

THE STATE
versus
PETROS NCUBE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 17 December 2014

Review Judgment

MUREMBA J: The accused was charged with rape in terms of s 65 of the Criminal Law Code. He was convicted after a full trial and was sentenced to 12 years imprisonment of which 4 years were suspended on condition of good behaviour.

I find the conviction questionable. According to the age estimation report by the dentist the accused was aged between 18 and 20 years old. The two are related in that the accused is a nephew of the complainant's mother. However, the relationship was not explained further to give a clearer picture of it. Both the accused and the complainant reside in the same village in Gokwe North.

The State led evidence from the complainant and her mother who was the first recipient of the rape report. The complainant's mother's evidence was as follows. On 26 September 2013 in the evening the accused came to their home. He was holding a lit torch. He found her and her son seated outside. She then left her son with the accused as she went to join her drunken husband who had already retired to bed. Around midnight she went outside to relieve herself. As she was outside she heard the sound of the kitchen door being opened. She went to the kitchen to investigate. She saw the accused walking outside holding a lit torch. She saw the complainant standing by the kitchen door and she questioned her whereupon the complainant indicated that the accused had come holding a torch and threatened her with a knife if she reported. He ordered her to remove her clothes and then raped her.

The complainant's evidence was as follows. She said that she was aged 15 years old, but she was never asked her date of birth. The prosecutor was quick to produce her age estimation report which states that as at 9 October 2013 when she was examined she was

aged between 14 and 16 years. She said that the accused came into the kitchen hut where she was sleeping with her sisters at around 8pm. The ages of the sisters were not given. The complainant said that the sisters did not witness the rape as they were sleeping.

The complainant stated that when the accused entered he was holding a lit torch. She said that the accused came to where she was sleeping and lowered her pant and skin tights that she was wearing to ankle level. The accused then produced a knife and placed it on her neck and threatened to kill her if she reported the matter. The accused then raped her. She said that as soon as the accused left the kitchen, she also went outside. She said that she reported the rape to her mother who questioned her after she had seen the accused leaving the kitchen hut.

It is common cause that the matter was reported to the police and the complainant was sent for medical examination. The medical report shows that she was examined on 28 September 2013. Her hymen had two fresh tears and penetration was said to be definite.

In denying the charge the accused stated that on the night in question he never went to the complainant's home. He said that he was at the shops where he was studying with an uncle. The accused did not dispute that someone had sexual intercourse with the complainant, but he disputed that it was him. He said that he was implicated because there is bad blood between him and the State witnesses.

I entirely agree with the trial magistrate that the accused was correctly identified as the person who had sexual intercourse with the complainant on the night in question. There is no doubt that the complainant and her mother clearly identified the accused. He is a person that they knew very well. He is from their village and is also a relative. He came to their home holding a lit torch before the mother retired to bed. holding a lit torch. He entered the kitchen where the complainant was sleeping holding the same torch as it was lit. When he was leaving the hut and the homestead the torch was still lit.

The accused failed to successfully challenge the State witnesses on the issue of identity. He did not put it to them that on the night in question he was at the shops and that they had falsely implicated him because of the bad blood which is between them. During the defence case he denied owning a torch, but he never disputed this to the witnesses. The medical report confirms that the complainant had sexual intercourse. So it means that somebody had sexual intercourse with the complainant. I do not see why the complainant and her mother would choose to falsely implicate the accused and protect the real culprit.

However, the problem that I have with the conviction is that the State did not show beyond reasonable doubt that the sexual intercourse between the accused and the complainant was not consensual. The State was not thorough in the way that it led evidence from its witnesses. This is a case where one is left with a lot of questions.

The complainant's behaviour leaves a lot to be desired. The picture that she paints is that she was in love with the accused and that the coming of the accused into the kitchen hut was by arrangement. She said that the accused entered the kitchen hut holding a lit torch. The prosecutor did not ask her to explain if at the time the accused entered she was asleep or awake, but the impression that she gives is that she was awake. The question that one asks is why did she not raise alarm to alert her siblings about the intruder as soon as the accused entered. Naturally it should have been difficult for the accused to rape the complainant in the presence of her sisters. He is said to have threatened to kill her if she reported the matter. The mother said that the complainant told her that the accused ordered her to remove her pant. This means that the accused was talking. The question is why were the sisters not awakened? The State did not seek to show how the accused was speaking which caused the complainant's sisters not wake up. It is not even known how many sisters of the complainant were in this hut. Their ages are also not on record. One is left wondering whether they were of very little ages such that they could not be awakened by whatever was happening.

The complainant said that the accused intruded into the hut at around 8pm while the mother said that when she saw the accused coming from the kitchen hut it was around midnight. The State did not seek to reconcile the disparity in time. If it is true that the accused entered at 8pm and left at 12 midnight the question that arises is what was he doing in that hut for 4 hours. It can be inferred that he was in love with the complainant and that in those 4 hours they were having a nice time.

The complainant said that the accused lowered her pant and skin tight to ankle level, but to her mother she said that the accused ordered her to remove her clothes. The State did not have this discrepancy reconciled. This makes the complainant's testimony inconsistent and unreliable. Between the two versions it is not known which one is correct. In any case it is highly improbable that the accused would have succeeded in removing the skin tight by force if the complainant did not want it removed. By nature if somebody is lying down and offering resistance it is difficult to pull down a skin tight. It means lifting up that person's bottom. For the accused to do that to the complainant he needed both his hands. It meant that the complainant had time to raise alarm. She was not asked to explain why she did not raise

alarm at that stage. She had people in the same room, so all she needed was a scream to get help or to scare away the accused.

What makes the State case worse is that after the accused had finished raping her he walked out of the hut. Again, instead of raising alarm the complainant followed him to the door silently. She was not asked to explain her strange behaviour or to explain what she was doing at the door. Her parents and her brother were at home. She even had sisters in the same kitchen hut where she was sleeping. If she was really serious about raising alarm she could have easily done so. Under the circumstances one cannot be faulted for thinking that when the complainant went to the door she was seeing her boyfriend off.

According to *S v Banana* 2000 (1) ZLR (S) 607 one of the requirements for a rape complaint to be admissible is that it must have been voluntarily made. In *casu*, the evidence shows that the complainant did not voluntarily make the rape report to her mother. The mother is the one who saw the accused as he was walking away from the kitchen while the complainant was standing at the door. It is the mother who then questioned the complainant leading to the disclosure of the rape.

The other problem with the State case is that it is not known what sort of questions the mother asked the complainant which resulted in her making the rape report. The two witnesses were not asked to explain the questions in order to show that the questions were not leading, intimidating or threatening. It is a requirement of admissibility that questions should not be leading, intimidating or threatening in nature.

The way the rape report surfaced makes it unsafe to convict the accused of rape. It cannot be ruled out that the complainant probably cried rape because she had been caught by her mother. Other than crying rape she had no other way of explaining the presence of the accused in the room where she was sleeping at midnight. Moreover she was standing by the door as the accused was leaving. In the result the conviction of rape is overturned. It also follows that the sentence that was imposed on the accused automatically falls away.

The accused could have been convicted under s 70 of the Criminal Law Code for having sexual intercourse with the consent of a young person considering that the complainant said that she was 15 years old. The problem though is that the State did not seek to show that she was indeed 15 years old. As stated above, she was not asked for her date of birth. The mother too was not asked about the complainants' date of birth. I presume that the age estimation report was produced because the complainant does not have a birth certificate. The problem with that report is that it says that the complainant is aged between 14 and 16

years old. I interpret this to mean that the complainant could have been anything between 14 and less than 17 years old. It means that she could have turned 16 but not yet 17. So knowing the complainant's date of birth would have helped since under s 70 of the Criminal Law Code for a conviction to suffice the young person should be under the age of 16 years.

The other thing which complicates the conviction under s 70 is that the State did not lead any evidence to prove that the accused knew that the complainant was below 16 when he had sexual intercourse with her. So a conviction under s 70 is not sustainable.

In view of the foregoing the accused is entitled to his liberty. A warrant for his liberation is issued.

MAWADZE J: agrees.....