MAXWELL BANDA

versus

THE STATE

HIGH COURT OF ZIMBABWE

KAMOCHA AND CHIWESHE JJ

BULAWAYO 11 AND 21 FEBRUARY 2002

Criminal Appeal

A Sibanda for the appellant
Mrs *I. Nyoni* for the respondent

KAMOCHA J: The appellant, who was aged 26 at the time of the alleged offence, was facing a charge of rape. It being alleged that on the 6th day of July 1997 at house number 7950/33 Sizinda, Bulawayo he unlawfully and intentionally had sexual intercourse with the complainant who was aged 5 years 11 months. He pleaded not guilty but was found guilty despite his protestation. He was sentenced to undergo 10 years imprisonment of which 2 years imprisonment was suspended on the customary conditions of future good behaviour. This appeal is against both conviction and sentence.

While the appellant agreed with the findings of the trial court that the complainant was a credible witness he complained that her evidence was uncorroborated on a number of material points. In particular he complained that the doctor who examined the complaint within 48 hours concluded that there was no evidence of penile penetration of the complaint *per vaginam*.

The appellant also attacked the trial court's manner of handling the trial. He alleged that the trial court allowed the public prosecutor to put leading questions on matters that did not emanate from the complaint's testimony. That criticism was clearly unfounded because the prosecutor was merely seeking clarification on matters that the complainant had mentioned in her evidence in chief.

The questions that must be decided are (a) whether or not the crime of rape was committed; (b) whether or not the complainant's evidence was corroborated.

Her evidence was that on the day in question her mother left her and her sister Millicent in the custody of the appellant's wife. The appellant's wife was her mother's friend. The mother went to see a sick relative after a church service leaving the children and the accused's wife at the church. The appellant was also at the church. After the complainant's mother had left, the appellant proceeded home with the complainant leaving his wife and Millicent at the church. This piece of evidence is supported by the accused's wife. The wife also supports the evidence that when she got home she found the complainant sitting on the bed contrary to the appellant's story that the complainant was getting off the bed. The evidence that the appellant's wife and Millicent at some stage went to the shops leaving the appellant and the complainant in the room is also supported by appellant's wife. The complainant gave a detailed account of how the appellant allegedly raped her. She described an unusual scenario where she was allegedly raped while standing with her legs astride and the appellant seated. The appellant removed her panties and pulled her dress up and then caused his male organ

"to dance" onto her female organ. She even demonstrated in the victim friendly court using two dolls. The male doll was seated while the female one was standing. She illustrated how the male doll was moving its penis around the female genital organ. There was contact between the male and the female organs.

The appellant's untruths also corroborated the complainant's evidence because he would not be untruthful if he was innocent. As the trial progressed the appellant suggested the complaint and her mother must have been influenced to incriminate him by one Mrs Ndlovu. That was clearly an afterthought because he does not mention that in his somewhat detailed defence outline. He was also untruthful when he suggested that when his wife and Millicent arrived at the house the complainant was getting off the bed. The wife said the complainant was seated on the bed when they arrived.

Millicent supports the complainant's story that she (complainant) reported the alleged rape to her on that same day. The rape story was repeated to the mother that same evening.

Upon receiving such a report the mother immediately examined the complainant in a bid to establish whether or not there was something to suggest that penetration could have been effected. She saw no signs of injury or bruises, tenderness or inflammation. The appellant was aged 26 years at the time while the complainant was only a month less than six years. It seems to me that if the appellant's penis had slightly penetrated the complainant per vulva and was rubbed around, there would have been some signs of tenderness or inflammation or even some slight bruising and swelling in view of the complainant's age.

The trial court concluded that there was legal penetration. What has now come to be known as legal penetration is where the male organ is in the slightest degree within the female's body: *per* G Feltoe in *A Guide to Zimbabwe Criminal Law* Reprint 1991. The *South African Criminal Law and Procedure* Volume II 3rd edition by J R L Milton at 448 also states that the slightest penetration establishes the necessary element for liability of an accused person. The slightest penetration is given by the learned author as being entry (in the sense of res in re) into the labia (the anterior of the female genital organ).

In casu the evidence established that the appellant's organ was in contact with the complainant's genital organ. She described it as "dancing on" not dancing inside. In the absence of evidence of any legal penetration it would be wrong to conclude that because the male organ was in contact with the female genital organ there was legal penetration. The mere contact of the male organ with the female genital organ without any slightest penetration does not amount to legal penetration. The appellant cannot therefore, be guilty of rape.

What admits of no doubt, however, is that appellant removed the complainant's pants and pulled up her dress and tried to rape her. His male organ got as far as the complainant's genital organ but fortuitously did not penetrate her. He is clearly guilty of attempted rape.

In as far as sentence is concerned Mr *Sibanda* representing the appellant properly conceded that the sentence was in line with sentences that are normally imposed for offences of this nature.

The appellant was sentenced to 10 years imprisonment of which 2 years imprisonment was suspended for raping a 6 year old child. I must point out that the trial court erred on the side of leniency. People who rape children should receive effective sentences of not less than 10 years. In this case the appellant was 26 years at the time he committed the crime. That gives an age difference of 20 years. Moreso the accused is married which makes it difficult to understand why he ever abused this child. This is what makes the sentence imposed by the court a quo still appropriate on a conviction of attempted rape although it would have been inadequate if the conviction for rape had been upheld.

The appeal against conviction succeeds to the extent that the conviction of rape is set aside and substituted with one of attempted rape. The appeal against sentence is dismissed.

CHIWESHE J: I agree.

Joel Pincus, Konson & Wolhuter, appellant's legal practitioners
Criminal Division of the Attorney General's Office, respondent's legal practitioners