

**IAN MUKONI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J & CHEDA AJ  
BULAWAYO 24 SEPTEMBER & 1 NOVEMBER 2012

Appellant in person  
*L. Maunze* for respondent

Criminal Appeal

**CHEDA AJ:** The appellant was charged with the crime of rape at the magistrates' court. He pleaded not guilty but after a trial he was found guilty. The magistrate sentenced him to 16 years imprisonment of which 3 ½ years were suspended on conditions of good behaviour. The court also ordered that 2 ½ years of the sentence be reduced because of pre-incarceration. He was left with 10 years effective.

The appellant applied for leave to appeal in person against both conviction and sentence. The Judge who dealt with the application granted the appellant leave to appeal against conviction only.

The background of the matter based on the evidence of the appellant's wife was this:

On the 12<sup>th</sup> day of October 2009 the mother of the child victim, a four year old girl, woke up and dressed the child who was already awake. The accused remained in bed. The child's mother went to a neighbour's home leaving the child with the appellant.

On returning after sometime she found that the trousers that the child had been wearing was by the door step of the bedroom hut. On entering the room she found the appellant in the blankets with the child lying on top of him. She enquired what was happening. The appellant got up and started assaulting the child's mother. The neighbours who heard the noise went to stop the fight.

The mother examined the child and noticed some bruises and blood stains. She reported the matter to the police who arrested the appellant. The child was examined at the hospital in Tsholotsho. The doctor established that the child's labia minora has some bruises

and the hymen was torn. The examination of the child was painful. The doctor reported that penetration had been effected.

In his defence outline the appellant said that during the evening of the 11<sup>th</sup> October 2009 his wife started insulting him saying he was loose and he had sexual intercourse with neighbours and the neighbours had told her. On asking her who told her she said she did not want to talk to him and she was leaving for her parents' home and taking the children away. He said he told her that she had been out of hospital after she collapsed, and there was not enough money for her to go to her home in Gokwe as he had only \$10,00. She continued to insult him while packing her property. She then said that she would fix him. He woke up his son Shepherd to go to school but she stopped him. Shepherd woke up his sibling Lucia (the complainant) to go and play outside. The appellant remained in the house with his wife. He was still in the blankets while she was seated. He told her to go outside and talk to a neighbour and he remained in the house while the children were playing outside. He heard children crying outside while the mother was beating them but this did not trouble him. After sometime she came and pulled the blankets and threw them over to the side. She said she suspected children could have slept with him and that it was better for him to sleep with her. He thought she wanted to fix him and if he slept with her she would report him for rape. He went on to say she has a mental problem. She held him by his private parts and he hit her. Some neighbours came and said they saw her beating the children outside. The neighbours asked Lucia who told them she was injured by Ronald who pricked her with a stick as they were playing and Ronald explained what happened.

In her evidence the appellant's wife said,

"When I came back I found Shepherd standing by the door, my husband was lying facing upwards and my child Lucia was on top of him on his thing. I asked him "What are you doing?" He started assaulting me with a whip. I had a child on my back. I screamed but saw that no one was coming to assist. I then pulled down his trousers, he sat down. I tied the towel. Carried child with property (sic) and went out and a neighbour came in."

She went on to say that the neighbours enquired about the noise and she started explaining. She checked the child with another woman after her husband had gone with Rannie's father to fetch some firewood. The appellant pleaded with her to forgive him and she said, "No because my child had been injured" and he had been fighting her and took her bag because she did not want him to know she was going to the police.

Asked to elaborate on what she saw as the child was on top of the accused she said;

"I saw my husband lying down naked facing upwards; he had removed clothes I had dressed the child with. When I asked him he let the child loose and child moved from on top of him and sat down. She looked weak and shy and she held her private parts.

She said the child was bleeding when he removed her from him. The child had no clothes and the appellant had no clothes, not even under wear. When he got up he put on his trousers and started assaulting her. Shepherd was by the door and ran outside laughing and saying they had already done it. Lucia told her mother that her father put his thing into her.

In his cross examination the appellant asked his wife: "Did you see rape or heard or fabricated it?"

In answer she said "I saw the rape." He asked her what social problems she had and she said she was seeing people and could not speak, then she collapsed and was taken to Mpilo by ambulance, treated for 3 days then discharged.

He put to her that in 2007 she became ill and insane and burnt all the property. She replied that what he was saying was not connected to what she found him doing with the child and she could recall everything that she saw and did. He asked her if she recalled saying she wanted to fix him. She replied that she said after he had rapes the child.

In answer to another question she said she was taking some keys to a neighbour and when she returned Shepherd was by the door and Lucia was sleeping with her father.

The child, Lucia gave evidence after being admonished.

Asked how old she was she raised three fingers. She said she lives at Nyamandlovu with her mother Moses and Shepherd. Asked what happened she said;

"Father came and mounted me. Then father said 'get out', to Shepherd as he stood by the door way.

She said she was wearing a shirt only and her father was not dressed. She told the court that her father used the same thing that her brother Shepherd has for urinating and she felt pain.

She admitted that Ronald also injured her with a stick and touched her private parts. She said she did not want her father to come back home because he might rape her again. She was asked what happened when she was injured she said she bled and police took her father away.

The following is part of the exchange that took place between the child and her father under cross examination:

“Q Do you know where your father is

A Yes

Q Where is he – A – he is at the remand

Do you want your father to come back home – No

Why don't you want him to come back

A Because he may again rape me

Q Who told you that - Mother

Is it true that all you said you were told by mother? – Yes

But you know you were injured by Ronald with a stick – Yes

In his submissions the appellant argued that he did not rape the child but she was injured by Ronald with a stick and Ronald confirmed that. What remained unclear was when in relation to the alleged rape was the child injured by Ronald. There was no independent witness to that story.

The appellant said he wanted to call defence witnesses concerning that and the mental state of his wife. Attempts to locate those witnesses were unsuccessful.

In her judgment the trial magistrate said she found that although there was some background about the mental state of appellant's wife, when she gave evidence in court there was nothing to suggest that she was mentally unstable. She gave her evidence well and the court was satisfied with it.

The court also found that the mother would have discussed the matter with the child to find out what happened. This is a young child who although admitting that one Ronald injured her with a stick, was still able to say that her father used the thing similar to what Shepherd has, on her and she felt pain.

While in response to the question;

“Who told you that?” She answered “mother”. This should not be read as suggesting that her evidence was all based on what her mother had told her. The question came soon after she said she feared that if her father came home he may rape her again. There is nothing wrong with her mother expressing that fear to her.

The appellant dwelt on the issue of his wife’s mental state. What he did not challenge is her evidence that (a) the child no longer had on her the trousers she was dressed with by the mother before she left; (b) he was still in bed lying facing upwards, the child was sitting on top of him, and seeing his wife he pushed the child away.

The trial court concluded that the injury of the child by Ronald could not have been on that day as Ronald was not at the child’s home on that day. When the appellant was given an opportunity to call his defence witnesses he sent the police on a wild goose chase. He could not tell the police any correct information about where the witnesses could be located.

The appellant did not give any explanation for assaulting his wife. The trial court also found that the evidence of the child’s mother was credible and was accepted as compared to that of the appellant. The trial court also concluded, and rightly so, that the mother’s evidence could not have been fabricated by a mentally unstable person.

On the basis of the above evidence the trial court’s findings and conclusion is supported. The evidence of the child complainant was properly corroborated by that of her mother and the medical report. There was no basis for rejecting that evidence.

I find the appeal against conviction to be devoid of any merit and it is dismissed.

Although there was no appeal against sentence the sentence, viewed from the above break ground and the age of the child I consider the sentence to be appropriate though on the side of leniency. There is no reason to interfere with the sentence.

Cheda J ..... I agree

*Criminal Division, Attorney General’s Office, respondent’s legal practitioners*