

NYASHA PHIRI CHISANGO  
Versus  
THE STATE

HIGH COURT OF ZIMBABWE  
**BACHI MZAWAZI J**  
CHINHOYI, 10, 27 July 2023

### **Criminal Appeal**

Appellant, *in person*  
*T.H. Maromo*, for the State

**BACHI MZAWAZI J:** The accused person was aged 20 years, when he was tried and convicted of 2 counts of rape on a minor girl then aged 9 years, in 2022. He was sentenced to an effective 15 years from a sentence of 18 years with 3 suspended on good behaviour. He is appealing against both conviction and sentence.

His grounds of appeal are basically that the court erred in making a finding that there was rape when the medical affidavit could not confirm the same. Further, that the evidence of the complainant was inconsistent as to the place where the rape took place and that penetration was effected. As regards sentence the appellant states that it was both excessive and harsh.

The brief facts are that the appellant was employed by the complainant's step mother as a general hand. During that stint he developed a love relationship with the complainant's elder sister then aged 16 years close to 17 years. This relationship came to light when a report was made to the step mother of an exchange of a cellphone between the appellant and the said elder girl. The complainant's step mother demanded some answers as to the cellphone and the attendant love dubby messages she found therein.

The elder sister divulged the love relationship information and was sent to the Victim Friendly Unit of the police where the stepmother worked. The step parent then interrogated the 9 year old who then informed her of the alleged sexual molestation leading to the arrest of the appellant.

Initially, he was charged of 4 rape counts, two against each sister. He was acquitted in court after the court concluded that the 16 year old was in a love sexual relationship with the accused. However, he was convicted on charges pertaining to the 9 year old. The court's reasoning was that although the medical affidavit revealed no penetration, the state managed to prove legal penetration.

In his defence, accused from the onset stated that the offences against the 9 year old were trumped up. He had been in a relationship with the 16 year old which evolved into a consensual sexual affair. He adverted that after the step mother had found out of the phone, she quizzed him and he admitted. He then opted to leave employment as the relationship had soured. Only to be arrested on rape allegations. He further attested that, he was not given all his employment dues and his constant demand of the arrears may have motivated the report on the minor child.

The evidence which came mainly from the 9 year old is that the appellant invited her to his quarters near the fowl run. He undressed her and himself and placed his male organ on her private parts. She stated that she felt nothing on both occasions but on the second occasion the appellant slightly penetrated her. It was her evidence that on the first occasion she saw urine like substance, watery and yellow after the encounter. This witness attested that she was interrogated by her step mother and she informed her of the incidences.

Upon cross examination she conceded that the offences took place when there were several other people within the premises. She also indicated that the place where the rape took place was not the fowl run perse but the dining room where people were nearby. The reason for not reporting was that she was promised some jiggies.

The complainant's stepmother confirmed that it was after discovering the sexual relationship between the appellant and her 16 year old step daughter that she then quizzed the toddler. She admitted that she then told the Victim Friendly Unit that there may be another charge against the appellant over and above the first one on the 16 year old. The medical report stated that there was no evidence of penetration or any sexual tampering on the complainant.

The court's reasoning was that there was legal penetration which the medial report cannot reveal. The court acknowledged the inconsistencies in the complainant's story but

then concluded that it is normal for a 9 year old to exaggerate. Moreso as she had been offered jiggies.

The question that arises is that was there sufficient evidence to support legal penetration within the backdrop of the complainant's evidence?

Firstly, it is an established legal principle that once a male organ comes close or to the proximity of the female genitalia then rape is committed.

In *S-v-Torongo SC 206* at p6 it was held that;

“as far as the law is concerned placing the male organ at the orifice of the female organ resulting in the slightest penetration constitutes rape.”

In *S-v-Mhanje 2000 (2) ZLR (H)* it was noted that for rape to take place it is not necessary that there should be full penetration. The slightest degree of penetration will suffice.

The Black law dictionary defines legal penetration, as;

“The insertion of the male part into the female parts to however slight on extent, by which insertion the offence is complete without proof of emission.”

On analysis, the evidence of the complainant was to the effect that there was slight penetration. If this was not suggested to her, then it means she felt the accused's male organ entering her to some extent. This is a 9 year old girl who had no previous sexual encounters. Clearly, if the male organ enters her to some extent, there are bound to be some physical remnants of evidence to that effect.

The medical report could have dictated the slight force used to enter the child's female organ. This is not the case. The story could have been different if the complainant ended in saying the appellant's organ only came close to hers. She says there was slight penetration. If this is not taken in isolation but with the rest of the evidence of the complainant, in particular when the offences are said to have taken place when people were at the residence, a shadow of doubt is cast.

This observation is coupled with the fact that the report was not voluntarily and timeously made. It was made after questioning by the step mother. Evidently, it was

prompted by the relationship that had been discovered by the parents of the complainants. One cannot help but notice the emotional attachment by the trial court on the 9 year old. Once the court is emotive, justice flies by the window. Evidence not sentiments are the hall marks of a judgment.

It seems that the court felt that since the appellant had been let loose on the first aspect involving the 16 year old then dutifully he was not going to escape the allegations on the second complainant. “If we cannot have him on the first then we must pin him down on the second.”

We are of the view that, in rape and serious cases attracting sterner penalties, courts should not convict on stretched evidence. The benefit of the doubt should go to the appellant. Whilst it is respected that the factual findings of the trial court should ordinarily not be interfered with but in the interest of justice. We are also of the opinion that the interest of justice favoured that the benefit of doubt be accorded to the accused. See *S-v-Kombayi HH27/04. Michael Gwanzura-v-The State SC66/91.*

For those reasons we agree that the court’s oversight in the aspect of slight penetration viz viz the medical report was flawed and a misdirection.

It has been said time and again that the interests of justice dictate that it is better to err on the side of caution and exonerate an accused person than to send an innocent person to jail.

Accordingly, both the conviction and sentence of the court a quo are set aside and substituted with not guilty and acquitted.

MUZOF A J Agrees