

NEVER MASHAMAIRE
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE, TAGU JJ
HARARE, 6 February 2014

Criminal appeal

R.J. Gumbo, for the appellant
R. Chikosha, for respondent

TAGU J: The appellant was convicted at Bindura Regional Magistrate Court on a charge of rape. The allegations being that he raped his own daughter aged 13 years on 6 July 2011. He was convicted after a protracted trial. He was sentenced to 16 years imprisonment of which 6 years imprisonment were suspended for 5 years on the usual conditions of good behaviour.

He now appeals against conviction only. The grounds of appeal being that-

- “1. The court erred in sustaining conviction where the totality of the evidence led does not sustain such a finding.
2. The court erred in taking complainant as a credible witness when the evidence led clearly shows that she was not.
3. The court erred in mixing up evidence between the appellant and the complainant’s step father. This, according to the judgement contributed to appellant’s conviction.
4. The court erred in holding that the appellant had apologised for the rape and offered to pay a beast or cash. The evidence led does not support this finding in that the appellant said the issue related to complainant’s behaviour and not the rape.
5. The court erred in believing the complainant’s evidence regarding the manner the rape took place. It’s highly unlikely that that piece of evidence is true.
6. The court erred in convicting appellant even in the absence of evidence from a witness, namely Reasonayi who allegedly caught the appellant in the act and
7. The court erred in dismissing the appellant’s defence which was quite plausible and believable.”

The State is opposed to the application. Its argument being that the witness was a credible witness. Citing *Mpetha & Ors* 1983 (4) SA 262 where it was said- “credibility of witness remains in the domain of the trial court, to judge whether witness is worth believing or not, mainly basing on his demeanour in the box how he testifies, response to questions whether generally the story is coherent and worth believing”.

In casu the counsel for the respondent argued that the complainant was credible because at p 28 of the proceedings she said-

“I know but how many men are out there for me to make allegations against my own father. Would I just allege my own father raped me? Is it that I don’t like or love my father”.

To support its argument further the respondent said complainant’s evidence was corroborated by the uncle one Thomas Hamatsinde who told the court that appellant offered an apology and even further offered to compensate.

On the none calling of one Reasonayi – as a witness the respondent argued that it was not a gross misdirection to vitiate the court *a quo*’s findings. The appellant who was represented could also have called the same Reasonayi as a defence witness.

The appellant persisted with his argument in the heads of argument. He averred that the complainant and the father were not in good books. The father was assaulting her because she was prostituting herself. That is the reason why the charges were falsely laid against the appellant. He insisted that the evidence of Reasonayi was vital and could have proved the guilty of the appellant beyond doubt. He referred to the evidence of William Magora and the Headman who testified to the effect that the complainant was living a life of prostitution.

In her evidence in chief as well as the evidence of the uncle Thomas Hamatsinde the complainant talked of one Reasonayi as having witnessed the rape. She said on p 22-

“I was fast asleep. Suddenly I saw the accused on top of me having sex with me. There came Reasonayi 3rd wife’s daughter. Reasonayi opened the cloth acting as the door. Accused asked her what she was looking for. She remained standing and accused insisted. Reasonayi left and the accused continued to do it”

This act of sexual intercourse is said to have taken place at or about 0500am. Surely if complainant’s evidence is true, Reasonayi must have seen what the appellant was doing.

It was not stated why this vital witness was not called to testify. The State conceded that Reasonayi was indeed a vital witness. In our view Reasonayi should have been called to testify and her evidence could have proved beyond doubt the appellant’s guilty. We were not

persuaded by the State's argument that appellant should have called Reasonayi to testify. To do so is tantamount to ask an accused to prove his innocence. The onus is on the State to prove its case beyond reasonable doubt.

Further the evidence is clear that when appellant went to complainant's uncle he did not specifically state that he was apologising for having raped the complainant. At p 32 the uncle asked this question – "Did he tell you the details of the misunderstanding?" and the response was "No". The uncle merely thought the misunderstanding was the rape yet there was the issue of complainant's wayward behaviour.

In his judgement the learned trial magistrate at p 6 acknowledged that the accused did not spell out the exact nature of the misunderstanding. He only mentioned sexual abuse after being further probed. But perusal of the record does not show where the appellant specifically admitted that fact.

Complainant is a 13 year old girl. She was seen in a bar at one stage. The evidence is clear at times she would sleep in the bush. Hence the mere fact that medical report confirms penetration did not necessarily mean that it was the appellant who did so.

Having considered the totality of the evidence we are of the view that in the absence of the evidence of Reasonayi; and the existence of bad blood between complainant and appellant it was not safe to convict the appellant. The story of the appellant was probable that he had problems with complainant because of her wayward behaviour.

In the circumstances the conviction is quashed. The appellant is found not guilty and is acquitted.

Gumbo & Associates, appellant's legal practitioners.

Attorney General's Office, respondent's legal practitioners

TAGU J _____

BERE J Agrees _____