

NELSON MUGANHU
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 13 February 2013 & 9 August 2017

Criminal appeal

O Gumbo, for the appellant
I Muchini, for the respondent

BERE J: The appellant appeared at Bindura Magistrates Court facing a charge of rape in violation of s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Upon his conviction the appellant was sentenced to 10 years imprisonment, 3 years of which were suspended on the usual conditions of future good conduct. This appeal is against both conviction and sentence.

The grounds of appeal against conviction are given as follows:

- “1. That the court erred in sustaining a conviction where there was no evidence before it.
2. That the court erred in failing to accurately analyse the evidence before it.
3. That the court erred in dismissing the appellant’s argument which was sound and plausible.
4. That the court erred by holding that the issue did not involve a love triangle in which appellant was being falsely incriminated.
5. That the court *a quo* erred in holding that there was no evidence to support that Mandovha, the so called star witness was in love with the complainant making him and interested party in the proceedings
6. That the court *a quo* failed to properly read the evidence of Mandovha in the light of the appellant’s defence outline and evidence which alleged the existence of a triangular love relationship involving the appellant, Mandovha and the complainant.”

When served with the notice of appeal, the respondent opted not to support the conviction and filed its notice with elaborate reasons in support of its position. A careful reading of the court *a quo*’s judgment, the record of proceedings as well as the reasons outlined by the respondent clearly demonstrate that the respondent’s position was well thought and well informed basically because of the following reasons.

A simple reading of the appellant's elaborate defence outline shows clearly that the appellant, the complainant and the so called star witness Mandovha were known to each other and that the appellant could not possibly have been exaggerating when he alleged that the complainant was cheating on her husband and had cunningly created a triangular love relationship involving Mandovha and the appellant.

In both his detailed outline and evidence in chief coupled with his cross-examination, the appellant gave a convincing explanation as to how he picked up a misunderstanding with the complainant after the two had indulged in consensual sexual intercourse. The appellant explained how the complainant threatened to fix him and in my view the involvement of Mandovha must be seen in this light.

Mandovha's involvement and his enthusiasm in this matter which resulted in him giving to himself investigative powers and the subsequent report of the matter to the police must have been sufficient to trigger a more cautious approach to the matter than the simplicity with which the court *a quo* handled this matter. Mandovha was evidently a bitter man who sought to fix his rival by trumping up these allegations about rape.

The mere fact that the complainant had the guts to report the alleged rape to Mandovha (who was projected as a total stranger to the complainant) and her failure to report same to her husband was quite curious. All this in my view demonstrate beyond doubt that this rape was stage-managed and the court *a quo* fell for this trap.

It was even more curious that the complainant, who was aged 33 years would have been raped in the manner she described and that after such a mishap she would just sit in the field for about 10-15 minutes sobbing only to be rescued by a stranger to whom she would confide in about her misfortune. Not only that but the complainant had the guts to go with this stranger to his home and would meet for several times after this incident. It becomes even more suspicious, that the complainant would tell this stranger about the rape but avoid making a report to her own husband or to the police when she was reasonably expected to do so.

The delay in reporting this rape which was evident did not assist the complainant at all as it went against the ratio laid down in the much celebrated case of *S v Banana*¹ which requires among other things that the complaint of rape must be made without undue delay to the first person to whom the complainant could reasonably have been expected to make.

¹ *S v Banana* 200 (1) ZLR 607 (S) at p 609

The exuberance shown by Mandovha in personally taking it upon himself to perform the role of an investigating officer in “tracking” down the appellant and eventually reporting this case fits firmly into what the appellant said about this witness and it is amazing that the trial magistrate could have missed this point.

In my view this is one case where after critically looking at the evidence doubt should have continued to linger into the mind of the court *a quo*. I am reminded of the dicta in the case of *L v V²* where the court made the following observations:

“In my view, there is simply not enough evidence to prove the appellant’s guilty beyond a reasonable doubt. The result will of course be a grave injustice if the appellant in fact raped the complainant. But that does not justify the commission of an even more serious injustice of convicting a person without his guilty having been established beyond reasonable doubt.”

In all the probabilities of this case it is not possible to come to the conclusion that the evidence relied upon by the court *a quo* reached the minimal threshold of proof beyond a reasonable doubt.

For these reasons the conviction and sentence are set aside

The appeal succeeds

HUNGWE J: agrees

Gumbo and Associates, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners

² 2003 (1) SA 16 (SCA)