

RAPHAEL MADOMBWE

vs

THE STATE

HIGH COURT OF ZIMBABWE

BLACKIE and GOWORA JJ

HARARE 22 January 2002

Ms *Munangati*, for the appellant

Mr *Musgangwe*, for the respondent

GOWORA J: The Regional Magistrate in Bindura convicted the appellant of rape on the 9<sup>th</sup> April 2001. He sentenced the appellant to 8½ years imprisonment of which 2 years imprisonment were suspended for 5 years on conditions of good behaviour.

The appellant appealed to this court against both the conviction and the sentence imposed on him. However, in his argument before this court the appellant's counsel has submitted argument against the appellant's conviction only.

Two grounds of appeal are advanced against the conviction. The first is that the complainant's identification of the appellant as the person who raped her is unsatisfactory and unreliable. The second is that, in any event, the complainant's evidence as a whole was inconsistent and not of a standard on which a court which could safely convict the appellant.

The State concedes that the conviction cannot be supported. It concedes that the trial magistrate erred in accepting the evidence of the complainant as being credible. In particular, it concedes that the admitted delay in reporting the rape by the complainant raises the real possibility that whatever sexual relations the complainant may have had could have been consensual.

The complainant was examined by a medical doctor some days after the alleged rape. The doctor's report on that medical examination states that the complainant's private parts admitted two fingers and that the hymen was perforated. In his opinion, penetration of the complainant had been had been effected. The appellant did not challenge the doctor's opinion or the fact that the complainant had had intercourse.

However, the complainant's evidence that she was raped and raped by the appellant was unsatisfactory and contradictory in a number of respects. In particular, it was unsatisfactory in her description of her relationship appellant, her identification of the appellant as the person who raped her, the means by which he had threatened and overpowered her and why she delayed in reporting the rape, which she had said had been inflicted on her.

In respect of her relationship with the appellant, the complainant gave a number of different versions. In her evidence in chief she said that she and the appellant had a cordial relationship but that she realised that if she became close to the appellant he would go to extremes. During cross-examination, she told the court that she and the appellant just liked each other. Later she described how the appellant had earlier propositioned her and she had turned him down.

Her identification of the appellant was totally unsatisfactory. She stated positively that it was the appellant who raped her. However, she also said that she never saw the person who raped her and that she just felt him when he came into her blankets. She gave no explanation as how she was able to identify the appellant as her rapist without being able to see him.

The complainant further stated that the person raping her had threatened her with a knife. Nevertheless, her description of the knife and how it was used towards her contains a number of important contradictions. Initially she stated that that she became aware of the knife when she touched its handle whilst appellant was raping her. During cross examination she said that the appellant had showed her the knife and lifted it up, pointed it at her and threatened her in the midst of the act of

intercourse. Later she said that the appellant had prodded her and threatened her with the knife after the sexual intercourse. Much later, she stated that when she was threatened with the knife she was seated on her bedding after the intercourse.

The evidence discloses that the complainant had a number of opportunities to report the rape shortly after the rape was alleged to have occurred, that she did not take advantage of those opportunities and that she only made her report of rape after her mother had questioned her extensively.

The complaint's grandmother stays within the vicinity of Madziva, the place where the rape was said to have taken place. Complainant could have gone there and made a report. She did not do so. Her explanation as to why she did not do so does not read well and must be regarded as unsatisfactory.

The day after the alleged rape the complainant set out for home. On her way went to a police station. She met with the wives of at least four policemen. She spent the night in the home of a policeman. The following day she met another two policemen. However, she says, that it never crossed her mind to make a report that the appellant had raped her to anyone of these people.

When the complainant arrived home, two days after the alleged rape, her mother noted she was dragging her right leg and appeared to have difficulty in walking. The complainant made no report of the rape to her mother. Later, she went with a female relative to town. In the course of that journey, the complainant told the relative that the appellant had propositioned her. The relative later mentioned this proposition to complainant's mother. The mother questioned the complainant about the proposition. It was only then that the complainant made the report of rape.

Both counsel accept that there was a lack of spontaneity in the complainant's report. They submit that the report was extracted by inducement and questions of a suggestive nature thus rendering her evidence inadmissible. In *S v Zaranyika* 1997 (1) ZLR 539 (H) at 557 GILLESPIE J stated as follows:

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“Both the promptitude and spontaneous or voluntary nature of the complainant are important elements in rendering such a complainant admissible. Where any threat or any inducement by question of a leading or suggestive nature precedes and procures the making of the complainant its voluntary nature is destroyed and the evidence of the complainant becomes inadmissible.”

In the circumstances of this case we are not satisfied that the evidence of the complainant is such that we can say beyond reasonable doubt that the appellant raped her. In the result the appeal is allowed. The conviction and sentence are set aside.

**Blackie J. agrees.**

*Munangati & Associates*, appellant’s legal practitioners.

*Attorney General’s Office*, respondent’s legal practitioners