

**EPHRAIM NCUBE**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE

NDOU J & CHEDA AJ

BULAWAYO 11 & 21 JUNE 2012

Appellant in person

*Ms A. Munyeriwa* for the respondent

Criminal Appeal

**NDOU J:** The appellant was arraigned before Regional Magistrate sitting at the Bulawayo Regional Magistrates' Court on 17 November 2011 facing one count of rape as defined in section 65 (1) of the Criminal law (Codification and Reform) Act [Chapter 9:23] ("the code"). He pleaded not guilty to the charge but at the end of the trial he was convicted and sentenced to 20 years imprisonment of which 4 years was suspended for five (5) years on the usual conditions of good future behaviour. This court granted him leave to prosecute the appeal in person against conviction only. The appellant raised two main issues in his appeal i.e. identification and capacity of the complainant to testify in view of her alleged mental retardation. I propose to deal with these issues in turn.

**Identification**

The appellant contended that the court *a quo* erred when it accepted the state's witnesses' evidence of identification. It is trite law that for identification evidence to be relied upon, it must be tested. The circumstances surrounding the identification must be carefully probed to the extent that the witness' powers of recollection and observation are put to test – *S v Muters & Anor* SC-66-89; *S v Makoni & Ors* SC-67-89; *S v Nkomo & Anor* 1989 (3) ZLR 117 (S); *S v Madziwa* SC-191-90 and *Charzen & Anor v S* [2006] 2 ALL SA 371 (SCA). *In casu*, the issue of identification does not really arise, the reason being that during the trial the appellant did not dispute being at the scene. In his defence outline the appellant said that he went to the complainant's homestead looking for one Madu. When he got there, he said he found people

talking and there was a little girl who came out of the hut. He said the little girl said “she was going to urinate”. This corroborated Nicola’s testimony which is to the effect that when she ran away from the appellant she said “she was going to urinate”. This cannot be a coincidence. Furthermore, the appellant averred that when he got there, he left his bicycle by the gate. This was also confirmed by Nicola who said that one her way out of the homestead she saw the appellant’s bicycle by the gate. This taken together with the fact that the appellant was identified positively when a match was struck and by means of his voice dispels any notion of any false implication. The appellant was properly identified.

### **Complainant’s capacity to testify**

This issue of the complainant’s mental retardation emanates mainly from the testimony of her mother, Besina Moyo. This is what she said-

“My child i.e. complainant is not mental stable. ...

Q How bad is complainant’s mental problem?

A My child was born normal. She suffered a stroke but she appreciates things. She has children and men had dated her but she has never said that she has been raped.”

In light of this testimony the state counsel submitted that it was not proper for the court to rely on the testimony of the complainant’s mother without the evidence of an expert, presumably a psychiatrist. She relied on the decision in *S v Mbizi* 1989 (3) ZLR 317 (SC). She submitted that the conviction should be quashed and a fresh trial be ordered. I am not in agreement with this concession by the state counsel. Section 64 (3) of the Code provides:

“(3) A person who engages in sexual intercourse, oral sexual intercourse or other sexual conduct with a mentally incompetent adult person shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, unless there is evidence that the mentally incompetent person –

- (a) Was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct, and;
- (b) Gave his or her consent thereto”

In other words, this subsection replaced section 4 of the Sexual Offences Act, which rendered criminal all sexual acts with mentally incompetent persons. Section 64(3) renders

such conduct criminal only if it is shown that the mentally incompetent person was incapable of consenting to such acts, or, if capable, did not consent to such acts. The complainant, *in casu*, was capable of testifying sensibly. All that can be said from the evidence in this matter is that she is, to some degree, mentally retarded. Her mother stated that notwithstanding this mental retardation, she was able to appreciate things. This opinion by her other is, borne out by the manner in which she logically narrated the events of the day in question. This is evinced by her following testimony:

“He came and opened the door, lit matches and said I should sell to him a child called Nicola. He twisted my neck so that I should not scream and alert others. Nicola then ran away. I do not know where to. He twisted my neck and removed my pant. My minor child began crying and he told me not to bother at the crying baby. He did his thing to me and finished. When I woke up in the morning, I told my neighbours that I could not see the child as we were invaded by accused. Mother was away in the fields which are far away from us. When I woke up I went to tell her. ...

Q Who else was in the room when accused came?

A Nicola and my baby

Q How was the light in the room?

A On entering he lit matches. ...

Q Were you able to see him?

A Yes

Q You said accused did this thing, what do you mean?

A He removed my clothes, twisted my neck and removed my pant. He put his thing into me.

Q What is this thing he put in you?

A A pencil

Q What is it used for?

A You use it if you want to have a baby

Q What is it?

A Vagina ...

Q Did he say anything after the event?

A He gave me R10 and went away. He said he was looking for Madu, a neighbour in our area.”

This is similar to what she told her mother because the latter stated in her testimony:

“Q What story did the complainant tell you?

A That Phono [the appellant] had forcefully had sexual intercourse with her without her consent

Q What else?

A Then Phono asked permission from Nicola to sleep with her and Nicola ran away. The complainant remained behind with her baby. Then he ordered her to remove her ... and gave her R10.”

The story she told her mother is materially consistent with the one she told the court some seven (7) months later. The evidence by the complainant is substantially corroborated by that of Nicola Ncube. She stated:

“...Ephraim arrived and opened the door. He lit matches. He then said Sukoluhle [complainant] should sell me to him. Suko queried why she should sell the child to him and what explanation would she give the elders when they come. He said he did not want to go away with her but to sleep with her. That is when I ran away.”

It is trite that “no person appearing or proved to be afflicted with a mental disorder or defect or laboring under any imbecility of mind arising from intoxication or otherwise, shall be competent to give evidence while under the influence of any such malady or disability” – Section 246 of the Criminal Procedure and Evidence Act [Chapter 9:07] – *Ndiweni v S* SC 149-89. From what has been highlighted above, the complainant was not suffering from mental disability or malady at the time she testified. She gave a chronological and sensible story which

was corroborated by independent evidence of Nicola Ncube. I agree with state counsel that the prosecution should ideally lead expert evidence on the extent of a witness' mental competence in most cases because it is not in every case that you find such consistent testimony which is reliably corroborated by that of an independent witness. Where there is an indication of mental retardation of a witness the prosecutor should lead expert evidence on the depth of the mental retardation.

For these reasons, the complainant is a competent witness and the conviction is safe notwithstanding her mental retardation.

Accordingly, the appeal against conviction is dismissed.

Cheda AJ ..... I agree

Criminal Division, Attorney General's Office, respondent's legal practitioners