THOMAS AMUVET NYAMIMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HLATSWAYO and GUVAVA JJ
HARARE 8 November 2002

**Criminal Appeal**

GUVAVA J: At the hearing of this matter we dismissed the appeal against both conviction and sentence and indicated that our reasons would follow. These are the reasons.

This is an appeal against the conviction and sentence imposed by the Regional Magistrate sitting at Chitungwiza on 17 September 2001.

The appellant pleaded not guilty to one count of rape but was convicted and sentenced to 9 years imprisonment of which 2 years were suspended on the usual conditions of good behaviour.

The facts upon which the appellant was convicted may be summarised as follows. On 21 March, 2001 the complainant, who was about 6 years old at the time, was playing with her friends at Mashanda Farm in Beatrice where she resides, with her family. The appellant, who was the complainant's neighbour, called the complainant to his house and invited her inside. He thereafter closed the door and had sexual intercourse with the complainant one while she was lying on the floor. The appellant gave the complainant some sweets and told her not to report what had happened to anyone. The complainant did not report the incident. On the following day the complainant's father was passing near a place where the complainant was playing with her friends. He heard her friends jeering at her and saying that she was appellant's wife. He called the complainant and questioned her and she told him that the appellant had raped her. A report was made to the police and the complainant was later taken to a doctor for examination. The medical report on the complainant's condition was produced as Exhibit 1. The doctor observed that the complainant's hymen was intact but that the upper half of the vestibule was inflamed (red and oedematous). He also observed bruises on the vestibular roof and urethral mound of the complainant. With regards to whether penetration was effected he stated as follows: "most likely rear intracrural insertion with friction outer vestibule – sexual

molestation without penetration". The doctor also reported that the young girl was not sexually active. The complainant's birth certificate was also produced as Exhibit 2 and shows that she was about 5½ years at time of the offence.

The appellant has challenged the conviction on the grounds that he should not have been convicted of rape as the medical report does not show that penetration was effected as the hymn was intact. He also stated that he never raped the complainant and that all the witnesses were lying against him. In respect to the sentence he stated that the sentence was so excessive that it induced a sense of shock.

The trial magistrate accepted the evidence of the State witnesses and rejected that of the appellant. In her judgment the magistrate said in regard to the complainant's evidence:

> "The complainant gave evidence using the Victim Friendly Court facility. Considering her age that is the age of 6 her evidence was remarkable. She vividly recalled what transpired. She used the victim Friendly Court dolls to demonstrate an act of sexual intercourse. Accused person was given an opportunity to cross-examine the complainant after the complainant testified. Accused person indicated that he had no questions to put to the complainant after purposes of cross-examination were explained to him. Accused person did not dispute complainant's story. This was a clear indication what the complainant testified was the truth".

The trial court went further and found that the complainant's evidence was credible and believable in all material respects. The trial court also found that the evidence of the complainant was corroborated by the other evidence which was before the court. It was submitted on behalf of the respondent that the approach by the trial court was in accordance with the well established rule which requires judicial officers to warn themselves of the dangers of convicting on the uncorroborated evidence of certain categories of witnesses such as complainant's in sexual offences. This approach was adopted in our courts in the landmark decision of *S v Mupfudze* 1982 (1) ZLR 271 (S) where the two stage test was applied and approved. This approach was premised on the basis that there was an inherent danger in relying on the uncorroborated testimony of such complaints. However this approach is no longer part of our law. In the case of *S v Banana* 2000 (1) ZLR 607 (S) the Supreme Court, after ex..... Sexual cases in various jurisdictions including South Africa and Namibia said at 614:

> "It is my opinion that the time has now come for our courts to move away from the application of the two-pronged test in sexual cases and proceed in

> conformity with the approach advocated in South Africa. ... I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I would emphasize that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully."

Thus once a trial court finds, as it did in this case, that the evidence of complainant was clear and satisfactory in every material respect and that the witness was credible there was no requirement that her evidence be corroborated by other evidence.

According to the decision in *Banana*'s case (*supra*) a court making such a finding must carefully examine all the evidence in relation to the alleged sexual offence and if satisfied, may convict the accused just as it would in any other case.

In this case there was ample evidence to indicate that the complainant's story was not concocted. The complainant's father had heard children teasing the complainant and calling her the appellant's wife. On questioning her she disclosed what had transpired. This story was confirmed by Farai who was part of the group of children who were teasing the complainant. The medical report too shows that the complainant was interfered with. The complainant identified her assailant as "Amuveti" the appellant's nick-name, as did Farai who told the court that complainant was said to have been raped by the appellant. The appellant did not cross-examine the complainant nor Farai thus accepting their evidence. The appellant's evidence that there was hatred between him and the complainant's family was completely without any foundation. The evidence by the complainant's father that there was no bad blood with the accused was not challenged by the accused. In my view the trial court's finding that the complainant was interfered with by the appellant is unassailable.

The appellant in his grounds of appeal raises the question of whether or not there was penetration of the complainant in view of the fact that the doctor stated that her hymn had not been ruptured. In order to constitute the crime of rape, penetration by the male organ of the complainant's vagina must be effected. Various cases in our courts have stated that the complainant's hymen need not be ruptured as the slightest degree of penetration is sufficient to constitute rape. In the case of *S v Mhlanga* 1987 (1) ZLR 70 at 72 DUMBUTSHENA CJ cited the learned authors Smith and Hogan *Criminal Law* 5th edition at page 407 when dealing with this very issue and they stated this: "The slightest penetration will suffice and it is not necessary to

prove that the hymen was ruptured". See also *Torongo v S* SC 206/96. It was not disputed in this case that the complainant described in her evidence the act of sexual intercourse using the dolls in the Victim Friendly Court. The complainant in her evidence explained that the appellant inserted his penis into her vagina using the dolls in the Victim Friendly Court. The evidence from the medical report by Dr Choto shows that the complainant sustained injuries on her genitalia. Her vestibule was inflamed and bruised. Such injuries could only have been effected in circumstances where the appellant had effected some degree of penetration. The remarks by the doctor were obviously from a medical and not a legal point of view. Clearly the court *a quo* convicted the appellant after carefully consideration of the evidence before it. I can find no basis for interfering with the findings of the trial magistrate that the appellant raped the complainant.

In respect to sentence it is trite that appellate courts will only interfere with the discretion of a trial court where the sentence is disturbingly inappropriate or where the discretion of a trial court in respect to sentence is disturbingly inappropriate or where the discretion has been exercised capriciously or upon wrong principles. (See *S v Sidat* 1997 (1) ZLR 487 at 490). There can be no suggestion in this case that the sentence imposed was so excessive as to induce a sense of shock or that the magistrate did not exercise her discretion judiciously. In my view on the facts of this case the trial court actually erred on the side of leniency.

The complainant was barely 6 years old at the time of the commission of the offence and the appellant was 44 years old. It is now accepted from studies of psychologists that complainants in sexual cases are taumatized by the ac of rape. From the evidence before the court the complainant not only suffered the physical trauma of the rape itself but she also suffered at the hands of her friends who teased at her for something which occurred through no fault of her own. Studies have shown that this trauma has far reaching psychological effects on rape victims. (See J R Spencer and Rhoni Flin "*The Evidence of Children : The Law and Psychology*," 2nd edition p 317 – 318).

Because of these studies this court has on numerous occasions emphasised the seriousness with which it viewed cases of rape particularly when they are committed against young children. In *Chidodo v S* HH 78/98 BLACKIE J said at p 2 of the judgment:

> "Firstly and primarily, rape is a very serious offence. It is a gross violation of the rights, body and dignity of the complainant. The offence is aggravated when it is committed on a child. A severe penalty must be seen to have been given."

The same position had been taken by MUBAKO J in the case of *Daniel Phiri v S* HH 219/93 where he stated as follows:

> "It is important that the courts protect victims of sexual aggression who are usually women. Sexual assaults are a most reprehensible invasion of one's body, one's personality and dignity, the more so when it is perpetrated on young people."

These sentiments are now even more valid in view of the high incidents of sexually transmitted diseases and the rampant spread of AIDS in Zimbabwe. Given the high incidents of rape of innocent young children and their possible exposure to these diseases the courts must impose severe penalties in order to deter offenders from committing such offences. That this view is widely held in Zimbabwe is evidenced by the recent promulgation of the Sexual Offences Act and the severe penalties which are provided therein.

In my view given the above dangers to which a rape victim is exposed, a rape perpetrated on a young girl should attract a sentence of at least 10 to 12 years imprisonment.

It was for these reasons that the appeal against conviction and sentence were dismissed.