

Judgment No. S.C. 14/99
Crim. Appeal No. 27/98

BENNIE MACHOWA v THE STATE

SUPREME COURT OF ZIMBABWE
MUCHECHETERE JA & SANDURA JA
HARARE, JANUARY 28 & MARCH 4, 1999

G Musariri, for the appellant

P Muziri, for the respondent

MUCHECHETERE JA: The appellant was convicted of rape and indecent assault. Both counts being taken as one for sentence, he was sentenced to seven years' imprisonment with labour of which eighteen months' imprisonment with labour was suspended for five years on the usual conditions of good behaviour. He appeals against conviction only.

The appellant was a schoolteacher and the complainant was his Grade Six pupil. It was alleged that sometime in 1996 the appellant unlawfully had sexual intercourse with the complainant who was then eleven years old. And that during the same year he had on several occasions indecently assaulted the complainant by fondling her breasts and inserting his fingers into her vagina.

The complainant's evidence was to the effect that she was at the time the incidents occurred a school prefect and the deputy head-girl at the school. She

was also a member of the school's netball team. The appellant trained the soccer team. According to her, one day she and her team were due to practise for a final match with a team from another school. They discovered that they did not have the netballs to practise with. During cross-examination she explained that a Mrs Ndoro, the teacher who kept the netballs, had locked the netballs in her class and left for home. She had apparently forgotten about the practice. The complainant was therefore sent to go and ask for soccer balls instead from the appellant who was at the time also at the sports grounds practising with his team. The appellant sent her to go and fetch a ball from a locker room in his classroom. The appellant, however, followed her into the classroom and into the locker room where the balls were kept. There he locked the locker room behind them and then pressed her against the wall. He then proceeded to remove her underpants and then inserted his penis into her private parts - in her words "he placed his thing into hers". This was the first time this had happened to her and she felt pain. After he had finished his purpose he warned her against telling anyone what he had done to her, saying that he would kill her if she did. She thereafter left to go and play netball with the others. She did not tell anyone about the incident because she feared that the appellant would carry out his threat.

The complainant stated that prior to and after the above incident the appellant used on many occasions to fondle her breasts and insert his fingers between her legs and into her private parts. This used to happen usually at break-times when other pupils would be playing in the playground. Then he would send her to arrange books in the locker room and thereafter follow her there. Later she stated that the appellant used to ask her to return to school after school hours to arrange books in the

locker room. On these occasions he would also fondle her breasts. She did not report any of this to anyone because she feared that the appellant would carry out his threat to kill her.

The above incidents became known at the end of the year when the complainant decided to tell all to the school's disciplinary committee ("the committee"), consisting of the school's deputy headmistress, a Mrs Tagwira, and five schoolteachers. This happened after she had first been approached by a Mrs Ziobwa. The latter interviewed her first and on her recommendation the complainant gave her account to the committee in person, followed by a written report. Then it had become certain that the next year she would not be attending at that school. She had found a Grade Seven place at another school. So she felt that it would be safe to reveal what had happened. Before then she feared that the appellant would carry out his threats whilst she walked home from school.

The complainant could not remember the date on which the alleged rape took place. She denied that she had a number of boyfriends and that one of them could have had sexual intercourse with her. She explained that one of the boys mentioned by the defence was the school's head-boy, one was a fellow prefect, one was a relative, one was a classmate and she did not know one of those mentioned. According to her, she only had working and platonic relationships with the boys mentioned. She also denied that she used to have large sums of money given to her by boyfriends, amongst whom, allegedly, was a commuter omnibus driver. She denied that she was "a promiscuous little girl". Her explanations and denials in this respect were not challenged.

The complainant also explained that after she had decided that it was safe to report she chose to talk first to Mrs Ziobwa because she wanted somebody elderly to corroborate her allegations. She feared that if she went and simply told her parents about the incidents they would not have believed her.

On why she did not scream when the appellant was having sexual intercourse with her, her reply was that although she did not scream she cried in a low voice and sobbed. At the time his body was pushing her against the wall. And she was also aware that nobody would really hear her cries because the door to the locker room had been locked behind them and all the windows were closed. All the pupils were not in the vicinity of the classrooms. They were at the sports grounds playing.

On why she carried on with the netball practice after the incident her reply was that that was the last practice before the crucial and final match and she had to play in the match. She knew the teacher would not excuse her from practising. Furthermore she would have had to reveal the reason why she was asking to be excused and that would have meant that she would have had to reveal the incident. This, according to her, would have resulted in the appellant carrying out his threats. She therefore decided to hide her pain.

The complainant also stated that the appellant used to put money in her dress pocket from time to time without her consent. She, however, used to take this money out and leave it in the cupboard in the classroom. She does not know what used to happen to the money after that. She did not take this money because she was afraid that she would have had to explain how she got it to her mother. That would

have resulted in her being transferred mid-term from the school and the appellant would then have been forced to carry out his threats.

She also stated that on most afternoons when she was required to return to the school she would be accompanied by the appellant's daughter, one Vanessa. Vanessa was the complainant's friend. She went on to say that the appellant would still fondle her breasts in the presence of Vanessa. So Vanessa knew what was happening between the complainant and the appellant. The complainant did not, however, tell Vanessa of her decision to report the incidents to the school authorities. She did not expect Vanessa to support her decision and the truth of the matter because the appellant is Vanessa's father.

The complainant was examined by a doctor and the medical report was produced. It indicated that the complainant was not sexually active. The doctor observed a white discharge from the vagina and could make a single finger insertion into her vagina. The examination was uncomfortable for the complainant. Because of the observations on the hymen, that it was "indented at 2 and 5 o'clock", the doctor concluded that there was penetration.

The next State witness was Inspector Margaret Olivia Tagwira (Mrs Tagwira), the school's deputy headmistress. She was on leave for the first school term of 1996 but began work in May 1996, the second school term. Her duties at the school would take her to 1530 hours before she left for home. During the course of the term she observed, on more than three occasions, that the complainant and Vanessa would come back to the school in the afternoon between

1400 and 1500 hours when all other pupils had left for home. When Mrs Tagwira asked the complainant about their reason for coming back, the latter's explanation was that the appellant asked them to come back to arrange books in the locker room. Mrs Tagwira was not happy with the explanation because the task of arranging books is usually carried out by all the pupils before they leave school. And she was also not happy because, in her view, it was inappropriate to call a non-resident pupil to come back to school later for menial work on a frequent basis - the school was in the police compound and the complainant lived outside the compound.

One morning, whilst Mrs Tagwira was still considering the matter, the complainant entered her office. Mrs Zirobwa, Mrs Madzivanzira and Mrs Bizavanhu were also in the office. After the complainant left, Mrs Tagwira told the lady teachers mentioned above about her unhappiness with the fact that the complainant was being asked to return to the school in the afternoons to arrange books. She then asked Mrs Madzivanzira, a member of the committee, to interview the complainant further about the matter. However, Mrs Zirobwa, who was known by all the schoolteachers to be close to the complainant, offered to have a friendly chat with the complainant about the issue. Mrs Tagwira gave her the go-ahead. Mrs Zirobwa later came back with a report, after having a chat with the complainant. That report resulted in the above allegations being made against the appellant.

Mrs Tagwira knew the complainant well because she was first selected a school prefect and was later promoted to deputy head-girl. On why Mrs Tagwira was suspicious of the complainant's movements leading to her having investigations made, Mrs Tagwira's reply was that her rôle as deputy headmistress was to supervise

the discipline of both teachers and pupils. And that she believed that it was wrong for the complainant and Vanessa to return to the school after school hours when all other pupils had gone away. She decided to confront them before confronting the teacher concerned. She questioned the complainant first because as a prefect and deputy head-girl she trusted her more. She stated that initially she did not consider that any sexual impropriety was involved but was curious as to what they got up to when they returned to the school. Mrs Tagwira denied that she told Mrs Ziobwa what to ask the complainant. All she told her was about her reservations on the reason the complainant gave her for returning to school after school hours.

Mrs Ziobwa also gave evidence for the State. After she heard the concerns of Mrs Tagwira she volunteered to have a friendly chat with the complainant. Initially she did not believe that the complainant would have lied to Mrs Tagwira about why she came back to school after school hours. This was because she had known the complainant since her first year at school and had taught her in Grade Three. During that period she had got to like the complainant and the complainant also liked her. Even though the complainant was in Grade six and was being taught by the appellant she used, time and again, to go into Mrs Ziobwa's classroom for chats. According to Mrs Ziobwa, the complainant was a model girl at the school. That was why she was chosen to be a prefect and afterwards promoted to be the deputy head-girl.

Mrs Ziobwa did have a chat with the complainant. She asked the complainant if anything untoward was happening in the class between her and the appellant. At this the complainant made allegations against the appellant. She told

Mrs Ziobwa that the appellant would ask her to come back to arrange books after school hours. And that whilst she was doing that the appellant would lock the classroom door and then lock her inside the locker room. There he would fondle her breasts and insert his fingers into her private parts. She also told Mrs Ziobwa that she had at times intended to tell her but that each time she attempted to do so she found her in the company of other teachers. Mrs Ziobwa was angry about the fact that the complainant had not reported the incidents to her, a person who was close to her. After that Mrs Ziobwa made a report to Mrs Tagwira.

Mrs Tabeth Bande (“Mrs Bande”) also gave evidence for the State. She is also a teacher at the school and a member of the committee. According to her, the complainant appeared before the committee soon after her chat with Mrs Ziobwa. She told the committee what she had already told Mrs Ziobwa. The committee was not satisfied with her explanation and as a result told her that they would send her to the clinic for medical examination. She then decided to tell them about the rape incident. The committee told her to write a report about the incidents and she complied.

It was put to Mrs Bande that the committee already had a suspect and that in the circumstances all they did was to get the complainant to confirm the incidents. It was also put to her that they intimidated the complainant into alleging that the appellant had raped her. She denied that they had a suspect and went on to state that all they had initially set out to do was to find out why the complainant came back to school after school hours and that when she made the allegations they questioned her about them in order to get to the truth. She added that the rape

allegation came out because they said they wanted to be certain that the allegations of sexual abuse were truthful. She was adamant that the complainant made the allegations voluntarily.

The appellant's evidence, on the other hand, was a blanket denial of all the allegations. He stated that the allegations arose because of the hatred between civilian members of staff and police members of staff. He did not explain how the hatred affected the allegations and the form the hatred took. He also stated that the complainant had several boyfriends who could have had sexual intercourse with her. The allegations of a love letter written by the complainant to the school head-boy wanting to make an appointment to see him after school hours was put to the complainant and she denied it. It is significant to point out here that the letter was not produced and that the appellant, as the class teacher, did not take action against the complainant. Neither did he report the matter to the committee.

The appellant's witnesses, his daughter Vanessa and another pupil, one Lydia Jaravaza, were not of much assistance. Vanessa denied the complainant's allegations. And she and Lydia testified that the complainant had boyfriends. Their evidence was clearly biased in favour of the appellant.

The learned trial magistrate believed the evidence of the complainant and the State witnesses. I consider that this was proper. In the first instance, the complainant was a very young girl and therefore could not have simply concocted an allegation of that nature. There was no bad blood between her and the appellant and as a matter of fact she was friendly to the appellant's daughter. There is therefore no

reason as to why she would set out to lie against the appellant. Her reason for not reporting the incidents earlier is reasonable and understandable. She was afraid of the appellant's threats. And at her age such fear is understandable. The evidence that the complainant was ravaged at least on one occasion was confirmed by the medical report. Although this in itself does not prove that the appellant raped her, it is an indication that the complainant was truthful in her evidence that she was raped once. The complainant's evidence in that respect gives the lie to the appellant's allegations that she was promiscuous. That she was not a promiscuous girl is also supported by the State witnesses.

The other State witnesses also corroborated each other on the fact that the complainant eventually reported the allegations. Mrs Tagwira corroborated the fact that the complainant used to return to the school after school hours. The witnesses denied that any pressure had been brought to bear on the complainant. Indeed if it was not for the fact that the complainant was unusually coming back to the school after school hours the deputy headmistress and the committee would not have involved themselves in the matter.

The learned magistrate was, properly in my view, not impressed by the evidence of the appellant and his witnesses. He gave no explanation as to why the complainant had to come back to school after school hours. His attempt to paint the complainant as a promiscuous girl indicates that he had a guilty mind. As already indicated above, he did not show how and why there was bad blood between him and the State witnesses. He also did not show that any motive existed as to why the complainant would falsely implicate him.

All in all I consider that the learned trial magistrate's finding cannot be faulted. The conviction is therefore unassailable.

In the result the appeal is dismissed.

SANDURA JA: I agree.

Musariri & Company, appellant's legal practitioners