

THE STATE
versus
VALENTINE MARUFU

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 December 2014

Review Judgment

MUREMBA J: The accused was charged with attempted rape as defined in s 189 as read with s 65 of the Criminal Law Code.

The accused pleaded not guilty and he was convicted after a full trial. He was sentenced to 3 years imprisonment of which 6 months imprisonment was suspended on condition of good behavior.

I have reservations with the conviction. The accused was aged 20 years old while the complainant was aged 15 years and 2 months when this offence was allegedly committed. It is common cause that the accused and the complainant were lovers. On 25 December 2013 around 8 – 9 pm the complainant was at a party in Harare. Around 8 – 9pm the accused came and asked to go with her to Westwood. The complainant agreed. They drove in accused's motor vehicle a commuter omnibus and parked in the bush in Westwood.

The accused lowered his trousers to knee level. He also removed the complainants pant and sat on her lap. It is not indicated where exactly in the omnibus the complainant was seated. However, as the accused was trying to insert his penis into the complainant's vagina police officers who were on patrol knocked on the window. The two were taken to the police station where they were made to pay a fine.

The complainant is the only witness who testified for the State. The accused was the sole defence witness. None of the two was asked what the fine was for though the complainant explained that the accused paid a fine. However, in the state outline it is indicated that the fine

was for loitering for the purpose of prostitution. The state outline further states that after the two had been fined they were released. When she was released she went back to the party where she learnt that her parents had come looking for her. She is said to have returned to the police station and made a report that the accused had tried to have sexual intercourse with her. A docket for attempted rape was then opened leading to the prosecution of the accused.

The accused was convicted on the basis of the complainant's evidence alone in terms of s 269 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. The trial magistrate stated that the complainant's testimony was clear, satisfactory and credible. However, I find the evidence of the complainant far from being credible. In her evidence she stated that although she agreed to go with the accused when he asked her to accompany him she did not agree that they have sexual intercourse. She said that the accused tried to force himself upon her. She said that it was fortuitous that the police then arrived at the scene.

On the other hand the accused stated that when he asked the complainant to go with him he had told her that he wanted to have sexual intercourse with her and she had agreed. I am inclined to accept the accused's version for the following reasons:

- (a) She left the house where the party was being held around 8 – 9 pm to go with the accused on her own volition. She agreed to go with him. When she was asked by the accused during cross examination she admitted that the accused parked the car in the bush with her consent. She stated that the accused left his seat and sat on her lap. She said that the accused forcibly removed her pant but I do not believe her story because if she was seated and she did not want the accused to remove it the accused would not have managed to remove it. The State did not seek to prove that the accused had removed the pant by force. The complainant should have been made to explain how the accused removed her pant. In the absence of such an explanation I am inclined to accept the accused's version that the complainant did not resist when her pant was being removed.
- (b) If the accused had tried to rape her, the question is when the police came to the car why did she not report to them about it? These police officers took them to station, but all the way there she never made a report. Even when they were fined

for loitering for the purpose of prostitution the complainant never made a report that the accused had attempted to rape her.

The State did not adduce evidence from the complainant on what happened after they had been fined at the police station. The whole record of proceedings is silent on how and at what stage the complainant made the report of attempted rape. It is only in the state outline that it is indicated that from the police station the complainant went back to the party where she learnt that her parents had come looking for her. When she heard this she returned to the police station and made the report of attempted rape. Whether or not this is the truth of how the attempted rape report was made it is not known since the State did not lead any evidence. However, if this is the truth what it shows is that the complainant did not report at the earliest opportunity to the first person to whom the complainant could reasonably be expected to have made it.

In *S v Banana* 2000 (1) ZLR 607 (S) it was held that for a sexual case complaint to be admissible it should fulfill certain requirements viz:

- (a) The complaint must have been made voluntarily, not as a result of questions of a leading and inducing or intimidating nature.
- (b) It must have been made without undue delay to the first person to whom the complainant could reasonably be expected to have made it. These requirements help show the consistency of the complainant's evidence and the absence of consent.

In the present case the evidence that was led on behalf of the State does not rebut the suspicion that the complainant fabricated the allegations when she learnt that her parents had come looking for her. If her report was genuine it is expected that she would have reported to the police when they came to the car or on the way to the police station or at the police station before they were released. Her report was delayed and there is no explanation for that.

The State ought to have led evidence from the first recipient of the report. This evidence was crucial in explaining how and under what circumstances the complainant made that report. The record of proceedings is silent on why that evidence was not led. In the absence of this evidence it cannot be said that the State proved the guilt of the accused beyond reasonable doubt. The accused should be given the benefit of the doubt. The conviction of attempted rape is over turned.

The accused admitted that he intended to have consensual sexual intercourse with the complainant. It is not in dispute that when the two lover birds were disturbed by the police both had removed their pants and the accused was busy trying to insert his penis into the complainant's vagina. The complainant was aged 15years and 2 months old. It is clear that the accused attempted to have consensual sexual intercourse with a young person in contravention of s 70 of the Criminal Law [Codification and Reform] Act [*Cap 9:23*].

Under the circumstances the accused could have been convicted of attempting to have consensual sexual intercourse with a young person, but it was not established during trial if the accused was aware that the complainant was below the age of 16 years. The conviction would have been proper in terms of s 274 of the Criminal Law [Codification and Reform] Act [*Cap 9:23*] which states that where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged.

Since the accused's conviction has been overturned the sentence that was imposed automatically falls away. The accused who is serving a prison term is entitled to his immediate release. A warrant of his liberation is hereby issued.

MUREMBA J.....

MAWADZE J: agrees.....