LAWRENCE MACHARAGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MUTEMA & MAKONESE JJ
BULAWAYO3 AND 27 NOVEMBER 2014

N. Dube for the appellant
T. Makoni for the respondent

Criminal Appeal

MUTEMA J: This is an appeal against both conviction and sentence. The appellant was arraigned before the regional court sitting at Bulawayo facing three counts of rape in contravention of section 65 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. Having denied all the charges he was convicted of three counts of having extra-marital sexual intercourse with a young person in contravention of section 70 (1) (a) of the same Act. All the three counts were treated as one for purposes of sentence and the appellant was sentenced to 36 months imprisonment 12 of which were suspended for 5 years on the usual condition of future good conduct. Appellant was sentenced on 6 August, 2012 and on 5 September, 2012 this court granted him bail pending appeal.

At the hearing of the appeal the respondent conceded, properly in our view, that the evidence adduced in the trial did not support the conviction. We allowed the appeal against both conviction and sentence and indicated that the reasons therefor would follow. These are they.

State allegations

Complainant was 13 years old while accused was 27 years old. Both were resident at 14 David Bernard Road, Waterford, Bulawayo. Complainant was a tenant of appellant's grandmother. The two were boyfriend and girlfriend. In mid-October, 2011 complainant's elder sister was admitted in hospital. Complainant asked appellant, who was a student at NUST, to help her with her homework. While doing the homework appellant told complainant to come to

his room at night. Complainant refused. At around 16:00 hours on the same day appellant intruded into the bathroom where complainant was taking a bath. He apologized, explaining that he was not aware that she was in the bathroom. He gave complainant $2 to buy whatever she wanted. Complainant accepted the money. At about 20:00 hours appellant, who occupied lodgings outside the main house came and knocked at complainant's room and asked her to open the main house door which she did. Appellant then cupped complainant's mouth and dragged her to his lodgings where he locked the door, spread a sheet on the floor, removed her pant and blouse and raped her. Complainant bled, went and bathed and went back to sleep. The foregoing constitutes count one.

Regarding count 2, appellant went and knocked at complainant's window two days after count one, claiming to be her uncle. She opened the door and appellant dragged her to his room and raped her on the floor. Appellant told complainant to go and borrow money from his grandmother (the landlady) claiming that she had been sent by her uncle. Appellant promised to pay back the money at month end. She went and borrowed $3 from the landlady.

Regarding count 3, a week later when her sister had returned from hospital, complainant encountered appellant at the tap around 5am. Appellant told her to come to his room to collect the repayment of the loan she had borrowed from the landlady. In the room she sat on the sofa and appellant raped her after which he told her to go and borrow $3 from the landlady. She went and was lent $2. Subsequently complainant went and borrowed another $2 from the landlady.

On 8 December, 2011 complainant's sister learnt from a fellow tenant that the landlady had told her that complainant's sister owed her a lot of money. When the sister confronted the landlady she was told that complainant had borrowed money saying she had been sent by her sister's husband. The sister took a stick and threatened to assault complainant asking her where she was taking the money to. The complainant then told the sister that she was being sent by appellant to borrow money following his raping her. The matter, thus found its way to the police.

Appellant denied *in toto* ever being in love with the complainant let alone ever having sexual intercourse with her, with or without her consent. He neither gave her money nor instructed her to borrow from his grandmother.

Complainant's testimony

She knows the appellant because he raped her.

Re: Count 1: following the bathroom intrusion appellant came in the evening while she was asleep with her sister's children. The sister was in hospital with a sick child and her brother-in-law had not yet returned from work. She thought it was her brother-in-law and opened the door. Appellant closed her mouth and took her to his room, locked the door, spread a towel, removed T-shirt and pant and wore a condom. He asked her to open her legs but she refused. He promised to give her $4 and she then consented to have sexual intercourse with him. She went back to sleep.

Re: Count 2: she met appellant by the tap and he told her he wanted to rape her. He asked her to go and borrow $4 from his grandmother. She was given the money and she went to school. She returned in the evening and appellant asked her to visit him and she refused. While bathing appellant came in and apologized and gave her $2 for intruding into the bathroom. She later retired and appellant came and knocked at the window. She thought it was her brother-in-law and opened the door. Appellant closed her mouth and took her to his room where he spread a blanket, locked the door, put the keys in his pocket, removed her pant, short and skirt and told her to lie down and she refused. He got some condoms and made her lie on the blankets and raped her. She threatened to report him and he told her to go and borrow money from his grandmother. She went and borrowed $3 and used it.

She said appellant raped her three times and threatened to kill her if she reported because she had spent his money. She said was a two day lull between first and second acts of sexual intercourse and one day between second and third acts. On the third occasion her brother-in-law was drunk sleeping on the bed while she slept on the floor with the children in the same room. She said she was given a total of $10. She said she was appellant's girlfriend. If her sister had not threatened to assault her she would not have opened up. She was not a virgin prior to the sexual encounter with appellant.

Complainant's sister Sikethiwe Ncube's testimony

After learning from landlady of the borrowed money she went and asked complainant

how she had used the $10 she had borrowed. At first complainant did not respond. She went outside and brought a switch and asked complainant to tell her. It was then that complainant told her that appellant was sending her and also having sexual intercourse with her three times by force.

Whether the complaint was admissible

The approach to the admissibility of complaints in sexual cases was settled in *State* v *Banana* 2000 (1) ZLR 607 (S). Therein, it was held that evidence of a complaint in a sexual case is admissible to show the consistency of the complainant's evidence and the absence of consent. The requirements for admissibility are:

(a) the complaint must have been made voluntarily, not as a result of questions of a leading and inducing or intimidating nature; and
(b) the complaint must have been made without undue delay, at what is in the circumstances the earlier opportunity, to the first person to whom the complainant could reasonably be expected to have made it.

What is pertinent to note is that the use of the conjunction "and" implies that both these requirements must be satisfied before the complainant can pass the hurdle of admissibility.

In the instant case the complaint was not made voluntarily. It is not in dispute that the complaint was engendered or induced by a threat of assault via the switch which complainant's sister was wielding concommitantly with the verbal threat to assault her if she did not disclose how she had used the $10 which she had borrowed from the landlady. For this reason the complaint is clearly inadmissible and the trial regional magistrate clearly grossly misdirected herself when she admitted it.

As regards when the complaint was lodged the record does not precisely ventilate this. It was encumbent upon the prosecutor to establish the fact whatever the duration it took for the complaint to be extracted it is clear that it was not made timeously to the sister. In fact, the complainant, in her evidence-in-chief, did not testify to even making the complaint to the sister. She simply said "I then told her that I was getting the money for the accused person. We then went on to report to the police." It was the sister who told the court that such complaint was

made. Complainant half-heartedly alleged the matter was discovered after the sister returned from hospital in October, 2011 yet the state outline alleges it was on 8 December, 2011. It therefore cannot be said that the report was timeously made.

Once the complaint was inadmissible then the State case had no leg to stand on. There was no need to even venture into the defence case.

Whether the complainant was a credible witness

Having done away with cautionary rule in sexual cases the courts must still consider carefully the nature and circumstances of the alleged sexual offence. All the trial court has to do is satisfy itself that the complainant has told the truth.

In the instant case the consistency of the complainant's evidence and absence of consent are no longer capable of being shown on account of the inadmissibility of the complaint as found *supra.* Over and above the foregoing, the complainant was anything but a credible witness. Her story is redolent of contradictions and improbabilities. The matter was reported to the police and came up for trial as three counts of rape. However, in her evidence the complainant told the court that in respect of count one she consented to the sexual intercourse because appellant gave her money or promised to give her money. She gave no evidence regarding how the third count was allegedly perpetrated save to simply allude to a third count. It is difficult to comprehend how and on what basis the trial regional magistrate found liability attaching to this count. Even regarding the other two counts, she did not tell her story in a coherent manner. On page 16 of the record complainant stated that regarding count two, appellant came and knocked at the window and she opened the door on the mistaken belief that it was her brother-in-law who was knocking. She said she did not bother to check who was knocking despite having previously opened the door in response to a knock which resulted in it being appellant who then allegedly raped her. This is highly improbable if not palpably false. On page 17 she said she was raped in the evening whilst her brother-in-law was at home in a drunken stupor yet in her statement she stated that this occasion occurred in the morning around 5am when the sister had spent a week having returned from hospital.

She said had the sister not threatened to beat her she would not have opened up. She

initially gave the impression that all the three counts were committed whilst the sister was in hospital but under cross-examination she shifted ground averring that her sister returned from hospital on Sunday and appellant raped her on Monday, Thursday and Saturday thereby exacerbating the delay in making a timeous report to the sister.

The medical report was ineffectual as evidence and no cogency can be attached to it because complainant conceded that she was no more a virgin when appellant allegedly raped her. It is baffling that inspite of all he inconsistencies emanating from the cross-examination of the complainant the prosecutor had no re-examination to conduct. Complainant faired dismally and was blatantly not a credible witness. That coupled with appellant's explanation borne out by exhibit 2 – proof of his circumcision during the relevant period which he said could not have enabled him to engage in sexual intercourse clearly should have persuaded the trial regional magistrate to dismiss the complainant's story off hand in its entirety.

There was no basis at all for the court *a quo* to even find appellant guilty of the lesser charge of having extra-marital sexual intercourse with a young person for no act of sexual intercourse was proven. Inevitably, without a conviction the sentence must fall away. The above are the reasons why we allowed the appeal against both conviction and sentence.

Makonese J ……. I agree

Cheda & Partners, appellant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners