

NGQABUTHO MASUKU  
**versus**  
THE STATE

HIGH COURT OF ZIMBABWE  
MATHONSI AND MAKONESE JJ  
BULAWAYO 20 JUNE AND 23 JUNE 2016

### **Criminal Appeal**

*T. Butshe-Dube* for the appellant  
*W. Mabaudhi* for the respondent

**MATHONSI J:** The appellant was, on 19 January 2015, convicted of rape in contravention of s65 (1) (a) of the Criminal Law Code [Chapter 9:23] after a full trial. He was sentenced to 16 years imprisonment of which 4 years imprisonment was suspended for 5 years on condition of future good behavior.

He was dissatisfied with the conviction only and noted an appeal to this court on the grounds, *inter alia*, that the complainant was not a credible witness, that there were serious discrepancies between the state outline and the evidence led by the state and that the complainant had gone to put up at the appellant's house freely and voluntarily and that for that reason, sexual intercourse was consensual.

It is an appeal which is strongly contested by the state on the basis that there was no misdirection whatsoever on the part of the court *a quo* in its findings and as such the appellant was properly convicted. *Mr Butshe-Dube* who appeared on behalf of the appellant submitted in the main, that the appellant and the complainant were once lovers and that it is not clear when the relationship was terminated. The court should have taken that into account in determining whether sexual intercourse was consensual or not.

The facts are generally common cause. The appellant is a member of the SDA church while the complainant is a fellow church member and a former girlfriend of his.

On 15 June 2013 they, along with other church members, had gone for a church crusade at Mawabeni in Esigodini and only returned late at night. With the driver of the minibus they were using having allegedly run out of fuel and unable to deliver them to their respective homes, the complainant and her sister went to sleep at the appellant's house in Mzilikazi fearing having to find their way home as danger is always lurking on the way at night.

At the appellant's house, the complainant was severely assaulted by the appellant and sustained serious injuries which were still visible when she appeared to testify in court on 20 August 2013 more than two months later. Hence the magistrate was able to observe that "at the time she testified complainant's eye was visibly still swollen. She had a black eye----."

She also had sexual intercourse with the appellant which she says was rape but the appellant says it was consensual. The issue which the court had to decide was whether intercourse was consensual or not.

The complainant narrated what had transpired on the night in question at the appellant's house. She said they had arrived in Bulawayo at around 2100 hours in a hired minibus which was supposed to deliver them to their homes but the driver could not do so as he said he had run out of fuel. Not even an offer to pay him more money could persuade him to deliver them to their homes. She was in the company of other members of the church including the appellant and one Mathe.

When she suggested that they would walk home other members of the church discouraged her as walking at night was dangerous. They suggested instead that herself, her young sister and Mathe should seek refuge at the appellant's house in Mzilikazi Bulawayo. She reluctantly complied.

At that house the appellant and Mathe were cooking while watching soccer. When she wanted to retire to bed with her young sister the appellant requested to talk to her in private. As Mathe occupied the sitting room while watching football they treated to the appellant's bedroom to talk. The appellant was on bended knees when he asked her for reconciliation because she had, some weeks earlier, terminated their relationship after she had found nude pictures of a woman in his cellphone. That night of course she was to be another victim of nudity when the appellant took pictures of her private parts after forcibly having sexual intercourse with her.

The complainant says she refused to reconcile with the appellant making it clear that she was no longer interested in him and did not love him anymore. The appellant forcibly kissed her. When she received a call on her cellphone the appellant got angry and started assaulting her with open hands asking about the person she was talking to. He continued assaulting her and also strangled her. When she screamed he put a teddy bear in her mouth and increased the volume of music playing on his laptop connected to speakers.

While still assaulting her he ordered her to lie on the bed and remove her clothes. He then removed his clothes telling her that he wanted to find out if she still had feelings for him. Although she told him she no longer had feelings for him he insisted that he wanted to taste a prostitute from the Seventh Day Adventist Church. He forced open her legs cursing that she did not know who he was. He then forced himself on her. After the act he sarcastically asked her if she was feeling any pain and whether he was not better than her boyfriends. He brought water to soothe her and food to eat but she refused to partake in any of that. When she dressed up and tried to leave the bedroom he told her he wanted to taste her for the last time. He tried to force her to hold his penis and insert it in her vagina and when she refused he did it himself and had sexual intercourse with her for the second time without her consent.

After the second act he interrogated her demanding to know if she still had no feelings for him insisting that she should look him straight in the eye. When she did not, he twisted her neck demanding to be looked in the face. The ordeal lasted more than two hours. At the end of what must have been a harrowing experience the appellant is said to have taken his camera and photographed her private parts. He threatened her with disappearance or that he would cut her into pieces.

The appellant's version was that it is the complainant who seduced him and lured him into the bedroom where they had consensual sexual intercourse. It was after the act that he found her talking on the phone. He interrogated her until she confessed to having affairs with two other men. He then assaulted her and promptly terminated their relationship.

In deciding which version to accept the court *a quo* took into account the following, namely;

- (a) That the complainant had been forced by circumstances to go to the appellant's home. It was late at night; the minibus driver refused to take them home and when they offered to walk other members dissuaded them because of the risk. The appellant and Mathe were trusted church members and the appellant offered shelter.
- (b) During the night the complainant was heard screaming (initially denied by the appellant but later admitted and explained as groans of sexual pleasure).
- (c) There was high volume of music either from speakers connected to a laptop or from Happy Valley night club across the road depending on whose version you work with, which muffled the screams.
- (d) The complainant was severely assaulted by the appellant who inflicted serious and visible injuries.
- (e) The complainant reported the rape immediately to her 17 years old young sister, a very impressive witness who charmed the court by her truthfulness and honesty.

All the above factors, which were generally common cause vitiated consent. One should add that after her ordeal the complainant left the appellant's bedroom leaving her clothes behind and did not put up with him for the night. She went and shared a bed with her young sister, something inconsistent with the picture of a seducer who was having a nice time with her boyfriend, which the appellant sought to portray.

Even the text message which she later sent to the appellant, vague as it was, was adequately explained as the fruit of despicable pressure from other church members, who should in fact be hanging their heads in shame for appearing to condone what was an unmitigated abuse of a 19 year old girl by a man 9 years her senior who simply could not accept rejection, and thought he had a God given right to do as he pleased on a defenceless and vulnerable church member. He took undue advantage of his religious association with the girl to turn her into a sex slave in the most ungodly manner.

In our view the court *a quo* meticulously dealt with the evidence and correctly accepted the state case and rejected the version of the unrepentant appellant who, as late as then, still did not see anything wrong with battering a girl and having sex with her at the same time. It was typical

behavior of sexual pervert, a treacherous sadist who was deriving pleasure in torturing a young girl for warped sexual fulfillment or to force her to have feelings for him.

There was no misdirection whatsoever and this appeal is spectacular by its lack of merit.

It is accordingly dismissed.

Makonese J agrees.....

*Mathonsi Ncube Law Chambers*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners