

Judgment No. S.C. 114/83 Crim. Appeal No. 143/83

KINGSTONE PARADZAYI v THE STATE

SUPREME COURT OF ZIMBABWE, GEORGES, CJ & BECK, JA,
Harare, OCTOBER 24, 1983

The appellant in' person

P.J. Batty, for the respondent

BECK JA: On the night of 23 September 1982, shortly after 11 pm, the sixteen year old complainant, who was five month's pregnant at the time, was twice raped near the Stodart Hall in Mbare. The fact that she was raped is not in issue. All that is in issue is whether the appellant is the man who raped her.

The man who raped her was found by the complainant's aunt lurking in the unlit back yard of the house in which the complainant lives. Claiming to be a comrade who wanted to discipline a young girl, whom he had seen entering that house, for roaming the streets with a boy, this man followed the complainant's aunt into the front room of the house. The room was electrically lit. In the room the man spoke at some length with the Complainant, her mother and her aunt, repeating that he was a comrade whose task it was to discipline the complainant for walking with a boy. He even asked for a stick with which to chastise her despite the fact that the older women protested that she should not be assaulted as she was pregnant.

The three women had an excellent opportunity *to* see the man and to take good note of him while he was with them in the electrically lit room and before he went off into the night with the complainant. He certainly had their undistracted attention and they were in some fear of him. They all noted that he wore brown trousers and a jersey with a zip down the front, although their individual recollections of the colours and pattern of the jersey were not entirely the same. They all noted that the man was light-skinned and wore a beard and moustache. It is quite clear therefore that they were alert in their observations.

They were all absolutely positive that the appellant is the man in question. They all said that they recognised his face at the time when they saw him in court although he had, according to two of them, trimmed his moustache a little since the night that they saw him. In addition the complainant's aunt said that she also recognised his voice after she had listened to his cross-examination of her even though she had not seen him between the night of the rape and the day of the trial some months later.

The complainant's mother said that she had caught sight of the appellant about a month after the rape when she saw him enter a house in Mbare. She quickly summoned the Police but by the time they arrived he had gone. She did, however, discover from someone in the vicinity that the first name of the man that she had seen was Kingston, which is the appellant's name. The evidence of this sighting of the appellant was Volunteered by the complainant's mother at a late stage in her evidence and when the magistrate taxed her with not having mentioned it earlier and with having initially created upon the court the impression that she had not seen the appellant between the night of the rape and the day of

the trial she became discomforted and agitated, as the record clearly shows. Despite that, the magistrate was satisfied with the honesty of her identification of the appellant, and there is really no reason to think that she fabricated this belated portion of her evidence. The spontaneous manner in which it emerged militates very much against the notion that it was a malicious lie. It is much more probable that she did not mention it earlier because it did not seem important to her, since nothing came of her endeavour to have him arrested on that occasion.

Of much greater significance was the evidence of how the appellant eventually came to be arrested.

He was fortuitously seen by the complainant herself on a day in December as he was drinking a cool-drink in the vicinity of the magistrate's court building, and she immediately recognised him and reported to a Policeman that he was the man who had raped her in September. The appellant was accordingly arrested, and a blood and secretion test established that he could indeed be the author of the semen that was found in the complainant's vagina on the night of the rape when she was medically examined. That semen originated from an "A" secretor, and the appellant belongs to that group. It is a group to which approximately 21% of the Negroid populations belong.

An attempt by the Investigating Officer to hold an identification parade was thwarted by the

appellant's refusal to submit to such a parade. His excuse for that refusal was a claim - disputed by all the State witnesses and by the Investigating Officer and at variance with the reason that he originally gave to the Investigating Officer that he had been seen at the magistrate's court by the complainant and by her mother and her aunt on an occasion when he had been brought to the court and been remand.

The magistrate was of the view that the appellant's conduct in this regard was indicative of a guilty conscience, but even if it be assumed that this was an inference that should not have been drawn, it is clear that it formed no more than a makeweight in the magistrate's judgment. His conviction was clearly based primarily on the direct evidence of identification.

The magistrate was particularly impressed with the quality of the evidence of the complainant and of her aunt whom he described as outstanding witnesses, and he was quite satisfied that each of them as well as the complainant's mother was genuinely and correctly convinced that the appellant was the man.

Having regard to the fact that the appellant was unhesitatingly identified by the complainant when she first saw him in December and that her positive and immediate identification was firmly corroborated by two other witnesses who had on excellent opportunity of observing the appellant for some time at close quarters and in good light and with their whole attention focused on him, and having regard to the fact that the magistrate found that all three of these witnesses were reliable and that he was particularly impressed by the calibre of the evidence of two of them, there seems to me to be no basis on which this Court could interfere with his conclusion.

Certainly the appellant's own evidence provides no such basis: for it consisted of no more than an obviously spurious assertion that he could remember that on the night in question he had enjoyed a drink or two entirely on his own at the nearby beer-hall before going home alone and to bed before 11 pm; and even in the giving of that purported recollection of what was for the appellant allegedly an unmemorable night the magistrate found him unconvincing - a finding that is amply justified by the record for his evidence does not read well.

In my view, therefore, the appeal is without merit and must be dismissed.

GEORGES CJ: I agree.