

**MBONISI NYATHI**

**VERSUS**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J AND CHEDA AJ  
BULAWAYO 4 FEBRUARY 2013 AND 28 MARCH 2013

Mr *M. Ncube* for the appellant  
Mrs *Ndlovu* for the respondent

Appeal

**CHEDA J:** This is an appeal against both conviction and sentence.

The facts of this matter as per the State outline are that appellant and complainant are neighbours and are aged 18 and 13 years respectively.

On the 15<sup>th</sup> May 2011 at around 0700 hours, complainant was playing outside the gate with other children when appellant came and called her. She refused and he pulled her by the hand. She resisted and bit him on the hands but he refused to release her. He took her far away from other children. At this juncture one Talent remonstrated with him to leave complainant alone but appellant would not listen. He got to a secluded spot where he removed complainant's pant and had sexual intercourse with her without her consent. She felt pain and cried. Appellant got off her. She wore her pant and ran back to other children. She was then medically examined and the Doctor who carried out the examination noted that there was very likelihood of penetration.

Appellant pleaded not guilty, but, was convicted and sentenced to 18 years imprisonment of which 9 years was suspended for 5 on the customary condition of good behaviour.

The basis of his appeal against conviction is that:

- (1) the state did not prove its case beyond reasonable doubt as:
  - 1.1 the State witnesses contradicted themselves

1.2 there was no evidence linking him to the crime

1.3 the identification parade was not properly carried out.

The evidence of children has to be carefully weighed as they are generally vulnerable and are susceptible to regurgitating statements from adults, thereby turning friction into facts. It is for that reason that these courts are extra cautious where children's evidence is concerned. In *S v Sibanda* 1994 (1) ZLR the Supreme Court analysed the possible pitfalls and gave guidelines in that regard.

The complainant is indeed a very young girl. Her evidence was very clear, she was playing with her friends where appellant grabbed her hand. This was in full view of other children. Talent Ncube also witnesses this incident. Above all the medical report confirms that complainant was sexually interfered with.

Appellant also attacked the identification parade. The need for a fairness in the conduct of an identification parade can not be overemphasised. The courts will always exercise caution where evidence of visual identification is concerned. The cardinal question is, is it possible that the witness was mistaken? The relevant questions which the court should focus on are:

- “(1) For what amount of time did the witness have the accused under observation?
- (2) What was the distance between the witness and the accused at the time of observation?
- (3) What were the lighting conditions at the time?
- (4) Were there any objects in the way which would have prevented or obscured observation?
- (5) Does the witness have good or poor eyesight? Does he wear glasses and did he have them on at the time?
- (6) Did the witness see clearly the accused's face or only the rest of his body?
- (7) Had the witness known the accused previously and if he had, how well had he known him?
- (10) If the accused has no distinctive facial or other features, how can the witness be certain of the identification?”

The offence occurred in the morning in view of other children, therefore complainant cannot be mistaken of the identity of the appellant. She was very close to him from the time he grabbed her hand, pulling her to a secluded spot, up to the time he mounted on her. She therefore had a clear view of his face.

In my respectful view the complainant can not be mistaken about her assailant. There is therefore no misdirection on the part of the trial court and I find that the conviction was proper.

With regards to sentence appellant was 18 years of age. He grabbed complainant's hand in broad day light. Despite vigorous resistance in protest to an extent of biting him, he was not prepared to let go. He did this in full view of other children including Talent Ncube who tried to stop him.

Appellant exhibited beastly conduct which can not be condoned. He indeed was young but his determination is in tandem with the behaviour of a sexually mature adult.

This is one of those cases where the appellant deserved to be treated like an adult.

Order.

The appeal against both conviction and sentence be and are hereby dismissed.

*Messrs Cheda and partners, appellant's legal practitioners*  
*Criminal Division, Attorney General's Office, respondent's legal practitioners*

Cheda J.....

Cheda AJ agrees.....