

CLIFFORD MATUNGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 14 July 2018

Bail application

Appellant in person
E Makoto, for the respondent

FOROMA J: The applicant was convicted of raping the complainant his step daughter with whom he was residing in Johannesburg South Africa. He was sentenced to 18 years imprisonment 4 years of which was suspended on the usual conditions of good behaviour. The applicant has appealed against both conviction and sentence. He has also applied for bail pending appeal. In August 2015 the applicant's application for bail was refused by TAGU J who handed judgement No. HH 706/15 in which the court ruled among other things that sexual intercourse was also confirmed by the medical report. In his judgment the regional magistrate observed though that "there isn't much which arises from the medical report which was produced by consent. It confirms that the complainant had been examined on 12 December 2015. This was about 4 years after the alleged commission of the crime."

The magistrate appears to have accepted that the applicant had previously abused the complainant. This is apparent from the following passage in the judgment p 248-

"He did do his best to confuse an easily confused complainant and her mother but that would not deter me from finding as a fact that the accused person had sexual intercourse with the complainant against her will. She did not tell anybody else about what had happened after telling Terry because she felt let down on the previous occasion when her mother and obvious other people in this case were discouraging her from having the accused person prosecuted and when one looks at it as well, one must begin to appreciate what must have been going on in her mind...."

The law requires a rape report to be made at the earliest opportunity. The magistrate found that the complainant made a report to Terry her uncle within 3 days which to the court *a quo* was early enough.

The court *a quo* overlooked that the report to Terry was not of any value as complainant rejected the suggestion allegedly made to her by Terry namely to report the rape to Uncle Givy.

There are a number of reasons why the law requires that the report of sexual assault (rape) be made without delay or at the earliest opportunity. Some of the reasons are

- (i) so that complainant gets prompt protection from further assaults by the accused who once the rape is reported to police should lead to the arrest of the accused.
- (ii) preservation of evidence of sexual assault i.e. complainant's clothes such as damaged under garments and soiled or torn under pants if any
- (iii) confirmation of absence of consent in case accused should suggest intercourse to have been consensual.
- (iv) prompt medical examination to establish penetration or absence of it.

The list is not exhaustive.

The reason given by the complainant for not making the rape known to her mother or other relatives is that she did not want to ruin her mother's marriage and besides the attitude of her mother in the past had not been encouraging. She told the court that she feared that her mother who was unemployed and was entirely dependent on the applicant could have a break-up of the marriage which would expose the entire family to suffering as the accused was the sole bread winner. During trial both applicant and complainant's mother testified that complainant's mother was a cross border trader and she was not entirely dependent on applicant. The complainant could not dispute this.

The reason of trying to save her mother's marriage was not the reason why the complainant urged Terry to keep mum about the rape. Applicant put it to Terry that in his statement to police he had said "... She further said that since her mother was away no one could come to her side, that was in South Africa when she was raped and you asked her to go and report to Gift Ndangana and she said no one would come to her side because her mother was away" and to this Terry responded that "That is what she said and that is what happened".

As result of the position she took as per Terry's evidence the court was deprived of vital evidence of the alleged rape. Had Uncle Givy been given the rape report he could have influenced a police report being made immediately with the consequent timeous medical examination of complainant and timeous arrest of the applicant. As matters stand there is no evidence of penetration save that of the complainant which applicant strongly denies. The magistrate erred in finding that the applicant warned complainant not to tell anyone of the rape after he had stopped raping her. In her evidence the complainant said after stopping the sexual

assault the accused asked for forgiveness for what he had done and he asked her not to disclose this to either her mother or to anyone else.

It is clear that the applicant did not threaten her with any harm if she revealed what had happened to anyone hence her reason for not telling her mother about the rape had nothing to do with fear of any threatened consequences.

It is important to note that when the applicant withdrew his original notice of appeal he was granted leave to appeal by MUREMBA J who must have accepted that he had an arguable case see *S v Hudson* 1996 (1) SACR 1312. It is clear therefore that the applicant has proved that there are changed circumstances. For the avoidance of doubt the applicant has demonstrated that contrary to the findings of TAGU J there was no evidence of sexual intercourse (penetration) of the complainant on or about the month of October 2011. In the circumstances applicant is hereby granted bail in terms of the draft order on p 14 subject to the following amendments (3) applicant to surrender his passport and any travelling documents to the Clerk of Court Harare Magistrate's Court.

(5) Applicant shall report once a week every Friday at Norton ZRP Station between 6:00am and 6:00pm until the appeal is finalised.

National Prosecuting Authority, respondent's legal practitioners