

NICHOLAS ZVIWANZA CHIRIMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 20 July 2017 & 22 November 2017

Criminal Appeal

Mr W D Zhangazha, for the appellant
Mr R Chikosha, for the respondent

MUSHORE J: Appellant was charged with 4 counts of rape in terms of s 65 of the Criminal (Codification and Reform) Act [*Chapter 9:23*]. He pleaded not guilty and after a trial in the matter was found guilty of 4 counts of having sexual intercourse with a young person in terms of s 70 of the Criminal (Codification and Reform) Act [*Chapter 9:23*]. The facts giving rise to the charges are as follows.

Appellant, a businessman was aged 26 years at the time that the alleged offences being committed. Complainant was 13years old. On 15 January 2006, appellant asked complainant's friend, Fadzai Nebvuma, to ask complainant to meet him at a hill on the pretext of returning a textbook which he had previously taken from the complainant. Complainant complied and when she met the appellant, he immediately professed his love for complainant and grabbed complainant's hand, and tickled its palm which I understand to have been a sexual overture. Complainant out rightly rejected him and apparently wounded by her rejection of him, tripped her up so that she fell on the ground. He then forced himself on the complainant and had sexual intercourse with her. Complainant, being a virgin at the time, bled from the act of intercourse. During the rape, appellant muffled complainant's screams by stuffing a piece of newspaper in her mouth. After the rape, appellant carried complainant on his shoulder and took her to his shop at Negwari Business Centre which was nearby. It was now 8 pm. Appellant held

complainant hostage and raped her twice again. In the morning he gave complainant water to bathe and apparently she complied by washing the blood off her. The two then took a bus to Masvingo. Complainant went along out of fear. They put up at an address unknown to complainant. Appellant had sexual intercourse with complainant again. He then locked complainant in the house and went to Bikita for two days. Upon his return, he took complainant to Beitbridge where they then began living there as husband and wife. One day, after complainant had been held hostage for 4 months, appellant inadvertently left the keys behind, thereby enabling complainant to leave. Complainant left Beitbridge and travelled to South Africa. After 4 years of living in South Africa, and having met another man from whom she bore a child, she returned to Zimbabwe in 2010. As soon as she arrived in Zimbabwe she reported everything which had happened to her to her mother. The matter was subsequently reported to the Police, leading to appellant's arrest.

Appellant denied that he had raped and abducted complainant. He alleged that the charges had been fabricated by complainant's mother and that complainant was not a credible witness.

AD CONVICTION

The complainant gave her testimony very well. Her recall of the events was impressive. She held her ground when she was being cross-examined.

When she gave her testimony, complainant vividly recounted what had taken place all those years ago and was clear on details such as dates and times. She stated that she had not resisted the abduction and rapes because she had felt fearful of appellant who had threatened to kill her. She complied in order to survive her ordeal. Appellant also told her that even if she told the authorities that he was a very wealthy individual who could bribe the Chief into inaction. It was at that time that appellant informed complainant that her mother was looking for her and had reported her missing. She testified that on that day appellant had raped her at knife-point. She described that she had felt too scared to run away or to alert anyone as to her predicament, even when they were on public transport en-route to Masvingo and again on the way to Beitbridge. Appellant's brother (Talent), who had once been assigned by the appellant to keep an eye on complainant, told complainant that although he pitied her, he was afraid to assist her because he also feared appellant's wrath.

Appellant failed to provide evidence which materially challenged the complainant's testimony. Apart from that, he did not provide detail in his testimony of his version of events. To that end, his testimony was limited to 'yes' and 'no' answers and simply stating that the witnesses were lying. Furthermore, the court found appellant to be lying when he contradicted himself by stating that at the time that the offences occurred, complainant was 16 years old, although he had also testified that complainant was in Grade 7, and thus would have been aware that complainant was 13 years old at the time he first raped her.

I see no misdirection on the part of the trial court in accepting complainant's evidence as being reliable.

See ZIYAMBI JA's comments in *Moses Chimbwanda v Irene Chimbwanda* SC 38/02.

Furthermore, the trial court was not wrong, (as submitted by the appellant) in convicting the appellant in terms of section 70 (having sexual intercourse with a young person). The trial court correctly observed that the medical affidavit could not be used to infer that the complainant had been raped by the appellant, bearing in mind that complainant was medically examined 4 years after the rapes; and after she had borne a child.

I am guided in my views by WATERMEYER J's comments in *R v W* 1971 (3) SA 772 pp 780 when he said:-

"In rape cases for instance, the established proper practice is not to require that complainant's evidence be corroborated before a conviction is competent. But what is required is that the trier of fact should have clearly in mind that cases of sexual assault require special treatment; that charges of this kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid"

I find it important to recognise that at the time that complainant was abducted; she was at a very vulnerable age. She was still in primary school. Appellant's own brother was fearful of appellant. What more a 13 year old girl who perceived appellant to be influential and all-powerful.

In my view, the events as described by the complainant, present a high degree of probability of authenticity. See *S v Chabalala* 2003 (1) SACR 134. This is so especially against the backdrop of appellant having furnished little detail as his version of the events. See: *S v Weber* 19781 (3) SA 754.

In the result, the appeal against the convictions has no substance.

AD SENTENCE.

The sentence which was imposed was within the sentencing guidelines. 10 years imprisonment, with 5 years suspended on conditions of good behaviour was an extremely lenient sentence given the trauma appellant caused to the complainant and to her family. Appellant's apparent grandiosity and sense of entitlement wrought havoc to complainant's life. Her opportunities in life have no doubt been hindered.

Accordingly, and in the circumstances”

“The appeals against conviction and sentence is dismissed”

HUNGWE J agrees.....

Chinogwenya & Zhangazha, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners