THE STATE
versus
OWEN TIRIVANHU

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 16 SEPTEMBER 2010

Criminal Review

UCHENA J: The accused person was convicted on three counts of contravening s 65 of the Criminal Law (Codification and Reform) Act *Cap 9:23*. He was sentenced to five years imprisonment of which three years were suspended on conditions of good behaviour and the remaining two years were suspended on condition he performed 840 hours of community service. The accused was 16 years old at the time he committed the offences. He was 19 at the time he was convicted and sentenced. The complaint was 12 years old at the time she was raped.

The facts on which the accused was convicted are that he on three different occasions, had sexual intercourse with the complainant. The complainant in her evidence on pages 5 and 8 of the record said on the first occasion the accused did not insert his penis into her vagina but "placed it outside her vagina near the hole". On the second occasion she said the accused inserted his penis into her vagina and had sexual intercourse with her. She felt pain and bled from her vagina. On the third occasion she said the accused tried to insert his penis into her vagina but she resisted, and the accused's male organ "only touched the outside" of her vagina.

The Regional magistrate convicted the accused of contravening s 65 of the code on all three counts. He reasoned as follows:

> "Looking at what the complainant said in all the counts she said in (*sic*) the first incident, his penis touched the genitallia and near the vulva but did not penetrate inside her vagina. On the second incident his penis penetrated and she felt pain and bled, and on the third incident his penis only touched the vagina. It must have been erect in (*sic*) all the occasions, the medical affidavit says penetration was effected. In my view when the complainant said his penis did not penetrate her vagina in the first and third occasions but touched her vagina the slightest penetration is enough from a legal perception point of view. See *S* v *Mhanje* 2000 (2) ZLR 20 (H)".

It is apparent that the Regional Magistrate's understanding of penetration is not correct nor is it in agreement with the case law he cited. In the case of *S* v *Torongo* S 206-96 KORSAH JA at p 7 of the cyclostyled judgment said:

> "As far as the law is concerned placing the male organ at the orifice of the female organ, resulting in the slightest penetration constitutes rape".

In the case of *S* v *Mhanje* 2000 (2) ZLR 20 (H), which the Regional Magistrate relied on it was held:

> "that the medical perception of what constitutes penetration does not coincide with legal penetration. For rape to take place, it is not necessary that there should be full penetration. The slightest degree of penetration will suffice."

> In the case of *S* v *Sabawu* 1999 (2) ZLR 314 (H) @ 316 CHATIKOBO J said:

> "It is a trite proposition that for the purposes of the crime of rape, penetration is effected if the male organ is in the slightest degree within the female body. It is not necessary to prove that the hymen was ruptured. If authority were required for this settled proposition I would refer to *S* v *Mhlanga* 1987 (1) ZLR 70 (S) at 72F and *S* v *Torongo* S-206-96".

In *Sabawu supra* the two girls' genitals had been penetrated as bruises were found inside the labia minora, and the other girl's hymen was redish though not ruptured showing the accused's penis had had contact with her hymen but failed to penetrate it.

These cases clearly demonstrate that rape can only be committed when the accused's penis penetrates the victim's vagina. The penetration need not be full penetration as the slightest penetration is sufficient. There must however be evidence that there was penetration. In the absence of such evidence an accused person can not be convicted on a charge of rape. In the case of *Mhanje supra* at p 22 GARWE J (as he then was) said:

> "For purposes of the case at hand the essential element that needs close examination is the aspect of sexual intercourse. Hunt *supra* at p 440 says:
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> > 'There must be penetration, but it suffices if the male organ is in the slightest degree within the female's body. It is not necessary in the case of a virgin that the hymen should be ruptured, and in any case it is unnecessary that semen should be emitted. **But if there is no penetration there is no rape, even though semen is emitted and pregnancy results.**'
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> The fact that there would be no rape if the accused fails to penetrate his victim's vagina, but emits semen which flows into his victim's vagina leading to her pregnancy,

proves that the crucial contact is that of the accused's penis penetrating the victim's vagina".

In this case the accused according to the complainant's own evidence failed to penetrate her on the first and third occasions, but succeeded in penetrating her on the second occasion. In respect of count one she said he "placed it outside her vagina near the hole. This means the accused's penis was not inside her vagina but outside it near the hole. There could therefore not have been any penetration when his penis was outside the complainant's vagina. The regional magistrate therefore erred when he convicted the accused of rape in count one, when the complainant's evidence proved that there was no penetration.

On count three the complainant said "the accused tried to insert his penis into her vagina but she resisted, and the accused's male organ 'only touched the outside' of her vagina".

The complainant's evidence clearly proves there was no penetration as the accused's penis "only touched the outside of her vagina". To touch is to be in contact with, but does not mean there was penetration. Contact which constitutes rape is that which includes the accused's penis' penetration of the female's vagina, even if such penetration is slight. In the circumstances the accused was again wrongly convicted of rape in count three.

The accused's conduct in counts one and three constitutes an attempt to contravene s 65 of the code. In terms of s 189 of the code one can be convicted of attempting to commit an offence. Section 189 provides as follows:

"(1) Subject to subsection (1), any person who –

(*a*) intending to commit a crime, whether in terms of this Code or any other enactment; or

(*b*) realising that there is a real risk or possibility that a crime, whether in terms of this Code or any other enactment, may be committed; does or omits to do anything that has reached at least the commencement of the execution of the intended crime, shall be guilty of attempting to commit the crime concerned.

(2) A person shall not be guilty of attempting to commit a crime if, before the commencement of the execution of the intended crime, he or she changes his or her mind and voluntarily desists from proceeding further with the crime."

In this case the accused had in counts one and three gone beyond the preparatory stages to rape the complainant. He had exhibited an intention to have sexual intercourse with the

complainant without her consent. He had removed his shorts and the complainant's pants. He had in count one placed his penis outside the complainant's vagina near the hole. In count three he had placed his penis just outside the complainant's vagina. He had in both counts gone beyond the commencement of the execution of the intended rapes. If the complainant had not resisted him he would have raped her. He therefore attempted to rape the complainant in counts one and three. The accused's convictions for rape on counts one and three are set aside and are substituted by those of attempting to contravene s 65 of the code.

The sentence imposed by the regional magistrate, remains within the deserved punishment in spite of the convictions in two of the counts being reduced to attempted rape. Section 192 of the code provides that the sentence for an attempt shall be the same as that of the substantive offence. It provides as follows;

> "Subject to this code and any other enactment, a person who is convicted of incitement, conspiracy or attempting to commit a crime shall be liable to the same punishment to which he or she would have been liable had he or she actually committed the crime concerned."

The regional magistrate sentenced the accused to five years imprisonment of which three years were suspended on conditions of good behaviour and the remaining two years were suspended on condition he performed 840 hours of community service. The guide lines issued by the national committee on community service in November 2002 limits the maximum number of hours which can be imposed to 630 hours. The regional magistrate therefore imposed more hours than was permissible. He ordered that the 840 hours be performed within six months of the imposition of the sentence. The accused was sentenced on 9 July 2010. He is still serving his sentence and can therefore benefit from the reduction of the hours to be performed from 840 to 630 hours. The sentenced imposed by the regional magistrate is amended by deleting the words "840 hours" and substituting them with the words "630 hours".

BHUNU J agrees …….