

DISTRIBUTABLE (11)

Judgment No. S.C. 16/85 Crim. Appeal
No. 185/84

MANYANGE MANGWENDE v THE STATE

SUPREME COURT OF ZIMBABWE,

DUMBUTSHENA, CJ, BECK, JA & McNALLY, JA.

HARARE, FEBRUARY 25 & MARCH 4, 1985.

A. S. G. Nhari, for the appellant M. Werrett, for the
respondent

McNALLY, JA: The appellant was convicted of attempted rape and sentenced to three years' imprisonment, with one suspended. The complainant was a two-and-a-half year old girl.

He appeals against conviction and sentence. The appeal against conviction is to my mind quite hopeless. The evidence against the appellant is overwhelming.

The State case is that the child's mother missed the little girl during the course of a party. Acting on information received she went to the appellant's house nearby and searched from room to room, accompanied by a young man. Eventually she forced open the closed door of the appellant's bedroom, helped by the young man who was close behind her. Inside, on a bed she found her child lying on its back with its clothes pulled down.

On top of the child was the appellant with his trousers pulled down and no shirt on, in the act of intercourse with the child.

He leapt from the bed on her arrival and grappled with her. She was rescued by the young man who came in behind her.

The young man supports her evidence, save that he did not claim to see the actual intercourse. However, he saw the clothing of both parties disarrayed.

-

2 S.C. 16/85

The medical affidavit, was to the effect that the child's vestibule was inflamed, the hymen ruptured, the examination painful, and that penetration had been effected. The examination took place on the day of the alleged rape. However, since rape was denied, and the doctor was not available to give evidence, the magistrate found it safer to convict of attempted rape.

The defence case was a ridiculous one. The appellant claimed that the complainant's mother rushed into his room with her child, stripped the child, and started screaming rape. This version of events is not even supported by his own witnesses, his own friends. They confirm that the mother came looking for her child.

The court was advised that there were conflicts between what the young man said to the police and what he said in court.

No great point was made of these conflicts in cross-examination, and in my view they are negligible. Thus to the police he allegedly said he kicked open the door; in court he said he pushed it. To the police he said the appellant fell over when he pushed him away from the complainant's mother; in court he denied the appellant fell over. To the police he said the complainant's trousers and pants were around her ankles; in court he said one leg was out of her trousers.

As against this the evidence of the complainant's mother and the young man reads very well. The mother noted, with what reads rather like surprise, that the child was not crying when she burst into the room. The young man does not claim to have seen the appellant in the act of intercourse. He was, of course, behind the mother. Thus on the one hand we have the credible evidence of two witnesses, corroborated by the medical report, and supported in a material respect, as against the appellant's version, by the appellants own witnesses . On the other hand there is a self-evidently false story which is in the highest degree improbable and materially contradicted by the appellant's witnesses.

The appeal against conviction is dismissed.

As to sentence, I agree entirely with the State's contention that such an assault upon a two-and-a-half year old girl is a most horrible and serious offence. It is not to be compared with cases of statutory rape where the victim is a girl only slightly below the age of consent, The fact that the child was not visibly distressed or permanently physically injured is a consideration, but it is one of which the magistrate, an experienced and senior magistrate, took full account. No misdirection is alleged, and the sentence induces no sense of shock in relation to its severity.

I would dismiss the appeal both against conviction and sentence.

DUMBUTSHENA, CJ: I agree.

BECK, JA: I agree.