

THE STATE  
versus  
MUSEKIWA TSOKA

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 6 September 2013

### **Criminal Review**

TAGU J: The accused, a 36 year old father is alleged to have raped his 5 year old daughter on an unknown date sometime in December 2003. This is alleged to have taken place at accused's home at Muchatisi Village under Chief Tandi in Rusape. The allegations were that the accused called the complainant into his bedroom in the afternoon and beat her up before sending her to go and fetch some water. When she came back to his bedroom he ravished her. He fled from the area and was arrested during the month of August 2010.

The accused denied the allegations. He said he was only near the complainant once in December 2003 at his homestead when complainant was brought there. Thereafter he left for DRC on a tour of duty. He made it known that he married complainant's mother at one time but they divorced. He remarried and by the time of the alleged commission of this crime he had a son called Francis who was two months old. He made it clear that all his problems must have been as a result of his ex-wife's desire to punish him.

It is obvious that the accused and Charity who is the mother of the complainant are not the best of friends. The accused suggested and it is possible that complainant could have been sexually abused by Prosper and or Cleopas during the time she was residing in the so called resettlement area. But Charity mentioned only her mother and her sister as if to deliberately exclude Prosper and Cleopas.

There is also evidence that Charity when she made a report misled the Police about the village details where accused lived and this explained why it took long for Police to locate the accused. When accused heard of the allegations through a relative he voluntarily went to enquire about it from the police and was arrested, meaning he could possibly not have been on the run.

Complainant is said to have been aged 5 years in December 2003. She was not yet at school. She said she was now 11 years old at the time she gave evidence and was now in Grade 7. Her recollection of events which took place at such a tender age is doubtful. She said that she had been raped by her father. She gave evidence in camera in the same court room facing the accused because the Closed Television System was down. But she said she was not able to identify her father. Even when she saw accused she could not recognise him as her father who abused her. Clearly the identity of the abuser was in issue. There was a real possibility of her mentioning the father as the abuser as a thing she just heard from elders. She was questioned for quite sometime and she sounded confused about the sequence of events particularly on the aspects of who she revealed the sexual abuse to for the first time. Of note is the fact that there are areas she could not remember well.

The State outline says she was beaten up before the rape. But the complainant would not agree with the contents of the State outline which were to the effect that the accused had beaten her up first before the rape took place. This was a clear contradiction.

Again complainant said after the rape the accused warned her “if you tell anybody I will beat you up”. She felt pain in her vagina. After this she had gone out to continue with her games with Vivian who was older than her. She did not cry nor report. One must note that playing with Vivian meant or rather involved running around and about. At that tender age was she able to suppress the pain of having her hymen torn? She did not reveal what had been done to her to anybody. At a later stage she was then taken by her mother away to the resettlement area where she lived without saying anything.

Complainant would be bathed by people like Keni, Nomatter and Lindiwe. The indication here was that if ever she had been sexually abused while she was in that homestead, these girls would have noticed the anomaly on her person. The possibility is she was abused elsewhere or somehow.

The complainant did not lodge a voluntary complaint immediately or within a reasonable time to anyone. She was taken to clinic by the grandmother to receive some treatment normally administered to 5 year olds. She did not know what the grandmother said to the nurse but she remembered being examined and questioned by the nurse and she said she was sexually abused by her father. Initially she had not opened up to the nurse. She only said it was the father after the grandmother was asked to leave the examination room. The nurse then referred her to the Doctor.

Complainant might have been sexually abused, but the report was not made timeously and it fell into the category of belatedly reported rape cases. It was not spontaneous. It fell short of the guidelines in the case of *S v Banana* 2000 (1) ZLR 607 (S).

Charity Pomho the mother of the complainant claimed that accused's mother had told her that the complainant had got cut with a thread which was on her pair of pants. Charity did not check on the cut but surprisingly when she got to her maiden home she told her mother about the cut. The mother inspected complainant and made a report to Charity of what she saw. Charity then inspected her daughter and noticed that there was a whitish substance on her vagina. She asked complainant what caused that but complainant had not opened up.

The trial magistrate noted that Charity exaggerated when she said during the time she was taking the complainant back to the resettlement area she had noticed that complainant was not walking properly. If it was so Charity should have checked on what was causing the difficulty gait in view of the report of her having been cut by a thread from her pants.

The Medical Report was compiled by Doctor Parekh on the 10<sup>th</sup> January 2004 and it indicated that there was a notch at 11 o'clock and 2 o'clock and had a whitish discharge from her vagina. Doctor concluded that penetration had "possibly" occurred particularly "partial" penetration. However, the doctor was not called to explain what could have caused the notches or the nature of the white discharge.

It is apparent that the report by Doctor Parekh is manifestly inadequate. It does not state what could have caused the notches in light of evidence that she could have been cut by a thread from the pant, and generally girls or women discharge white substances. On the authority of *S v Todzvo* 1997 (2) ZLR 162 (S) @ p 165 C-G it is respectfully submitted that the learned trial magistrate should have called the evidence of the Doctor.

In *S v Melrose* 1984 (2) ZLR 217(S) BARON AJA (as he then was) observed at p 223 A-C that where the medical report was lacking in detail it should be amplified by viva voce evidence and that magistrates should consider it both a right and duty to ensure that this evidence was obtained in the interest of justice.

Having regard to the contradictions, the delay and paucity of the evidence as well as the existence of bad blood, behaviour of complainant and her mother I am of the firm view that it was wholly unsafe to convict the accused.

It is accordingly ordered:-

1. That the conviction and sentence be and are hereby quashed and set aside.
2. The accused is found not guilty and acquitted.

3. The registrar be and is hereby directed to issue a warrant of liberation of the accused from prison forthwith.

TAGU J: .....

BHUNU J: agrees .....