ELVIS TSHUMA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J AND CHEDA AJ
BULAWAYO 4 FEBRUARY 2013 AND 28 MARCH 2013

Mr R. Mahachi for the appellant
Mr Mhlanga for the respondent

Criminal Appeal

CHEDA J: On the 12th June 2012 the appellant filed a notice of appeal challenging the conviction of two counts of rape for which he was sentenced to 20 years imprisonment of which 4 years imprisonment was suspended for 5 years on condition of good behaviour.

The State's allegations with regards to count 1 are that the accused who was aged 50 years at the relevant period and is complainant's grandfather. Complainant was about 12 years at the time of the alleged offence.

Sometime in 2009, the complainant who was in Form 1 was at house number 2559 Cowdray Park, Bulawayo with her 8 year young brother was left in the custody of appellant as their parents went away for a night. At about 2000 hours appellant ordered them to go and sleep, which they did. At about 2200 hours, accused went to the room where complainant and her brother were sleeping. He was armed with a kitchen knife which he poked at complainant's forehead at the same time threatening to kill her. He removed his pair of trousers and at the sametime forcibly removed complainant's pants and proceeded to have sexual intercourse with her without her consent. He thereafter threatened to kill her if she reported the incident.

On the 3rd January 2010 complainant's family moved to house number 509 Nguboyenja, Bulawayo together with appellant. Sometime in February 2010 complainant was asleep in the sitting room together with other 4 children when appellant entered their room at around 2300 hours. She was awakened by appellant's insertion of his sexual organ in hers. This caused her pain. When appellant noticed that she was awake, he produced a knife and poked it on her

forehead with a threat to kill her. Appellant then continued to have sexual intercourse with her. She did not tell anyone at the time. During the school holidays she went to Kombo area Matabeleland South where she discovered that she had developed genital warts. Upon her return to Bulawayo she reported her medical condition to her aunt Beauty Ncube who examined her and subsequently took her to Mpilo Hospital for treatment.

Appellant through his legal practitioner argued that the trial court erred by convicting him for rape as complainant had initially stated that she had been raped by one Polite. He also argued that complainant had been found with a sexually transmitted infection yet he did not have it.

It is on record that appellant is complainant's grandfather and on all occasions when she was being asked about her perpetrator he was present. It is also her evidence that appellant produced a knife which he poked her face with on both occasions he was raping her. This, in my view is enough threat to suppress her from coming out in the open. Therefore, the two factors, namely appellant's presence when she was being questioned, his position in the family and the threat of being killed effectively operated against her freedom to express herself.

He has further argued that complainant was found with a sexually transmitted infection which he did not have. The rape occurred in February and she discovered her medical condition in April, surely it is only reasonable that appellant had every opportunity to have himself treated earlier than complainant, bearing in mind her age and her immaturity which must have resulted in confusion with regards to what was happening to her.

The courts have adopted a cautious approach when dealing with children's evidence, but such caution should be positive and creative, see *S v Musasa* HH 52/02. Children's evidence should not be viewed with a jaundice eye as if the first impression on their evidence is that they are liars. These courts should always guard against the pitfalls of children's testimonies. This caution is necessary because:

(i) Children's memories are unreliable, particularly for detail;

(ii) Children are egocentric and not likely to consider the effect of their statements on others;

(iii) Children are highly suggestible;

(iv) Children have difficulty distinguishing fact from fantasy;

(v) Children make false allegations particularly of sexual assault and

(vi) Children do not understand the duty to tell the truth.

This is the approach advocated for in *S v Sibanda* S55/94. Taking into account the above approach I find that complainant clearly passes the above grid and as such she was a convincing and satisfactory witness.

In that regard the State proved its case beyond reasonable doubt in the circumstances.

Appellant was sentenced to 20 years imprisonment of which 4 years was suspended on condition of good behaviour.

Appellant is complainant's grandfather and was living in the same house with her. He was visiting her at night armed with a knife and issued death threats if she reported. Complainant being a 11 year old child under those circumstances must have been terrified and must have felt that the world had collapsed around her. This is not the kind of behaviour expected of a parent let alone of appellant's age.

With the prevalence of these sexual offences in general and the fact that appellant infected her with a sexually transmitted infection, appellant's offence is by any standard aggravated. Infact in my view, by suspending part of the sentence the trial court was very generous in its approach.

Deterrent sentences are called for and these courts should not give up fighting against this scourge in our society. There is a need to shift the approach from sympathising with criminals at the expense of paying lip-service to the complainant who will be left with the trauma of having been carnally known against their will under such violent circumstances.

The appeal against both conviction and sentence is dismissed.

Messrs Hara and partners, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners

Cheda AJ agrees.....