not reveal the rape for fear of being chased away from home as an orphan. She had nowhere else to go. Further she said she did not disclose the rape to Denis who had been given the keys by the accused as she was ashamed. In fact, the complainant said had it not been for the pregnancy she would not have revealed the rape since she thought she would be accused of misbehaving. She disputed that there were any arrangements made for her to marry the accused.

The accused despite being a self-actor and feeble in his cross examination did nonetheless put pertinent questions to the complainant. The following exchange took place between the accused and the complainant;

"Q. *Why did you not tell others that you had been raped?*

A. I did not tell anyone because my parents passed on and I grew up being looked after (sic). I would be told that if I misbehaved I would be left alone. I even wanted to commit suicide.

Q If you had not fallen ill were you going to report the rape?

A No

Q Would you have been chased away from home for being raped?

*A Yes, I could be chased away from home depending with the guardians who were looking after me (*sic)"

The learned trial Regional Magistrate did not put any questions to the complainant in order to appreciate her mind-set as to why she did not make a timeous report. No follow up was made to the questions put to the complainant by the accused.

Pettie Tigere (Pettie)

Pettie is complainant's aunt who resides in Hopley, Harare. She is the first person to whom complainant disclosed the alleged rape and therefore sheds light on how the matter came to light.

Pettie testified that she was advised by the complainant's custodians at the rural home in Gutu that the complainant was ill. A decision was made that complainant should proceed to Harare for possible treatment. Pettie said upon the complainant's arrival her husband suspected that the complainant could be pregnant as complainant would vomit after eating food. This prompted them to question the complainant. The complainant then disclosed that accused had raped her after he had chased away some two boys and locked her inside the bedroom. In fact, Pettie, contrary to the complainant's evidence said she was only rescued by one of the two boys after accused had locked her inside the bedroom and later gave the keys to one of those boys. Contrary to complainant's evidence Pettie said the complainant's report was that she cried out or called out for help during the rape hoping her neighbours could help her but apparently no one heard her distress call. As regards why she had not made a timeous report of the alleged rape the complainant's explanation to Pettie was that she was afraid that her uncle's wife would assault her.

According to Pettie after complainant disclosed the alleged rape they sent her back to rural Gutu where it was confirmed that she was pregnant at the local hospital. Again contrary the complainant's evidence Pettie said the complainant was thereafter taken to the accused's home for possible marriage but apparently the accused was unwilling to take the complainant's' hand in marriage and complainant was returned to her home. It was only after this that a report of rape was made to the police leading to the accused's arrest. Again Pettie was not probed why accused was being asked to marry the complainant if indeed he had raped her.

The accused

The accused's version is that indeed he first had consensual sexual intercourse with the complainant on 23 September 2015 but that sexual intercourse took place several times thereafter until about 5 October 2015. The accused reiterated that he did not forcefully have sexual intercourse with the complainant and that none of the complainant's clothes was torn. In fact, accused wanted to call the two boys who were in his company but they were not available at court and he was asked if the matter could proceed without them. As a lay person he agreed. This was the evidence placed before the trial court.

In its judgment the trial court never made any meaningful attempt to analyse the complainant's evidence. All what the learned trial Regional Magistrate said is that complainant gave her evidence well and that the court would accept her testimony. No basis was outlined as to why the complainant's evidence was acceptable and accused disbelieved. The court went further to accept that indeed the complainant did bite the accused during the sexual act without explaining why it accepted such evidence, more so as no injuries were inflicted on the accused. Amazingly the finding by the trial court was that the complainant made a voluntary report of rape to Pettie in Harare and did not bother to analyse the circumstances under which that report was made. To cap it all, it was the trial court's view that a timeous report of rape was made by the complainant since she was allegedly raped in September 2015 and disclosed the alleged rape in November 2015!! In fact, out of the many reasons the complainant gave for not disclosing the alleged rape timeously the trial court simply picked one reason and justified her conduct on the basis that as an orphan she was afraid to be chased away from home by her custodians. The reasonableness or otherwise of such a reason by a 20-year-old girl who had completed 'O' level was never considered.

A proper assessment of the complainant's evidence clearly shows that it does not meet the requirements of admissibility as espoused in our law. In a seminal judgment which is the *locus classicus* in a case of this nature GUBBAY C.J in S v Banana 2000 (1) ZLR 607 (S) at 616 A – C set out in very lucid and simple terms how the court should approach complaints made in sexual matters as follows;

> "*Evidence that a complainant in an alleged sexual offence made a complaint soon after the occurrence, and the terms of that complaint, are 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 has fabricated the allegations*"

The learned Chief Justice went on to state as follows;

"*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 G at 39 G – 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 been expected to make it. See R v C 1955 (4) SA 40 (W) at 40 G – H; S v Makanyanga supra at 242 G – 243 C [1996 (2) 2LR 231 (H)"*

It is abundantly clear from Pettie's testimony that the complainant did not make a voluntary report of rape. The complainant fell ill in rural Gutu and went to hospital where she got treatment as per her evidence. She did not disclose the rape. The illness remained unabated and still she decided not to disclose the alleged sexual assault. A decision was then made to take her to Harare for treatment but she still did not reveal anything. It was in Harare that Pettie's husband sensing that she could be pregnant as she vomited after taking food who questioned her if she was pregnant and that she should not waste resources as it were. It was only after this probing that she then revealed the sexual act between her and the accused in rural Gutu. In fact, the complainant herself stated that if she had not fallen pregnant (or ill) she had no intention to reveal the alleged rape. There lies the problem with her testimony. She had to be probed in order to reveal the alleged sexual assault.

It is clear that the complainant did not make a timeous report of the alleged rape. From the evidence led she could have made the report to Denis who brought to her the keys she said accused had taken that same night. She did not. Her explanation is that she was ashamed to disclose such an issue to Denis. The next day she did not disclose the alleged rape to any of her relatives or neighbours. Again when her uncle and his wife came home she made no report of the alleged rape. Even when she fell sick and was hospitalised she remained mum about what she alleges had been done to her. She had to travel from Gutu to Harare where she disclosed the alleged rape after being confronted that that she could be pregnant. A period of about two months had lapsed. To cap it all she gave various reasons as to why she did not make the report without undue delay. These range from personal shame, fear of assault and her personal circumstances as an orphan.

In my respectful view the complainant is not a toddler who did not fully appreciate what accused had done to her. She is an adult girl who had long completed 'O' level. The explanations she gave for not disclosing the alleged rape timeously are not only implausible but unreasonable in the circumstances.

The conduct of the complainant leaves much to be desired and negatively impacts on her credibility. It is not clear as to what she did with the alleged torn skirt. She decided to destroy the available evidence by washing the blood stained blankets.

The danger of false incrimination on the aspect of consent is very real in this case. The trial court should not only have been alive to such inherent danger but should have endeavoured to exclude it: see S v ZARANYIKA 1997 (1) ZLR 539 H at 555 B – C. All what the trial court did was to accept the complainant's evidence hook, line and sinker without appreciating the circumstances of the case that she was in love with the accused. How then was this danger of false incrimination on the aspect of consent eliminated? Did the complainant not have a motive to misrepresent facts on the aspect of consent? Why was she taken to a rapist for possible marriage? Why was the report of rape only made to the police after the accused had refused to take her hand in marriage? These are the questions which should have loomed large in the mind of the learned Regional Magistrate.

In my view this was a poorly prosecuted case aided by the undiscerning mind of the trial court. The trial court should have been alive to the fact that this was an unrepresented rural accused person. Crucial witnesses in this matter were not called. These include the complainant's custodian who could have shed light on their relations with the complainant and whether her fear were indeed well grounded. The two boys who were with the accused and the complainant on the night of the alleged rape were critical witnesses. The investigating officer was not even called to explain as to what happened to the torn apparel of the complainant.

The trial court should have invoked the provisions of s 232 of the Criminal Procedure and Evidence Act, [*Cap 9:07*] which provide as follows;

"*The court –*

(a) May at any stage subpoena any person as a witness or ----------

(b) *Shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case.*"

The duty of the court to assist an unrepresented accused was aptly put by McNally JA in the case of *S* v *Ndhlovu* 1992 (2) ZLR 231 (S) at 232 E – F where the learned Judge of Appeal said;

"*One final point needs to be made. The Magistrate held it against the appellant that he did not put it to the complainant in cross examination that he never inserted his hand in complainant's pocket. It is true he did not put it to the complainant. But it was clearly stated in his defence outline. If the Magistrate thought the point should have been put, he should have put it himself ---------- Such an intervention is not taking sides, or 'entering into the arena'. It is simply an attempt to ensure that the accused's case is properly commented by the witness*."

The point is made therefore that the trial court should not simply draw an adverse inference from the accused's failure to raise certain points in cross examination when such points are apparent from the accused's defence outline. The trial court has a duty to assist an unrepresented accused to ensure that justice is done.

It is saddening that the trial court went on to convict the unsophisticated and unrepresented accused instead of giving him the benefit of the doubt in relation to the issue of consent. The doubt is created by the complainant's inconsistent and contradictory actions after the alleged rape. I have no doubt that the trial Magistrate presided over a shoddy trial. This led to a miscarriage of justice. The danger of false incrimination on the aspect of consent is very real in this case. The accused ought to be given the benefit of the doubt in the circumstances. The conviction of the accused is clearly unsafe as the state failed to prove the rape charges against the accused to the required standard of proof in criminal matters.

Accordingly, the conviction of the accused is hereby set aside and the sentence quashed.

I have issued a warrant of liberation of the accused.

Mafusire J agrees……