ROBSON CHAMUNORWA TEVEDZAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 6 August 2014

In Chambers in terms of section 35 of the High Court Act, [*Cap 7:06*]

HUNGWE J: The appellant was convicted of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act, [*Cap 9: 23*], after a contested trial. He was sentenced to 16 years imprisonment of which four years imprisonment were suspended for five years on the standard conditions. He noted an appeal against both conviction and sentence. The State filed a notice in terms of s35 of the High Court Act, [*Cap 7:06*] indicating that it did not support the conviction. The reasons for not supporting the conviction are as follows.

The state led evidence from two witnesses namely, Rufaro Shava, the complainant, and Raphael Madziwa. It also relied on the following documentary exhibits; a) pregnancy test results; b) medical examination report on the complainant; and, c) complainant's birth certificate. The only evidence for the physical act of rape was given by the complainant herself. Her evidence was that on 5 December, 2012 the appellant waylaid her as she was coming from the bathroom. He pushed her inside his room where he had sexual intercourse with her. The appellant is a tenant at the complainant's residence. The second witness evidence was that on 10 December, 2012 he met the complainant, who is his girlfriend, at the shops. They failed to agree on a minor issue. He discovered that complainant was sweeping. Upon inquiry complainant told him about the rape.

A close examination of the evidence led from the complainant reveals a number of disquieting features. Complainant states in her evidence that after the act of rape she refused to leave appellant's room saying that she would wait until her mother arrived and saw what he had done to her. However, when her mother eventually came home, she did not report the alleged rape. It is not clear from the record whether or not her mother found her inside the appellant's room. She must have left at some point before her mother came. Upon being asked why she did not report to her mother, complainant stated that she feared that her

mother would think that she had consented to the act of sexual intercourse since she was alone at home. She only reported the rape to her boyfriend, a week later, after they had had a misunderstanding. The nature of the misunderstanding is described by the boyfriend as consisting in her "appearing moody and indifferent." What this means is that had the boyfriend not quizzed her she probably would not have disclosed that she had had sexual intercourse with the appellant. It is not clear why she chose to disclose the rape to her boyfriend first, rather than her mother as she had earlier resolved to do. However the reasons are apparent from the cross-examination by the appellant. Under cross-examination it is disclosed that the two had engaged in safe sexual intercourse in October before they indulged in unprotected sexual intercourse the following month. According to the appellant, this may have contributed to her dilemma regarding whose pregnancy she was carrying when she was medically examined after the rape report. The appellant apparently knew the exact age of the complainant's pregnancy. He told the court that she was 35 days pregnant at the time of her medical examination. This was confirmed by the medical report. When the appellant asked her whose pregnancy it was she was carrying, she expressed ignorance as to whether it was her boyfriend's or the appellant's. This answer reflects quite badly on her character in that it shows that she was indulging in an unprotected sexual intercourse simultaneously with more than one partner hence she could not say who was responsible for her pregnancy. Having failed to make a complaint of rape at the earliest opportunity to the first person she was reasonably expected to do so it is difficult to rely on her as a witness for the truth. Further, the circumstances surrounding the disclosure leaves as lot to be desired regarding her credibility.

In a line of cases our courts have held that when a complaint is made by a young person who allege that he or she has been sexually assaulted by a particular person until it is discovered she is pregnant or has anal lacerations, even when there is evidence tending to show that he or she has had some clandestine association with that particular person in circumstances which were suggestive of an opportunity for sexual intercourse, it may be difficult to find a conviction on the bare assertion that such sexual relations with persons named either occurred or were without his/her consent, whereas a timeous report of sexual assault would lend credence to that allegation. See *S* v *Zinyando* 1989 (2) ZLR 203 (SC); *S* v *Nyirenda* 2003 (2) ZLR 64(H).

Presently, the court *a quo* failed to give proper weight to, and eliminate, the real danger in convicting on the uncorroborated evidence of the complainant when she had a clear

motive to cry rape. There is a real possibility that she had indulged in consensual sexual intercourse with the appellant hence his intimate knowledge of her gestation age. If she was in a relationship with the second witness, she had to explain how it was that some other man knew in intimate detail, that she was pregnant. Clearly, she was not a credible witness on several issues least of which was how she had indulged with the appellant. As such the conviction was not safe. The concession by the state was well made. In the result I make the following order:

> "The appeal against conviction succeeds. The conviction of the accused in the court *a quo* be and is hereby set aside. The sentence is quashed."

BERE J agrees……

Laita & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners