THE STATE

versus

MADHINDA TAWANDA NJUMBE

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 7 September, 2012

**Criminal Review**

MUTEMA J: The accused was convicted of raping his seventeen year old girlfriend. He was also aged seventeen at the time. He had pleaded not guilty to the charge. The sentence imposed was, “To receive a moderate correction of one stroke with a rattan cane to be administered in private by a designated Prison Officer at Harare Central Prison.”

When the matter came up on automatic review, I queried both the propriety of the conviction and that of the sentence imposed. I wrote to the trial magistrate in this vein:

“Two issues arise from these proceedings. The first relates to the propriety of the conviction for rape and the second hinges on the propriety of the sentence that was imposed.

**Ad Conviction**

What is not in dispute is that the accused and complainant were lovers. The State outline reveals that on 10 April 2012 the two met around 13.00 hours. When it started raining they sought shelter at the accused’s residence. When the accused returned from his bedroom (para 6) to where the complainant was seated, he pulled her up by her hands and she stood up. The accused pressed her against his body and she did not retaliate (*sic*) (possibly did not resist). Para 7 alleges that the complainant’s panties were torn by the accused. Para 9 avers that after the “rape” the complainant told the accused she was going nowhere – meaning she was now the accused’s wife.

In his reasons for judgment the trial magistrate reasoned thus:

“Having considered all the evidence in its totality, it is abundantly clear that the accused person had sexual intercourse with the complainant without her consent because there was no reason why all of a sudden soon after the sexual intercourse she would then have refused to go back to their (*sic*) homestead because if sexual intercourse was with, the complainant’s consent, obviously she was supposed to have gone back home because nobody at their residence could have known that she had had sexual intercourse with the accused person.

The offence only came to light because the complainant was now resisting going back to their (*sic*) residence and the accused person’s parents, on the other hand, were not accepting the complainant at this homestead. Because otherwise had your (sic) parents accepted the complainant to be the accused’s wife, the offence could not have come to light because the complainant was now prepared to stay with him as her husband – not because she wanted to be your wife but because you (*sic*) had violated her virginity.”

The foregoing finding is not supported by the evidence adduced by the State. It was not established that the complainant was a virgin. The alleged lack of consent was also not supported by the evidence and probabilities.

The State outline does not aver any jot or tille of an allusion to lack of consent on the part of the complainant save that the panties were torn into pieces. That exhibit was not tendered in court – having been flushed away by the complainant. Even accepting that they were torn, that *perse* is not conclusive evidence of absence of consent. They could have been old and worn such that their removal by consent could have worsened their condition. It is unbelievable that a seventeen year old urban girl would throw away such an exhibit saying she did not know it would be required.

The parties according to the State outline, sought shelter at the accused’s residence around 1.00 pm. While being questioned by the court the complainant said she did not want to go home because her parents would not accept her as it was late, having phoned her grandmother around 6 pm. I do not believe that 6 pm can be said to be late. Sight should not be lost of traditional mentality of girls refusing to go back home following sexual intercourse even with their consent, wanting marriage.

The evidence of complainant’s grandmother Edith Mubvuri is quite telling. She said when the complainant phoned her she told her that the accused had slept with her, had had sexual intercourse with her. She said this thrice and it was only when the prosecutor asked her whether she understood that to be rape did she answer “yes”. So, in essence one cannot say that the complainant reported rape to her. Bearing in mind that the parties were lovers, that no report of rape was made to the grandmother and that the matter was only reported to the police as rape three to 4 days later following a failure by the two families to reach agreement on marriage the accused should have been given the benefit of doubt concerning the alleged rape.

**Ad Sentence**

The accused was sentenced to receive a moderate correction of one stroke with a rattan cane to be administered in private by a designated Prison Official at Harare Central Prison. The triviality of the sentence supports my foregoing view that there was doubt regarding the guilt of the accused. Surely one stroke for rape must be so trivial a sentence that the *de minimis* rule can be appropriately invoked?

Could I have the learned trial regional magistrate’s comments.

The trial magistrate’s response reads:

“**Ad Conviction**

From my understanding of the complainant’s evidence, she did not voluntarily enter into the bedroom where sexual intercourse took place. She even advised her grandmother that she was dragged into that room. From this I concluded that is where the application of force started until sexual intercourse.

She told the court that she was dragged into the room and pushed on the bed and the accused sat on top of her and tore her pants before having sex with her. That is the same report she gave to the grandmother.

Though the pant was not produced as an exhibit, the grandmother saw it.

However, be that as it may, since the accused person was challenging that the pant never got torn, it was of paramount importance for it to be produced. The failed marriage might have prompted these allegations and this appears to be confirmed by the negotiations which took place before the case was reported.

I however, did not want to put much weight on the traditional mentality of girls as this would tend to stereo type them as people who lie about rape when they would have consented. It is not very unusual for parties and or their relatives to enter into negotiations after rape has been revealed.

On the issue of the girl refusing to go back home after the sexual act it was my considered view that it was a reflection that sexual act was not consensual.

Finally, on the issue of virginity, the medical report shows that the complainant had no previous sexual history and confirmed by the hymen tears at 9 O’clock and 5 O’clock position.

**Ad Sentence**

I considered a single stroke appropriate taking into account the fact that two were lovers and the accused might have taken the complainant’s consent to enter into his house as consent to have sexual intercourse. Thus, so to speak, he might have been labouring under a mistaken sense of sexual entitlement.

I however stand guided by the Honourable Reviewing Judge.”

**Ad Conviction**

That response did not persuade me to deviate from the lingering doubt in my mind that this is a proper case in which the accused should have been accorded the benefit of the doubt. As pointed out in my query *supra* the complainant never lodged a report of rape to her grandmother. She only told the grandmother that the accused had had sexual intercourse with her. That was the grandmother’s testimony and she repeated this thrice. It was only after the prosecutor asked her a leading question whether she understood that to be rape that she answered “yes.” This was legally clearly inadmissible. Effectively there was no complaint of a sexual nature that was made. Also, the fact that the matter was only reported to the police some three to four days later following a breakdown in marriage talks between the two families corroborates the foregoing finding that the sexual intercourse was consensual, hence the accused should have been given the benefit of doubt.

**Ad Sentence**

The wording of the sentence does not fall on all fours with that prescribed in *S* v *Butau* 1994 (1) ZLR 240 (HC), viz “To receive moderate corporal punishment of … strokes with a rattan cane to be administered in private at … by a designated Prison Officer.” Then follows the triviality of the sentence. Surely if the learned trial magistrate entertained no doubts at all re: accused’s guilt for such a serious crime as rape, then he would not have imposed a sentence of only one stroke? To reason that the sentence was condign on account of the fact that the two were lovers and the accused might have taken the complainant’s consent to enter into his house as consent to the sexual intercourse, thus labouring under the mistaken sense of sexual entitlement simply clouds the issue of whether the accused had the *mens rea* for rape – a mistake of fact scenario.

In view of the foregoing both the conviction and sentence cannot be allowed to stand. It is unfortunate that the corporal punishment has already been carried out and cannot be retracted.

In the result both the conviction and sentence are set aside and the trial court’s verdict is substituted with one of not guilty and acquitted.

MATHONSI J: agrees