

MICHAEL JOHN
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA and TAGU JJ
HARARE, 10 & 17, November, 2014

Criminal Appeal

Ms K. Muyangwa, for the appellant
R Chikosha, for the respondent

MANGOTA J: Chido Chigwaze whom the State cited as the complainant in the present case was 3 years 8 months old on 14 June, 2013. Her mother who gave testimony on behalf of the State informed the court that the complainant was born on 28 October, 2009. Her evidence in the mentioned regard was not disputed. The court, therefore, accepts her assertion as reflecting the complainant's true and correct age.

The complainant told the court that the appellant whom she knew as Bhagga raped her on 14 June, 2013. She said he did so in the morning of the mentioned date and when her mother had gone to the market.

The appellant denied the charge of rape as defined in s 65 of the Criminal Law (Codification And Reform) Act [*Cap 9:23*]. He stated that he spent a substantial part of the day of the alleged offence with his friend one Munyaradzi John. He informed the court that he was surprised when, at about 6 pm of the day of the alleged offence, complainant's mother accused him of having raped her daughter.

The appellant was tried and convicted of the offence. He was sentenced to 10 years imprisonment. His appeal was against both conviction and sentence. His grounds of appeal as amplified by his Heads of Argument form part of the present appeal.

The complainant was allegedly raped on 14 June, 2014. She testified against the appellant on 1 July, 2013. She was, therefore, within the 3 year- 8 months age group when she gave her testimony. Her narration of what she said happened to her at the hands of the appellant read very well. She gave a graphic account of the events which led to the arrest and prosecution of the appellant. She remained substantially unshaken under what may be

regarded to have been a lengthy cross-examination by counsel for the appellant. That was so her tender age notwithstanding.

The appellant, on his part, could not advance any reason which tended to show that the complainant was falsely incriminating him. During the appeal, the court sought from the appellant's counsel the latter's honest and objective assessment of the complainant's evidence. Counsel agreed with the court and the respondent that the complainant told her story in a clear and very convincing manner.

Complainant's mother testified for the State and against the appellant. Her testimony, though told with some measure of anxiety, was substantially corroborative of the evidence of the complainant. She stated that, when her daughter told her of the alleged rape, she took her to the doctor. She did so on the evening of the day of the alleged rape, she said. She informed the court that the doctor who examined the complainant remained of the view that there was no evidence of penetration having occurred. Her evidence in the mentioned regard tallied in a material way with the contents of the medical report which the doctor who examined the complainant compiled. The report which the State produced with the consent of the appellant is dated 17 June, 2013. It stated, in a clear and unambiguous language, that there was no visible evidence of penetration. It stated, further, that sexual abuse could not be ruled out.

The complainant stated that the appellant placed his *scary thing* onto her *scary thing*. She, with the assistance of anatomically correct dolls which had been availed to her, was able to show the court that the *scary things* which she had made reference to pertained to the appellant's penis and her vagina. She stated that after he had placed his penis onto her vagina, the appellant made some coital movements. Her mother informed the court that the complainant had some sperms on her vagina. She said she discovered those after she had given her a bath and had placed her on the bed with a view to cleaning her private parts.

The above described set of circumstances are not consistent with the crime of rape. They are on all fours with the crime of attempted rape, in the view which the court holds of the matter. The appellant's conviction of rape cannot, therefore, stand. He, in the premise, remains convicted of attempted rape as defined in s 189 as read with s 65(1)(a) of the Criminal Law (Codification And Reform) Act.

The appellant appealed against the 10 year imprisonment sentence which the court *a quo* imposed upon him. That sentence was mandatorily imposed. The court followed what the

Legislature stipulated in s 80(1)(a) and (c) of the Criminal Law (Codification And Reform) Act. The court's hands were tied when it convicted the appellant of the crime of rape in circumstances where he was HIV infected. It could not impose upon him any sentence which was less than 10 years imprisonment. It could not do so as the appellant was not able to furnish the trial court with any special circumstances which were peculiar to the case as was required by proviso (i) of s 80(1) of the Code.

The appellant stands conviction of the crime of attempted rape. The court, therefore, remains at large in so far as the sentence which it will impose on the appellant is concerned. Proviso (ii) of s 80(1) of the Code is relevant in this regard. It reads:-

“(ii) notwithstanding section 192, this subsection shall not apply to an incitement or conspiracy to commit any crime referred to in paragraph (a)(b) or (c) nor to an attempt to commit any such crime unless the attempt involves any penetration of any part of the body of the convicted person or another person's body that incurs a risk of transmission of HIV; (emphasis added).

Evidence which is filed of record showed that the appellant, though of an HIV status, did not penetrate the complainant's vagina. His case should, therefore, be interpreted on the basis of the above cited proviso.

When the appellant appeared before the court *a quo*, it was submitted on his behalf that he be sentenced to some form of punishment other than imprisonment. The court notes that the appellant is a young, first offender who is of ill health. It does not remain oblivious to all what was stated in mitigation of sentence.

What the appellant did cannot, however, be wished away or glossed over. His conduct was extremely serious. The girl whose sanctity he endeavoured to violate was of a very tender age. He traumatised the complainant in an extremely serious manner. His knowledge of his HIV status aggravates his own side of the case in a manner which the court cannot condone. The appellant is certainly a very good candidate for a fairly lengthy custodial sentence. That will be so his youthfulness and the fact that he is a first offender notwithstanding. Young, first offenders do, sometimes, qualify to be sent to jail. Each case, however, does depend on its facts. The facts of this case, particularly the fact that the appellant made an effort to rape the complainant who was 3 years 8 months old, persuade the court to take the position which it asserts of the matter. A substantial portion of the sentence will be suspended for a period of time. That portion will, it is hoped, act as a specific deterrent upon the appellant in all his future conduct.

The court has considered all the circumstances of this case. It is satisfied that the appellant proved, on a balance of probabilities, his case against the respondent. His appeal, therefore, succeeds in part. It is, in the result ordered as follows:

- (i) that the conviction and the sentence of the appellant for rape be and is hereby quashed and the sentence set aside;
- (ii) that the appellant be and is hereby convicted of attempted rape as defined in s 189 as read with s 65 of the Criminal Law (Codification And Reform) Act, [Cap 9:23];
- (iii) that the appellant be and is hereby sentenced to 7 years imprisonment of which 3 years imprisonment are suspended for 5 years on condition the appellant does not, within that period, commit any offence of a sexual nature for which the appellant is sentenced to imprisonment without the option of a fine.
Effective sentence: 4 years imprisonment.

TAGU J: agrees

Muronda & Muyangwa, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners