

ELIAS MAZHINDU
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 23 October 2018 & 30 January 2019

Criminal Appeal

Appellant in person
W Badalani, for the respondent

WAMAMBO J: The appellant appeared before a magistrate sitting at Harare Magistrate Court facing three charges as follows:

- Count 1 Impersonation of a police officer, peace officer or public official as defined in s 179 (1) (a) of the Criminal Law (Codification and Reform Act) [Chapter 9:23].
- Count 2 Assault as defined in s 89 (1) of the Criminal Law (Codification and Reform Act) [Chapter 9:23].
- Count 3 Rape as defined in s 65 (1) of the Criminal Law (Codification and Reform Act) [Chapter 9:23].

He pleaded guilty to counts one and two and was sentenced as follows:

- Count 1 - 6 months imprisonment
Count 2 - \$100 or 10 days imprisonment

Appellant initially tendered a plea of guilty to count 3 which plea was altered to that of not guilty after he had pointed out that sexual intercourse with the complainant was consensual. A trial thereafter ensued resulting in the appellant being convicted as charged. He was sentenced on the third count to 16 years imprisonment of which 4 years imprisonment were suspended on condition of good behaviour.

The appellant is appealing against the conviction and sentence in count 3.

The appellant had no legal representation during the trial. That position persists up to this appeal stage. The notice of appeal was drafted by the appellant as a self-actor.

The purported grounds of appeal against conviction are voluminous, long winded nonspecific and repetitive. The tenor of appellant's complaint is that the trial court misdirected itself when it believed complainant's version when she did not scream for help and walked with him for a long distance without reporting the rape.

A lot of allegations are leveled at the trial court which do not amount to grounds of appeal.

The evidence led is not dissimilar to what is normally featured in thriller movies. There is the mixture of the conman, the charmer and the rapist against a vulnerable young victim who was taken by surprise by an apparently practiced trickster.

The chronology of events as given by the State witnesses is as follows;

The complainant in the third count was 17 years old when she testified. Her testimony was to the effect that she was seated with her boyfriend in the Harare Gardens at around 1645 hours. Appellant approached them and told them they were under arrest for having sex in a prohibited area and informed them that he was taking them to the police station. As they walked they met a police officer in uniform and appellant instructed complainant's boyfriend that he was to go with the uniformed police officer to the police station while she remained with him. As they roamed the park apparently in search of other couples appellant requested for \$2 from the complainant. She gave him. Apparently the money was to pay the police officer in a gesture of requesting for forgiveness. After some time her boyfriend fled and the uniformed police officer also left in a huff.

Appellant told complainant that Sergeants who were his superiors were coming their way. The said sergeants asked her where she stayed and she told them she stayed in Hopley. She asked for forgiveness. It appears that, the "Sergeants" like the uniformed police officer were in on the deal and were covering up in favour and on behalf of appellant.

Appellant asked the Sergeants where the keys were and he was told that they were at the usual place. Appellant led complainant to some rooms within the park. He took keys and opened a room then locked her in under the pretense that he was protecting her from the Sergeants. Appellant proceeded to throttle her threatened her with assault while holding a baton stick and raped her. After the rape appellant walked with complainant. Along the way he was hugging and conversing

with her. He was professing love for complainant in a harsh tone. She was afraid of him. The two walked up to Market Square.

Appellant went into the police base, and it appeared he was familiar with the police officers, who were present as he was being greeted with familiarity. Appellant obtained a pen and a piece of paper where he wrote his name and a phone number and gave to complainant.

After complainant got home she told her younger sister of the matter and later her boyfriend. At that stage she seemed to believe that appellant was a true Police officer. The phone number supplied by the appellant assisted the police to apprehend the appellant. Appellant when cross-examining the complainant, suggested that he had consensual sexual intercourse with her. She was adamant that he raped her.

The trial court found the complaint credible. Her evidence was supported by that of her younger sister in all material respects. See *S v Nyati* 1977 (2) ZLR 315(A) at 318 E – G and *S v Nathoo Supermarket (Pvt) Ltd* 1987 (2) ZLR 136 (S) at 138 D – F.

The complainant remained steadfast in her testimony. The appellant attempted to dent her testimony but failed. How complainant could think of a fabulous tale which she testified to is improbable.

The evidence suggests that appellant pounced on complainant and her boyfriend in the Park knowing it is one of the favourite recreational spots for young couples. He took advantage of his confidence and streetwise manner to dupe the young couple. He was also assisted by a person wearing police uniform. Whether he was a real policemen or a bogus one is not known. Appellant was also assisted by his colleagues the “Sergeants” Appellant was so convincing that he went into a ZRP Police Base at Market Square and was being greeted by police officers leading complainant to believe that he was indeed a police officer. The circumstances of force threats and wielding of a baton stick clearly negate sexual intercourse by consent.

The version by appellant was full of holes. In spite of the version he initially gave of consensual sex he conceded during cross-examination by the Prosecutor that he had sexual intercourse with complainant without her consent as follows:

“And I also put it to you that you had sexual intercourse with the complainant without her consent- Yes.

A few lines later the cross-examination continued as follows:

“It is because there was no consent when you had sexual intercourse, you had forced her to have sexual intercourse- Yes.

So let you agree on one thing. Are we agreed that you forced her to have sexual intercourse with you- Yes.”

Considering the full circumstances of this matter including the probabilities we are firmly of the view that the conviction is merited at law.

The sentence was attacked as being “Clearly out of step without considering the mitigating factor raised by applicant” (*sic*) and inducing a sense of shock. Appellant could not articulate the meaning of the purported grounds of appeal on sentence.

In any case in the light of the movie style manner in which he pulled wool over complainant eyes and proceeded to rape her the aggravating factors loom large over the mitigatory factors.

The trial Court was mindful that appellant is a young first offender with some family responsibilities.

The trial court also found in his favour that appellant had pleaded guilty to the first two counts.

The aggravating factors as found by the trial court are as follows-appellant pretended to be a police officer and effectively soiled the police’s good reputation. He used this exalted position to rape complainant after placing her under false arrest appellant used no protection when he committed the rape and disregarded a woman’s rights by invading her privacy accompanied by violence.

This court and other courts have lamented on the rise and proliferation of rape cases in our country. The rapes cut across gender although it seems the women and girls are at greater risk of being raped. Men like appellant who proceeded by hook or crook to entice and then forcefully ravage women deserve very little mercy.

The appellant was unable to convince us why we should interfere with the sentence at law. The sentence is also in line with other decided cases in similar circumstances.

See *Nigel Chirimuuta & Anor v The State* HH 535/17, *Elvis Madzemwa v The State* HH 288/17, *Bernard Chitima v The State* HH 109/16

In the result we order as follows.

The appeal against both conviction and sentence is dismissed.

HUNGWE J agrees.....

National Prosecuting Authority, respondent's legal practitioners