

GIVEMORE CHIMANIKIRE
versus
THE STATE

HIGH COURT OF ZIMBABWE
PATEL AND HUNGWE JJ
HARARE, 8 June and 5 July 2006

Criminal Appeal

Mr *Manyurureni*, for the Appellant
Mr *Tokwe*, for the Respondent

PATEL J: This is an appeal against the conviction of the appellant on one count of rape by the Regional Magistrates Court, sitting at Bindura. The appellant, who was legally unrepresented, pleaded not guilty to the charge. He was convicted and sentenced to a term of 8 years imprisonment of which a period of 2 years was suspended on condition of good behaviour.

The Facts

The complainant in this case is Barbra Mukadyata, a female juvenile aged 16 residing in Zvomuya Village, Madziwa. The appellant is a male adult aged 23 staying in the same village. He is employed as a soldier at 4.2 Battalion, Gutu. The appellant and the complainant were in love with one another.

It is common cause that on the 28th of November 2004, at about 7.30 p.m., the appellant met the complainant on her way home from Madziwa Township. The appellant had sexual intercourse with the complainant within a bushy area near the road.

The State case was that the appellant coerced and subdued the complainant into having sex with him and that the complainant did not consent to the act of sex. The complainant later reported the matter to her sister. A few days thereafter, the police were notified and the appellant was then arrested. According to the medical report subsequently compiled and produced at the trial, the complainant's hymen was torn and penetration had been effected.

The appellant's defence was that on the day in question he and the complainant walked together along the road until they arrived at a secluded place. They then had consensual sexual intercourse. Thereafter, he walked with her and they parted when they were close to her home. Subsequently, at a gathering of their respective families, he confirmed that they were in love and that they had had sexual intercourse. He then took her home, in accordance with customary norm, and they voluntarily stayed together as husband and wife. Three days later, the complainant left his residence and reported the alleged rape to the police.

The Arguments

Counsel for the appellant submits that his conviction is unsustainable for a number of reasons. The complainant did not raise any alarm at the time of the sexual encounter even though other persons were passing nearby. Moreover, there was no sign of any struggle at the scene of the alleged rape. The complainant's report to her sister was not spontaneous but was induced in order to justify her sexual misbehaviour. She only reported the matter to the police after she felt ill-treated by the appellant's family and after her intended marriage to the appellant did not materialise. She therefore had a strong motive to incriminate the appellant.

Counsel for the respondent submits that although the complainant was in love with the appellant, she was surprised by the sexual encounter. Her clothes were soiled and she reported the rape to her sister at the earliest opportunity. The appellant acted in the manner that he did because of the local customary practice whereunder whichever man first had sexual intercourse with a virgin was entitled to take her as his wife. The appellant feared the possibility of some other man deflowering and claiming the complainant as his wife. The fact that the matter was temporarily settled as between the two families does not detract from the complainant's lack of consent at the time of the alleged rape.

The Complainant's Evidence

Most of the facts *in casu* relative to the relationship between the appellant and the complainant and the events that occurred well after the alleged rape are common cause. What is in dispute is the nature and circumstances of the sexual encounter in question. In this respect, the complainant's evidence-in-chief as to what transpired at that time and immediately thereafter is highly pertinent. At pages 4 to 5 of the trial record, she states as follows:

“As we were going down the dust road we got to some place where there were some *mukute* trees. Accused person asked me if I was not prepared to go to his place of residence, but I told him I wasn't because his parents talk a lot. As we were standing there, he then grabbed me and dragged me to the side of the road. He grabbed me yet again and placed me yet on another point besides the road. He then fell me to the ground, he then had sexual intercourse with me. After doing that I asked him why he had done that to me when I had not consented.

..... Soon after he had finished I could not wear my shoes. I held them as we walked together. When we got to a point in between our homes, he then told me that he was going home. I

asked him how he could leave me like that after having had sexual intercourse with me because by then I was bleeding. My pair of pants was soiled with blood as well as my skirt. He then left for his place of residence leaving me alone standing there. I was stranded. I was afraid to go home because this time then my sister was looking for me. I was afraid to go home because it was my first time to have had sexual intercourse with a man. When my sister saw me she asked me why I delayed in coming home that day. I was afraid to tell her. She got a switch intending to assault me. I asked her to stop assaulting me. I then explained everything what had happened to her.”

As regards the complainant’s relationship with and feelings towards the appellant after the alleged rape, she had this to say, at pages 6 to 7 of the trial record, in response to questions from the prosecutor:

“He is saying you later stayed with him for three days as husband and wife. Did that happen? – Yes your Worship. I went to his place of residence. Upon my arrival, the father of the accused person started (ragging) against the accused and myself blaming him for having brought me home as his wife, but Givmore told his father that this was the woman that he wanted for marriage, but the father suggested that he wanted the girl from Bindura. Givmore was against this. They argued over this up until Givmore left me there and came to Bindura. When I remained behind, the parents could not give me anything, not even food or water.

Why did you go to his house? – My parents said that I should go to my husband. I agreed your Worship and proceeded to my husband, but on getting there, the parents to the accused person said they didn’t want to see me.

Why were you approaching him as your husband after he raped you? – Your Worship I had given my life to him as he was the first man to have sexual intercourse with me and, therefore, he was the man I was supposed to have married, to go into marriage and not any other.

But you insist he had raped you? – Yes your Worship, I had not consented but I had given my life to him. I want him to be my husband because he is the only one who had sexual intercourse with me. I cannot go to any other man for marriage now except him.

You first reported the matter to your sister. She got hold of a switch intending to assault you. Why did she want to assault you? She wanted me to tell her the truth of what had happened because I was rather reluctant to tell her because I was afraid.

I am not clear. Did she want you to tell her why you delayed coming home? – Yes.

So you gave a report of rape to her voluntarily. It was not, the assault was not calculated to solicit that report from you but to solicit satisfactory reply as to why you had? – She wanted me to tell her why I had delayed in coming home which was unusually of me. That is why, that is when I asked her to stop so that I could tell her everything what had happened.

When was the report made to the police? How long after you had been ravished? – It was after two days. It was after I had been chased away from home by accused's parents and I didn't know where to go."

Decision

It is clear from the complainant's testimony that she was and continues to be in love with the appellant. Their meeting on the night in question was not unusual and entirely voluntary. After the alleged rape, she walked with the appellant and wanted him to remain with her.

One of the principal features of evidence against the appellant was the fact that he effected penetration without the complainant's pants having been removed. This fact was relied upon to draw the inference that sexual intercourse took place without the complainant's consent. In the circumstances of this case, I take the view that the trial court's approach in this respect was misdirected.

In criminal cases, it is a well established principle that guilt by inference cannot be concluded unless the inference sought to be drawn is consistent with other proven facts and those facts exclude the possibility of any other inference. See *S v Blom* 1939 AD 188; *S v Phiri* S 78-88.

The inference of non-consensual sex drawn *in casu* is inconsistent with the surrounding circumstances, viz. the pre-existing relationship between the parties and the absence of any sign of struggle or cry for help at the time of their sexual encounter. Moreover, the facts as proven do not exclude the possibility that the complainant's pants were not removed during the act of sex because of its illicit and surreptitious nature coupled with the fact that it was performed alongside an open road.

What is critical *in casu* is the manner and circumstances in which the complainant made her report to her sister. She was obviously confused and ashamed of what had happened and was understandably afraid to explain her delay in returning home that night. Her confusion was compounded by the fact that her sister threatened to assault her. Her evidence suggests that her sister might well have already begun to beat her. In these circumstances, it cannot be said that her report was voluntary and spontaneous. It is possible if not probable that it was the fear of her sister's wrath and chastisement that induced the complainant to declare that she had been raped by the appellant.

As regards the complainant's subsequent report to the police, there is a strong possibility that she acted in a recriminatory manner following her rejection and ill-treatment at the hands of the appellant's parents. Her report to the police may well have been made in order to rehabilitate herself in the eyes of her own family.

It is trite that a complainant in a rape case should make her complaint or report freely and voluntarily and without any undue influence. See *R v Gittleson* 1938 SR 165; *S v Mbanje* S 75-89; *S v Zaranyika* 1997 (1) ZLR 539 (H) at 557.

Having regard to the complainant's own evidence, I am satisfied that her reports of the alleged rape, both to her sister and later to the police, were neither voluntary nor spontaneous. The learned Regional Magistrate should have guarded against the great likelihood and danger of false incrimination. See *S v Ziyando* S 79-89.

Taking all of the evidence into account, I am in agreement with counsel for the appellant that the evidence lead by the State did not rebut the possibility of consensual sexual intercourse having taken place between the parties. The appellant's version of what transpired on the night in question was reasonable and within the bounds of possibility. He should have been given the benefit of the doubt and acquitted on the charge against him. See *S v Moyo & Anor* S 12-93, where it was observed as follows:

“A court cannot also decide on the basis of whose story is more probable and credible because of the burden of proof. If the defence version could reasonably possibly be true although improbable, the accused must be acquitted.”

In the result, I am of the view that the State failed to establish the accused's guilt beyond a reasonable doubt at his trial and that his conviction on the evidence before the court *a quo* is unsafe and cannot be allowed to stand. The appeal is accordingly allowed. The conviction *in casu* is quashed and the sentence imposed is set aside.

HUNGWE J: I agree.