

THE STATE

**versus**

CANISIO TAZVIVINGA

and

CHAMUNORWA NYANGANI

HIGH COURT OF ZIMBABWE

MAKARAU J

HARARE, 11 February 2004

### **CRIMINAL REVIEW**

MAKARAU J: The accused persons appeared before a Regional Magistrate at Chitungwiza, facing one count of rape. It was alleged that on 30 September 2001, at an open space in Chitungwiza, the accused each raped the complainant.

The accused denied the charge. After trial, they were convicted and sentenced each to nine and half years imprisonment.

The evidence adduced by the state from the complainant was to the following effect: On 29 September 2001, the complainant retired to bed around 8.00pm. She did not switch off the lights to her room. She also did not switch off the television set as she intended to wake up later to watch a football match. She woke up around 2.00 am the following morning and saw an owl sitting on top of the television set. She shouted for help and someone opened the door for her from the outside. She bolted from the room clad in a petticoat and headgear only. She took a blanket with which she wrapped herself. She set off for her brother's place in the same suburb.

On the way, she met the two accused persons who were part of a group of six. The two detached from the group and came towards her. They got hold of her by the hands and pulled her towards a vlei at the back of a local high school. She was shaking from her encounter with the owl. She was crying and asking the

two to let her go. In the vlei, the first accused took her blanket away. The two accused persons then felled her and the second accused had sexual intercourse with her. The first accused then took a turn on her. The two accused persons then walked her to the entrance of the school where she was given back her blanket. She then ran to her brother's place. She was met by her sister-in-law who opened the door for her. She then reported the incident of the owl to her sister in law. The time was now around 5.00am. Later in the morning, she proceeded to her residence in the company of her sister in law. On their way back, they met the two accused persons and she then made a report to her sister in law that the two had raped her the previous night. The accused persons were then arrested.

She first met the accused persons around 3.00 am on the day in question. Visibility was good, as there was illumination from a nearby tower light and from the lights from nearby houses. She was able to see their faces as well as the clothes they were wearing. She was with them from 3.00a.m and arrived at her brother's place around 5.00am. (The distance between the two places is however not given in her testimony). When she met them later in the morning while she was in the company of her sister in law, they were still wearing the same clothes. She did not identify any other members of the group of six from which the accused persons had detached.

In addition to the evidence of the complainant, the state also adduced evidence from the complainants' sister-in-law. Her evidence corroborated that of the complainant largely. She added that she had taken the complainant to a prophet on account of her having been visited by the owl and it was on their way back from the prophet that they met the accused persons. She did not take

the accusation of the accused persons by the complainant seriously as she thought the events of the previous night had confused the complainant.

In their defence, the accused persons denied that they raped the complainant on the day in question or at all. They alleged that they met the complainant for the first time when she falsely accused them of the offence. Upon being so accused, they threatened to beat up the complainant and attempted to walk away from the scene but were arrested by a police detail who was passing by.

On the basis of the above evidence, the accused persons were convicted.

The sole issue that has exercised my mind in this matter is whether the accused persons were sufficiently identified. In her judgment, the trial magistrate correctly identified the issue that was before her. In their defence, the accused persons distanced themselves from the offence. Thus, the identity of the rapists was the sole issue for determination in the trial. The trial court disposed of the issue by finding that the complainant was positive about the two accused persons' identity, that visibility was good and that the complainant took cognizance of the accused persons as she pleaded with them to leave her. The trial court was further impressed by the fact that the complainant was able to differentiate between the two accused persons and recalled the different roles that each played. The trial magistrate also found that the complainant suffered severe trauma and had a clear picture of her abuse.

It is a settled position at law that evidence of the identity of persons must always be approached with caution.( *See S v Mtethwa* 1972 (SA) 766); *R v Shekelele* 1953(1) SA 636 (T) and *S v Mupfudza* 1982(1) ZLR 228 (SC).

The courts have often observed upon the dangers of mistaken identity and have developed tools to assist in excluding the possibility of mistaken identity.

The court must warn itself initially of the dangers facing it. (See *R v J* 1966 (1) SA 88 (SRAD)).

In weighing up the evidence at the end of the trial, the trial court must establish whether or not the surrounding circumstances exclude the danger. ( *R v J* (*supra*) and *S v Mhandu* 1985 (1) ZLR 229 (SC).

Sincerity and conviction of the witness are not sufficient. (See *S v Mehlope* 1963 (2) SA 29 (A).

Applying the above principles to the matter under review, it would appear to me that the trial magistrate did appreciate the danger that beset her when she evaluated the evidence.

She however erred in my view in accepting that the possibility of mistaken identity had been excluded. She appeared to have been taken in by the sincerity and conviction of the complainant. She should not have been as there were features of the complainant's evidence that did not exclude that possibility for making the conviction safe. For instance, while it was stated that visibility was good, as there was a tower light in the area, the distance of the tower light to the scene was not established nor was the strength of the light illuminated by the tower light. Further, the features, facial or otherwise by which the complainant recognised or remembered the accused persons were not fully investigated. The complainant simply testified that she saw the faces of her assailants as well as the clothes they were wearing. She was not asked to detail that which she saw on their respective faces and that made her remember them a few hours later. The complainant testified that she observed the clothes that the accused persons were wearing when they assaulted her and that these were the same clothes that they were wearing when she next saw them. The details of the clothes the accused

persons were wearing when they were arrested were not solicited from her, to test her identification of the accused persons.

The circumstances of the matter were that finding an owl within her abode had traumatized the complainant. So traumatized was she by this that she bolted out her residence inadequately clothed, seeking refuge at her brother's place. According to her own testimony, she was shaking from the incident. The incident occurred in the early hours of the morning after the complainant's sleep had been dramatically interrupted. She was clearly in a disturbed state of mind. In such circumstances, the trial magistrate must have been keenly aware of the possibility of a genuine but mistaken identification on the part of the complainant. In my view, it was highly unsafe that the trial court relies on the conviction and credibility of the complainant to convict the accused persons. The danger of mistaken identity was not excluded beyond reasonable doubt. While the complainant may have been correct in her identification, the circumstances of this matter are in my view an example of where the court should acquit rather than convict.

In the result, the conviction and sentence imposed on the accused persons is set aside. The accused persons are entitled to their liberation with immediate effect.

MAKARAU J.....

CHITAKUNYE J agrees.....