HB 292-17
HCA 172-16
XREF GKP 1524-16

LLOYD HEBERT NYAMUCHIWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 30 OCTOBER 2017 AND 2 NOVEMBER 2017

Criminal Appeal

C Mhuka for the appellant
Ms N Ndlovu for the respondent

MATHONSI J: The appellant was charged with attempted rape in contravention of s189 as read with s65 (1) of the Criminal Law [Codification and Reform] Act [Chapter 9:23] before a provincial magistrate at Gokwe. Although he pleaded not guilty he was, following a full contested trial, convicted and was, on 10 November 2016 sentenced to 4 years imprisonment was of which 1 year imprisonment was suspended for 5 years on condition of future good behaviour.

The appellant was aggrieved by the conviction and sentence and approached this court on appeal. His grounds of appeal are that the court *a quo* should not have found the complainant a credible witness when there are discrepancies in her testimony. He did not elaborate. The court *a quo* erred in rejecting his explanation that it is in fact the complainant who had seduced him because she was desperate to enroll at Mkoba Teacher's College in Gweru for a training course. The court *a quo* erred in finding that the complainant's mother had no reason to incriminate him when she had been involved in negotiations for compensation only to report the matter after those negotiations failed. Regarding sentence it is his view that the sentence imposed is so harsh as to induce a sense of shock.

The facts of this matter were generally common cause except for mainly the issue of consent or lack of it. The appellant is a member of the President's office based in Nembudziya Gokwe while the complainant is a 20 year old village girl hailing from Anama village in Gokwe North. On 12 July 2016, the complainant's mother referred her to the Zanu PF office in Gokwe

where he was to submit her application forms for enrolment at Mkoba Teacher's College in Gweru for a teaching course. The complainant was given the appellant's phone number as the contact person at that office.

Upon arrival in the morning, the complainant found the office closed and quickly phoned her mother back at home who in turn contacted the appellant to find out who was dealing with the applications for enrolment at the office. The appellant advised the mother that it was indeed himself and he directed that the complainant should call him so that he could direct her to his house as he had knocked off that morning.

Having assumed the powers of an enrolment officer of the College claiming to have authority to process the complainant's application to study at the College, and being well-known to the complainant's mother, the appellant lured her to his house at Mtora Stands in Gokwe North. The moment the complainant arrived at his house, the appellant immediately locked the door and attempted to have sex with her.

He had completely undressed the complainant, thrown her onto the bed and put on a condom while sitting on her legs when the struggling complainant managed to bite his penis inflicting excruciating pain which forced him to let go of the complainant. Weak and unable to perform what he had started the appellant ordered the complainant out of his house but not before the tenacious complainant had managed to text a message to her mother communicating what the appellant was trying to do. Her mother had then frantically phoned both the complainant and the appellant during that episode but none of them responded.

For his efforts, as I have said, the appellant was charged aforesaid. His defence was that, although he was meeting the complainant for the first time, it is the complainant who had seduced him by sitting on his bed, removing her jacket and pushing her dress up seductively. Having been encouraged by the complainant's actions, he said he had requested to have sexual intercourse with her to which the complainant agreed but advised him to be careful in doing so as she was a virgin. Having helped her take off her clothes he asked her to perform oral sex on him and she complied. It was after the oral sex that the complainant's phone rang and she spoke to her mother after which she announced that he had to leave.

Unfortunately for the appellant not only is that story bizarre in the extreme, the complainant and her mother were very impressive witnesses. The clarity of their testimonies captured the imagination of the court *a quo,* which meticulously dealt with the evidence and embraced that of the state while rejecting the explanation given by the appellant as extremely false. The court reasoned;

> "It is not in dispute that the accused person and the complainant met for the first time on the day in question. The complainant is a 20 year old and unsophisticated girl. It will be very difficult for this court to believe that the complainant seduced the accused person at all or in the manner suggested by the accused. The court is persuaded by the complainant's evidence that she could (not) seduce a stranger. The medical report produced by the state indicates that there was no penetration, suggesting to the court that complainant is a virgin. That complainant is a 20 year old virgin on its own speaks volumes about the complainant's character and behaviour and a reasonable court acting carefully would not believe that such a complainant would recklessly act sexually suggestively to a stranger ---. The state produced a blue pant which was torn on its side. Complainant told the court that it was during accused's struggle to undress (her) that her pant got torn. The court was satisfied that the pant produced got torn when accused was forcibly undressing the complainant."

The court went on to reject the assertion that the complainant would have seduced the appellant the way he suggested before deciding to leave without performing the act only because her mother called her from home which was between 5 and 8km away. Perhaps it is because of such impressive assessment of the evidence that Mr *Mhuka* for the appellant did not even bother to address the court on the appeal against conviction restricting his address to the challenge on sentence.

The appellant's major undoing is that the report of the sexual attack was made contemporaneously by cellphone to a person, the mother, expected to receive such a complaint. Therefore the evidence of the complainant found steady corroboration in her mother, who received the complaint as the offence occurred.

Although corroboration is no longer a requirement in our law in respect of sexual offences, the evidence of a complaint is admissible to show the consistency of the complainant's evidence and to demonstrate the absence of consent. See *S* v *Banana* 2000 (1) ZLR 607 (S).

I agree with Ms *Ndlovu* for the respondent that both the promptitude and the spontaneous or voluntary nature of the complaint are important elements rendering the complaint admissible. See *S* v *Mutize* HH 87-15.

Regarding sentence nothing really commends the appellant to consideration of a lighter sentence. This is a person who abused his position as an officer in the President's Office and a member of the Zanu PF party to victimize a simple rural school leaver desperate for a placement at a college. She was unsuspecting and genuinely believed that she could be assisted. Even her mother entrusted her to the appellant who turned out to be a wolf in sheep's clothing. For betraying that trust the appellant deserved what was coming to her. There is absolutely nothing wrong with the sentence.

In the result, the appeal is hereby dismissed in its entirely.

Takuva J agrees,……

H. Tafa & Associates, C/o Mlweli Ndlovu & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners