

NELSON NDLOVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKONESE AND MOYO JJ
BULAWAYO 11 JUNE 2018 AND 21 JUNE 2018

Criminal Appeal

C Makwara for the appellant
Miss N Ngwenya for the respondent

MOYO J: The appellant in this matter was convicted of rape as defined in section 65 (1) of the Criminal Law Codification and Reform Act [Chapter 9:23]. He had pleaded not guilty but was convicted after a full trial. He was sentenced to 20 years imprisonment of which 5 years imprisonment was suspended on the usual conditions leaving him with 15 years effective. Dissatisfied with both conviction and sentence, the appellant noted an appeal to this court.

At the hearing of the appeal, I allowed it in its entirety and stated that detailed reasons would follow. Her are the detailed reasons:

The grounds for appeal as espoused in the notice of appeal are as follows:

Ad Conviction

1. The court *a quo* erred in convicting the appellant when the state had failed to discharge the onus to prove all the essential elements of the offence of rape.
2. The court *a quo* erred in making a finding that the appellant was guilty of raping the complainant when there was no basis for such a finding particularly with regard to the material inconsistencies in the state case.
3. The court *a quo* erred in convicting the appellant when the defence was more probable and reasonably possibly time such that he was entitled to an acquittal.

I will not delve into the grounds of appeal as against sentence as I allowed the appeal against conviction meaning that the issue of sentence then became an irrelevant consideration.

The facts of this matter are that the complainant and the accused are father and daughter. The complainant was aged 28 years at the material time and the appellant was aged 59 years. It is alleged that on the morning of 9 June 2016 at about 0500 hours, the complainant went into the appellant's bedroom to wake him up for him to go to work. When she was there, the appellant who is her biological father allegedly grabbed her, dragged her onto his bed and closed her mouth with his hands. He removed complainant's pair of tights and her blue panties and then had sexual intercourse with her once without her consent. The complainant later reported the matter with the police at Zimbabwe Republic Police Pumula. The state case is built on the version of the complainant and her sister Tumisang Ndlovu.

The complainant's version

The complainant's version is that on the morning of 9 June 2016 she went to appellant's bedroom to wake him up for work. She alleged that the appellant raped her and then gave her \$5-00. She said she did not scream because appellant closed her mouth with one of his hands. She said the \$5-00 was meant to buy her silence on the incident. She said she has no relationship with the appellant's then wife-to-be and that she did not have a relationship with her since she only saw her once. She said that she told her sister after the rape incident and then she proceeded to the police station.

Tumisang Ndlovu (complainant's sister's) version

The complainant's sister Tumisang Ndlovu told the court that her sister, the complainant asked her if she wanted their father to be arrested and she acceded to that suggestion. The precise details of that aspect of Tumisang's evidence are at page 19 of the court record wherein she was asked:

Q: On that day did she (complainant) ask you whether you wanted your father to be arrested or not?

A: Yes we discussed.

Q: What did you discuss, tell us?

A: She asked me if I wanted our father to be arrested and I confirmed. She then told me that I continue to rest since I was lying on the bed. She then proceeded to our father's room.

Q: Then what?

A: When she came back she slept. Our father had not yet gone to work. When he had gone that is when she left for the police station."

In essence, the complainant's sister in these averments is in fact saying complainant asked her if she wanted their father to be arrested, prior to the complainant leaving for the father's bedroom where the rape then allegedly took place. Complainant's sister then said she has also had consensual sex with the appellant. She had told her sister (complainant) and her sister had said that she should report such matters to the police. According to her the \$5-00 that had been given to the complainant by the father was for provisions as was the norm. When asked why complainant wanted to have the appellant arrested, per their discussion, she said that complainant said the accused was asking to have sex with her. She (complainant) also asked the witness if she (complainant) should agree or not. Under cross examination complainant's sister agreed that complainant had a prior plan to have their father arrested. She confirmed that the \$5-00 given by the appellant to the complainant was to assist with food in the house. Complainant's sister said when complainant returned from the father's bedroom she was not crying. Complainant's sister also told the court that complainant did not like their step mother-to-be as she considered her to be a lazy person. She confirmed that the complainant had sought employment for her in Lupane a point that the father raised in his defence as one of the reasons for the fabrication of the allegations of rape by the complainant against him. Complainant had denied that she had sourced employment for Tumisang as alleged by the appellant.

At page 22 of the court record, the court then asks:

"Q: On 9 June complainant asked you if you wanted accused arrested.

A: Yes

Q: Did she ask you this before or after she had gone to the accused's bedroom?

A: She first went there to wake him up, she asked me when she returned.

The defence counsel then asked complainant's sister

Q: You said your sister woke you up around 5am to ask whether you wanted your father arrested then told you not to get up?

A: Yes she told me not to get up."

The appellant's version is that he never requested complainant to wake him up. Complainant just came to his bedroom. The appellant also gave a reason for complainant's fabrication of the rape allegations as that complainant did not like the step-mother to be, she also did not like the fact that (she) complainant had sought employment for Tumisang but the father did not release Tumisang to go and work, she then fabricated the rape allegations in order to have him arrested so that her younger sister Tumisang would be free to go and work in the rural areas.

There are serious problems with the state case in my view.

- 1) Firstly it is not clear from the state case why complainant went to appellant's bedroom on the morning in question. Complainant says she went to wake appellant up. A seemingly unbelievable assertion as why would complainant's father need to be awakened by the complainant to go to work in the first place?

There seems to be no reason for this. Appellant's assertion that that is not true, and that complainant just came of her own accord, is reasonable, possible and could be true in the circumstances. Complainant's sister says complainant went to the appellant's bedroom after hatching a plan to have him arrested. Although the court tried to clarify that point, and complainant's sister seemed to say they talked about the arrest after complainant had come from the father's bedroom, she further relented and went back to her original story upon being questioned by the defence counsel. The doubt created by Tumisang's version as to what transpired works in appellant's favour.

Again, while complainant said the \$5-00 was to buy her silence on the rape incident, she seems to have told the sister that it was for provisions. Although the sister also says the \$5-00 was to be used as evidence with the police, it remains unclear if it was to be used as evidence because of the hatched plan to have the father arrested or if indeed it was real evidence. The lack of clarity on this issue from Tumisang's evidence works in favour of the appellant as the state bears the onus to prove that material point beyond any reasonable doubt.

Again, while complainant pretended she did not know the step mother-to-be and hence had no reason to hate her as alleged by the defence, complainant's sister confirms that complainant in fact did not like the stepmother-to-be as she was lazy. While, complainant

refuted the allegations by the defence that she also be-grudged the father because she had found a job for Tumisang at Lupane and did not like the fact that the father would not allow that, complainant's sister confirms that in fact it was complainant who had sourced that job for her. If complainant did not harbour malicious intentions against the appellant on his actions of blocking Tumisang from taking up the job she (complainant) had sought for her (Tumisang), why would complainant deny such an innocent fact, that she indeed sourced the alleged job?

Whilst there are no formulas for a rape incident to occur as it can take any form or shape, this court notes that:

- 1) The complainant is 28 years old.
- 2) After the incident, she went to sleep in her bedroom with her sister, only to wake up later to go to the police station. Why did she not immediately alert the sister about the alleged rape? Why did she not immediately cause alarm?

This is worsened by the fact that her mission to her father's bedroom on the day in question is also not clear because it is unheard of that a 59 year old man would be awoken by a 28 year old daughter in order to go to work? That does not bode well for logic. It defies logic that a 59 year old man would be awoken by a 28 year old daughter in order to go to work. Complainant herself says she was visiting at the material time as she lived in the rural areas why would the father suddenly use her to wake up and go to work, what would he use in her absence?

The only logical conclusion is that complainant's version is porous, it cannot be held to be a credible version upon which a conviction can be sustained.

The complainant's sister's version, which suggested a hatched plan to have the father incarcerated prior to the alleged rape incident rendered the stated case entirely unreliable as it laid bare the reality of false incrimination. The complainant's sister's version also supported the appellant's version on issues that appellant raised in his defence like the aspect of complainant's dislike for her step-mother-to-be and the issue of her having sought a job for Tumisang which efforts were seemingly foiled by the appellant.

Whilst complainant's sister spoke of consensual sex with appellant, which was denied by the appellant during his evidence-in-chief, even if such sexual interactions were there, for

argument's sake they do not formulate any basis for the charge that the appellant faced in the court *a quo*. They may be abominable acts that are in fact taboo and if they did happen they should be condemned in the strongest terms, but they take the state case before us nowhere as they have nothing to do with the essential elements of the offence of rape as faced by the appellant in this matter. They do not compliment the state case in any way because the state case itself has fallen apart on critical issues.

It is for these reasons that I upheld the appeal and set aside both the conviction and sentence. The state failed to adduce evidence that passed the test of proof beyond a reasonable doubt and in such an instance, the court has no option but to acquit.

The appeal succeeds. Both conviction and sentence are set aside and the appellant is entitled to his immediate release.

Makonese J agrees.....

Mathonsi Ncube Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners