AUSTIN M. SULUBANI

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND MATHONSI JJ
BULAWAYO 22 JULY 2011 AND 24 NOVEMBER 2011

Mr T. Sibanda for the appellant
Mr W. Mabhaudi for the respondent

Appeal

CHEDA J: This is an appeal against both conviction and sentence which was imposed by the Regional magistrate sitting in Bulawayo on the 14th January 2011.

The state case as outlined by the respondent, is that appellant was aged 14 years at the time of the alleged offence. The complainant was aged 4 years at the time and is appellant's neighbour.

The allegations are that on the 25th December 2010 in the afternoon, but, before 1600 hours complainant was playing alone at the gate when appellant called her outside to play with him. When she got to him appellant ordered her to lie down facing upwards. He then proceed to remove her pants and removed his too. He inserted his penis in her vagina, thereby having sexual intercourse with her. The question of consent does not arise as she is legally incapable of making such consent.

Appellant pleaded not guilty to the charge, but, was convicted of rape and was sentenced to receive corporal punishment of four (4) strokes.

His grounds of appeal as amplified in his heads of argument are that he was not in that vicinity of the scene of crime at the time and that there was lack of direct or conclusive evidence to prove the commission of the offence beyond reasonable doubt.

It is appellants' contention that on the day in question, he was at home in the morning. In the afternoon he went to a party and was there between 1400 hours and 1800 hours, therefore, he was nowhere near the scene of the crime.

The issues here are that of appellant's identity and his alibi. One of the tenets of the attainment of justice in a trial, especial a criminal trial is fairness to both the complainant and accused. These courts have on time without number bemoaned the increasing trend of paying lip-service by the triers of facts in determining the guilt or otherwise of accused persons in general and in particular the unrepresented accused. It should be borne in mind that for many people, appearance in court is intimidating and may result in the loss of their defence or explanation of their conduct, which if properly articulated could lead to an acquittal. The courts should always bear in mind the need to adhere to the requirements of conducting a fair trial and avoid the bias against the accused even if the complainant is vulnerable by reason of age, sex or some such other disability.

Appellant was consistent and persistent in his plea of not guilty. He queried the manner the four year old complainant implicated him. Complainant's father assaulted him, which he viewed as undue pressure to extract an undeserved and unwarranted confession. He also raised an alibi which was not followed.

The correct legal position is that in criminal trials, conviction should only be returned when the state has proved its case beyond reasonable doubt. In casu appellant's challenge that he did not rape the complainant as he was not present at the relevant period was not discredited by the state, which should have been the case as it is the state which has the burden of proving the commission of an offence beyond reasonable doubt. The learned trial magistrate seems to have accommodated the supposed date of the commission of the offence which was not proper. She further went on to express an opinion on medical matters when she was not qualified to do so. This court has previously decried the temptation by judicial officers to express medical opinions when they are not qualified to do so. Again this practice is discouraged.

She, together with the state seem to have fallen in the trap that, it is appellant who should prove his alibi yet it is the state which should have done so, by calling witnesses whom appellant suggested he was with at the relevant time.

It is my considered opinion that there were a lot of loopholes in this matter which made a conviction unsafe.

There is an understandable tendency amongst some judicial officers to unnecessarily sympathise with complainants, particularly in matters where a suspect is said to have unlawfully acquired carnal knowledge of the female species, even before the trial commences. Such a stance unfortunately prejudices the suspect thereby depriving him of his constitutional right to a fair trial. This seems to have been the position in casu.

Appellant was sentenced to four strokes. This punishment has already been carried out, in circumstances where this should not have been. This, can only point to one factor and one factor alone, being that judicial officers should approach trials with the highest degree of diligence, objectivity and professionalism so as to avoid the danger of falling in the emotional trap clothed with the name of justice.

It should be remembered that the amount of power they weild, if improperly used can easily be viewed as abuse by society. This, however, is not to say, was the case in casu.

There was a serious miscarriage of justice in this matter

In light of the above the conviction and sentence is set aside.

Mathonsi J agrees.....

Messrs James, Moyo-Majwabu & Nyoni appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners