

THE STATE  
versus  
CAPTAIN KAMUPAKERA

HIGH COURT OF ZIMBABWE  
MAWADZE & MUREMBA JJ  
HARARE, 1 March 2016

### **Criminal Review Judgment**

MUREMBA J: Accused, 35, was charged with one count of rape as defined in s 65 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] for raping his sister in law, as in his wife's young sister who was aged 14 years old. He was convicted after a full trial and sentenced to 14 years imprisonment of which 4 years imprisonment was suspended on condition of future good behavior. He was left with an effective 10 years imprisonment.

In his defence, during trial, the accused stated that the sexual intercourse with the complainant was with her consent. He said that in fact they had had sexual intercourse on 4 occasions, not once. He said that all the sexual encounters took place at his home. He said that the reason why the complainant cried rape was because she had fallen pregnant. He further said that the reason why she did not tell the truth that she consented to the sexual intercourse was that she was afraid of her father.

When the complainant testified she stated that she had sexual intercourse with the accused on 3 different occasions, but she never revealed the rape to anyone. She said that she never reported because the accused had made some death threats to her. The complainant admitted that she only revealed the rape to her other sister who is not the wife of the accused, upon being questioned, after it had been discovered that she was pregnant. Evidence on record shows that when the complainant was questioned she was now 13 weeks pregnant.

In convicting the accused the learned regional magistrate, on page 5 of his judgment said,

“The complainant in her evidence alleges that she was seriously intimidated not to report this sexual abuse. It is understood that cases of sexual abuse must be reported immediately when they happen to the most sympathetic person that is available. In this case the complainant it is understood did not report timeously but her fears are quite understandable as a vulnerable girl. She is 14 years of age. She is still a juvenile. There is evidence that she was intimidated that is the reason why she was getting into the accused person in the way she was doing and getting to be sexually abused in this way. But she revealed this to Tariro.

Now if she had consented to the sexual intercourse why would she say that the accused raped her? One can say that she had to name the culprit because she was now pregnant but according to the court’s view when the complainant was giving evidence in this court her demeanour does not suggest that she consented and she is buttressed by the medical affidavit that says she was penetrated. There is evidence that she has no previous genital sexual experience. She has been consistent throughout that she was raped by the accused and this was not by her consent.”

I have reservations with the conviction of the accused and my reasons are as follows. At law, for a report of a sexual nature to be admissible it has to meet certain requirements. The requirements for admissibility are that (a) the complaint must have been made voluntarily, not as the result of questions of a leading and inducing or intimidating nature; and (b) must have been made without undue delay, at what is in the circumstances the earliest opportunity, to the first person to whom the complainant could reasonably be expected to have made it<sup>1</sup>. Evidence that a complainant in an alleged sexual offence made a complaint soon after its occurrence is admissible to show the consistency of the complainant's evidence and the absence of consent. By making a report soon after its occurrence the complaint serves to rebut any suspicion that the complainant has fabricated the allegation<sup>2</sup>.

In the circumstances of the present matter it is apparent that the complainant did not make her report promptly, soon after its occurrence. In addition, she did not make it voluntarily. She only made it as a result of the pregnancy which means that had it not been for the pregnancy she might probably have remained quiet about the sexual encounters that happened between her and the accused. It is therefore difficult to say with certainty that the complainant was raped. Chances that she consented to the sexual intercourse cannot be ruled out. It is very much possible that she kept quiet because she

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<sup>1</sup> S v Banana 2000 (1) ZLR 607 (SC) @ 616

<sup>2</sup> S v Banana 2000 (1) ZLR 607 (SC) @ 616

was a consenting partner. On the other hand it could be true that she might have kept quiet because she had been threatened by the accused. Anything is possible, but what cannot be doubted is that her rape report does not meet the requirements for admissibility. Her failure to report the rape voluntarily without undue delay soon after its occurrence makes it difficult to rebut the suspicion that she might have lied that she did not consent to the sexual intercourse. Many a time people lie to save their skin when they are caught out.

For the learned trial magistrate to simply say the complainant's demeanour in court did not suggest that she consented to the sex without weighing her demeanour against the circumstances under which she eventually revealed the rape and without seriously considering whether or not her rape report to her sister met the requirements for admissibility was a total and grave misdirection. Demeanour alone cannot outweigh glaring facts which point towards the conclusion that the complainant might have consented to the sex. This is moreso if the circumstances in which she says the accused raped her are considered. She said that on 5 October 2015, the accused came to her grandfather's place of residence where she resided. He came in the evening under the pretext that he had come to while up time. When she then went to her bedroom to retire for the night the accused walked in and said, "My sister you should not say this out, once you do so you will die." Thereafter the accused made her to lie down on the blankets and raped her. Despite her grandfather being present at home and sleeping in another hut, she did not raise alarm. She said that she just cried softly. The complainant said that, then on 7 October 2015, the accused called her to his homestead in the same village in the evening. His children had retired to bed. He invited her into his bedroom. She said that she entered thinking that her sister was in, but she then discovered that she was not in. She said that he then threw her onto the bed and raped her. After that he accompanied her to her place. She said that on the third occasion she had gone to the accused's home to fetch water. The accused who was alone at home with his wife having gone to some place called Mupandira called her into his bedroom, pushed her onto the bed and raped her. She said that on the 4<sup>th</sup> occasion the accused approached her at the well and fondled her

breasts, but this time around he did not rape her because she amassed the courage to tell him that she was going to report him.

In my view, the conduct of the complainant alone shows that she was consenting to the sex. There is no plausible explanation as to why she kept going to the accused's place, let alone entering his bedroom even on occasions that she knew that her sister was not at home. She kept doing this when she knew that the accused had raped her on previous occasions. Her excuse that she did so because she was afraid of the death threats that he had made against her is just a lame one. No meaningful death threats were made by the accused. She did not even explain how he said she would die if she reported him. This conclusion is strengthened by the fact that in her own words the complainant said that on the 4<sup>th</sup> occasion the accused only fondled her breasts, but did not proceed to rape her because she had threatened to report him. If a simple threat to report him was enough to make him stop, it simply means that on the previous occasions the complainant had never told him that she was not interested in having sex with him. In any case if the threat to report him finally worked miracles for her on the 4<sup>th</sup> occasion, why did she not then go ahead and report him for having raped her previously? Was that not her chance to report him? Did she need to wait until it was discovered that she was pregnant? All these questions make me doubt that the complainant was raped. If the trial magistrate had seriously considered the complainant's conduct and how the report came out he would not have convicted the accused. The complainant's demeanour in court alone would not have carried the day.

In light of the foregoing it cannot therefore be said that the accused's guilt was proven beyond reasonable doubt. The accused should be given the benefit of the doubt. Consequently, the conviction of rape is quashed. It follows that the sentence thereof automatically falls away. Since the complainant was aged 14 years old at the material time the accused is convicted of having sexual intercourse with a young person as defined in s 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In arriving at the appropriate sentence I have considered that the accused was charged with only one count although evidence shows that he had sexual intercourse with the complainant on 3 occasions. That he had sexual intercourse with the complainant on 2

more occasions aggravates the offence. The accused is a 35 year old man who took advantage of a very young girl aged 14 years old. He took advantage of the complainant's youthfulness and immaturity. Lack of experience of life might have caused the complainant to fall for her sister's husband's antics. The accused also took advantage of his relationship to the complainant, i.e. that she is a young sister to his wife. The accused impregnated the complainant which means that he disrupted her education. Now she has to bear the responsibility of looking after a child when she is still a child herself. At the time the accused sexually abused her she was in grade 7. The accused thus failed to respect the complainant's rights as a child, the right to family care<sup>3</sup>; the right to be protected from sexual exploitation<sup>4</sup>; and the right to education<sup>5</sup>. I thus sentence him as follows:

“6 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition accused does not within that period commit an offence of a sexual nature and for which upon conviction he is sentenced to imprisonment without the option of a fine. Effective 4 years imprisonment”.

MUREMBA J .....

MAWADZE J agrees: .....

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<sup>3</sup> S 81 (1) (d) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013

<sup>4</sup> S 81 (1) (e) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013

<sup>5</sup> S 81 (1) (f) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013