EMMANUEL PHIRI v THE PEOPLE (1982) Z.R. 77 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO , JJ.S
27TH JULY ,1982
(S.C.Z. JUDGMENT NO. 21 OF 1982)
APPEAL NO. 56 OF 1982

Flynote

Evidence - Corroboration - Rape - Elements to be corroborated - Application of proviso - Whether Appropriate.

Headnote

The appellant was convicted of rape by Subordinate Court and sentenced to two years' imprisonment with hard labour. On appeal the sentence was enhanced to five years. He appealed further against conviction on grounds of mistaken identity and against the sentence as being too severe.

Held:

(i) In a sexual offence there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the court to warn itself is a misdirection.

(ii) A conviction may be upheld in a proper case notwithstanding that no warning as to corroboration has been given if there in fact exists in the case corroboration or that something more as excludes the dangers referred to.

(iii) It is a special and compelling ground, or that something more which would justify a conviction on uncorroborated evidence, where, in the particular circumstances of the case there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against, an accused; and the case in effect resolves itself in practice to being no different from any other in which the conviction depends on the reliability of her evidence as to the identity of the culprit.

Cases cited:

(1) Butembo v The People (1976) Z.R. 193.
(2) Katebe v The People (1975) Z.R. 13.

For the appellant: In person.
For the respondent: K.C. Chanda, State Advocate.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

The appellant was convicted of raping the prosecutrix and was sentenced to two years' imprisonment with hard labour. On appeal to the High Court the sentence was enhanced to five years and he now appeals against conviction and sentence.

The complainant in this case was at the time eight months pregnant. She was walking along a

road near her village, when a man on a bicycle came up to her. He forced her to the ground, beat her up and threatened her with death if she refused, and had carnal knowledge of her without her consent. Throughout the incident she was struggling and shouting for help. After raping her the man beat her again for not succumbing quietly. She was bruised and covered in dirt and she was crying. She made an immediate complaint to several people as confirmed by PWs 3 and 4. She also gave a description of her assailant and of the bicycle he had. A few moments afterwards PW4 saw the appellant who fitted the description given, both as to the attire and the bicycle, and intercepted him, whereupon the appellant dropped the bicycle and ran off into the bush. The following day the appellant was identified by the complainant when he came to the village to retrieve his uncle's bicycle. He was apprehended and handed over to the police.

The appellant argues in one of his grounds of appeal that it was not established that the offence had been committed. With this submission we cannot agree. There was in fact ample evidence to support the finding that the complainant had been raped. There was adequate support for her testimony in the evidence of early complaint, her distressed condition, her dishevelled appearance, and the substance of the medical evidence which disclosed a state of affairs which was in the doctor's opinion, consistent with having had something inserted in her private part. All these factors taken together with the rest of the evidence fully justified the conclusion that the complainant had been raped.

The major ground of appeal advanced by the appellant concerns his identification as the culprit. In this regard it is to be observed that while the learned trial magistrate quite properly warned himself of the need to look for corroboration in a sexual offence, it is clear from a reading of his judgment that he had addressed his mind to that aspect only as pertained to the commission of the offence. He did not deal with the issue as it related to the question of identity.

The principles upon which corroboration of the offence is required apply equally to the second element in the case, namely, the identity of the offender. For as much as there is always recognised the danger of false complaint, the courts have consistently recognised an even greater danger, namely, the danger of false implication. The court below had confined its consideration of the issue of identity to a review of the quality,

nature and circumstances of the identification by reason of which the complainant's evidence was found to be reliable. As will be seen shortly while this finding cannot be questioned the failure on the part of the learned trial magistrate to warn himself with reference to corroboration as it related to the identity of the offender must be viewed as a misdirection.

We must now proceed to consider whether on the facts of this case the proviso should be applied. As this court has said before, for example in *Butembo v The People* (1), a conviction may be upheld in a proper case notwithstanding that no warning as to corroboration has been given if there in fact exists in the case corroboration or that something more as excludes the danger to which we have already referred.

We agree with Mr Chanda, the State Advocate, that there can be no question of mistaken identity in this case. The incident occurred in broad daylight, and judging from the complainant's ability to give an accurate description, which enables others to spot the appellant, the opportunity to make reliable observations must have been good. It only remains to consider whether there exists any likelihood of false implication. As this court has observed before, for instance in *Katebe v The People* (2), there are circumstances in which a woman will make false allegations. *In Katebe* (2) the examples given were the protection of a boy friend, or fear of the anger of a husband or a father. The danger to be guarded against must necessarily vary with the circumstances of each case. It follows therefore, as was said in *Katebe* (2), that where in the particular circumstances of the case there can be no motive for prosecutrix deliberately and dishonestly to make a false allegation against an accused, and the case in effect resolves itself in practice to being no different from any others in which the conviction depends on the reliability of her evidence as to the

identity of the culprit, this is a special and compelling ground, or that something more which would justify a conviction on uncorroborated evidence. We agree with Mr Chanda that, in the instant case, there are no factors to suggest that any situation existed to actuate the complainant to falsely single out the appellant, a man previously not even known to her. We have seen no motive for the complainant to falsely implicate the appellant and in the circumstances we are satisfied that, notwithstanding the misdirection, the conviction cannot be upset. The appeal against conviction is dismissed.

The appellant also complains against the enhanced sentence. The sentence imposed by the learned trial magistrate was increased from two years to five years by the learned appellate judge who considered the original sentence to have been totally inadequate, having regard to the condition of the complainant at the time and the brutal manner in which this offence was committed. We agree. We must point out that rape is a very serious crime which calls for appropriate custodial sentences to mark the gravity of the offence, to emphasise public disapproval, to serve as warning to others, to punish the offenders, and, above all, to protect women. In the circumstances of this case we consider the enhanced

p80
sentence to be neither extravagant nor too severe. It is an entirely appropriate sentence and the appeal against sentence cannot succeed and it is dismissed.

Appeal dismissed
