

THE STATE
versus
HAPPY MUNSAKA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 28 APRIL 2016

Criminal Review

MOYO J: The accused person in this matter was arraigned initially appeared before one magistrate charged with the offence of having sexual intercourse with a minor as defined in section 70 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Midway during those proceedings, they were stopped as the evidence led prompted the state to alter the charge to that of rape as defined in section 65 of the Criminal Law Codification and Reform Act (*supra*) (hereinafter referred to as the Code).

The facts of the matter as stated in the state outline point to the existence of a love affair between the accused and the complainant. It was alleged there in that the accused person, on an unknown date between December 2011 and October 2012 fell in love with the complainant and started having sexual intercourse with her and yet the complainant was aged 15.

In his defence outline the accused person stated that he had proposed love to the complainant who accepted and that he had sexual intercourse with her by consent. He also told the court that the only problem was that complainant's aunt caught them having sex in the bedroom and that is when they were later taken to the police. The complainant in her evidence accepted that the accused did propose love to her but that she did not accept his proposal. She told the court that they lived in the same house with accused who had his own bedroom.

The complainant said she shared a bedroom with her other two sisters and her aunt. She told the court that the accused person would give her monies to buy lollipops. She said on one occasion, the accused person raped her in the sitting room. On another occasion the accused person raped her when she was in the bathroom. And yet on another occasion the accused

person raped her when she was in the bedroom sleeping on the floor. Her aunt and the other children slept on the bed. Accused came and slept on top of her whilst she was fast asleep. Her aunt woke up intending to go to the toilet and she saw the accused person on top of the complainant. The matter was then reported to the police.

Crucial from the complainant's version of events is that the report of the sexual assault was made after their aunt discovered it and she talks of several other occasions where accused had forced sex with her. She says the accused person told her not to tell anyone and that she was afraid of her aunt.

The aunt confirms that indeed she discovered accused sleeping on top of complainant as she was leaving for the toilet. We are not told if ever complainant screamed or showed any signs of resistance.

It is my view that complainant's conduct on that night is consistent with the accused person's defence that he went there on agreement with the complainant as she was his girlfriend. The aunt also says she never spoke to accused about the issue until the day she came to give evidence in court. Why would she not query what the accused person was doing? She also said she did not know if accused was in love with the complainant. A crucial question that the court should have asked itself dealing with an unrepresented accused person is that why would he sneak into a bedroom that is fully occupied by other people including an adult to commit an offence of rape? The second crucial question that the court should have asked itself is that why would the complainant be raped quietly in a bedroom with other occupants? The next crucial question that the court should have asked itself is, does the complainant have any incentive to lie against the accused person? Which incentive the court would have found in that they had been caught by adults and she could be denying the issue of consent to save her own skin. The next crucial question that the court should have asked itself was if the accused person's version could safely be dismissed as being improbable, unreasonable and not possibly true? I do not think the accused's defence can be found as such in the circumstances I have just queried.

An accused person's defence should not be disbelieved by the court and rejected where what the accused person proffers as a defence cannot be dismissed as improbable, unreasonable and possibly untrue. The fact that he failed to ask certain questions in cross examination of the

aunt does not in my view render his defence improbable or untrue as the aunt's evidence did not in my view add much to the state case. It is the complainant's evidence that was crucial. The required standard of proof beyond a reasonable doubt was aptly put in the case of *S v Makanyanga* 1996 (2) ZLR 231. The court in that case stated thus:

“A conviction cannot possibly be sustained unless the judicial office entertains a belief in the truth of a criminal complaint, but the fact that such credence is given to the testimony of the complainant's testimony does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that a complainant be believed and accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true.” (emphasis mine)

The accused person's version that complainant had consented has not been shown in the court record to be palpably false in my view. It is for these reasons that we find that the conviction of rape in contravention of section 65 of the Code cannot be safe in light of the factors alluded to herein. A proper conviction would be that of contravention of section 70 (1) (a) of the Code. The conviction and sentence are accordingly set aside.

The accused person is accordingly convicted of the offence of having sexual intercourse with a minor as defined in section 70 (1)(a) of the Code.

He is a first offender. By implication he pleaded guilty to the appropriate charge as he did not dispute having sex with the complainant but stated that it was consensual. The sentencing trends on statutory rape the previous equivalent of contravention of the current section 700 (c) of the Code. have been dealt with in depth by the late MUTEMA J in the case of *S v Tshuma* HB 70/13.

From that judgment it is clear that a non-custodial sentence is usually passed in such offences. In that case the learned judge altered a sentence of 18 months imprisonment with 6 months suspended on the usual conditions to a fine of \$200 or in default of payment 25 days, the 25 days being the amount of time the accused person had already spent in prison. The court in that case held that the accused from the sentencing trends did not deserve incarceration at all. The court quoted the following cases:

- 1) In *S v Nare* 1983 (2) ZLR 135 the accused was sentenced to \$750 or 5 months imprisonment for statutory rape (which was the equivalent for the current charge then)

- 2) *S v Mutowo* 1997 (1) ZLR 87 (HC). On review a sentence of 24 months imprisonment with 10 suspended was altered to a fine of \$300 or 1 month imprisonment.
- 3) In *S v James* 1998 (1) ZLR 424 (SC). The accused was sentenced to \$600 or 1 month imprisonment.

At the time the accused person in this matter was liberated on automatic review he had already served 21 days and yet from the sentencing trends he did not deserve to be incarcerated at all. It is for these reasons, guided by the *Tshuma* case *supra* that the accused will be sentenced to pay a fine of \$200 or in default, 21 days imprisonment (which he has already served) and is therefore entitled to his immediate release.

I accordingly make the following order:

- 1) The conviction on the charge of rape as defined in section 65 of the Code together with the sentence in this matter be and are hereby set aside.
- 2) They are substituted as follows:
 - a) The accused person is convicted of the offence of having sexual intercourse with a minor as defined in section 70 (1) (a) of the Code.
 - b) The accused person is sentenced to pay a fine of \$200 or in default of payment 21 days imprisonment which imprisonment he has already served and is accordingly entitled to his immediate release.

Takuva J agrees.....