IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 50 OF 2001

MSHAM SAIDI ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

J U D G M E N T

KIMARO, J:

This is an appeal against conviction for rape and sentence of thirty years imprisonment metted out for the offence. The appellant is Mshamu Said and in this appeal he is represented by Maleta and Ndumbaru Advocates.

The appellant's conviction was based on the evidence of the victim of the offence one Asia Yusuph who testified as PW1 in the trial. Asia was aged seventeen at the time she testified in court on 25/8/98. The offence was alleged to have been committed by the appellant on 11th July, 1998. The doctor who examined Asia to satisfy himself whether rape had been committed or not, testified as PW2. He is Dr. Fred Paulo Mtafakolo. He is a doctor working at Muhimbili Medical Centre and he is a gynochologist.

What PW1 told the court is that on 11/7/98 she had returned from the market and found the appellant alone in the house. The appellant is PW1's brother in Law. The appellant is married to Dainess Mchome who is the sister of PW1. It is on record that the victim of the offence used to serve as a house servant of the appellant and his wife Dainess. They had two children. One was aged 9 and the other 6. When PW1 returned from the market the children were not at home.

After she went into the house the appellant required her to give him information about events which took place when she travelled to Moshi with his wife. PW1 could not furnish any information because she told the appellant that after their arrival she parted with his wife and went to their house. The appellant was not satisfied with the answer. He threatened to kill PW1 if she resisted giving him information about what his wife did while she was at Moshi. She said he had a knife and panga. PW1 insisted that she knew nothing and herself and his wife were living seperately in Moshi.

By then the doors were locked. The appellant approached PW1 with a knife, threatened her, pulled off her underpants and a skirt which she had on, and then raped her. As he was raping her, he threatened her with a knife that if she cried, she would be killed. After raping her, the appellant informed PW1 that he had changed his mind and he was no longer going to kill her because she had seen his body and the appellant had seen hers.

Later she managed to escape and reported the matter to her sister at Kilwa Road. They in turn, reported the incident to the wife of the appellant and eventually to the police station where PW1 was given a PF3 for treatment. She ended up being treated at the Muhimbili Medical Centre where she was admitted for two days.

The doctor who examined her, confirmed that PW1 was raped.

The wife of the appellant is a Police women who was working at Ufaiki by then. She testified having received the information about the rape and assisted Asia to have the matter reported to the police. Later she escorted PW1 to hospital for treatment.

Apparently the appellant did not give his defence. He requested for a with drawal of the trial magistrate on the ground that he did not have confidence that justice would prevail. His request was turned down. He refused to testify and the trial magistrate wrote a judgment on the evidence which was on record. He ended up convicting the appellant and sentencing him to 30 years imprisonment. He was aggrieved and filed this appeal.

There are seven grounds of appeal. The trial magistrate is faulted for having accepted and relying on the evidence of PW2 who is an unreliable expert, for considering the evidence of PW3 in contravention of the law and for relying on her evidence for being biased because he refused to withdraw from the case, for denying the appellant the right to defend himself, for convicting the appellant on the uncorroborated evidence of PW1 and for relying on contradictory prosecution evidence.

The hearing of this appeal was conducted by written submissions. The Learned Advocate for the appellant and the Learned State Attorney for the Republic are commended for their efforts in the preparation of the submissions. The advocates for the appellants in particular must have spent a lot of time to find a way in which the case for the appellant could go through.

While the efforts made are really appreciated, I do not find merit in any of the grounds of appeal relied upon for reasons to be explained.

PW2 is a gynocologist. He is a specialized doctor. The advocates for the appellant are challenging why he was summoned while he was not listed as a witness to be called after the preliminary hearing. The arguments for the counsel for the appellant is that Section 289 (1) & (2) of the Criminal Procedure Act, 1985 was contravened. The Section bars calling of a witness whose statement was not read at the Committal Proceedings without a reasonable notice having been given by the prosecution to the accused and his advocate.

With greatest respect to the Learned Advocate for the appellant, the Section is very very clear. It is speaking about trials in the High Court and not in the subordinate Court. Section 289 is in Part VIII of the Criminal Procedure Act, 1985. Part VIII deals with the procedure for trial before the

High Court.

It is true that for trials in the High Court, a witness whose statement was not read over to the accused during committal proceedings, cannot be allowed to be called as a witness at the trial in the High Court unless a reasonable notice has been given in writing by the prosecution to the accused and his advocate.

In this appeal, the section has been quoted out of context and it is a real misdirection on the part of the advocate for the appellant. The section is talking of an entirely different situation so the question of declaring the evidence of PW2 a nullity and what not does not arise. That provision is not applicable in the subordinate courts.

Regarding the second ground of appeal it is true that PW3 was a competant but not a compellable witness against the appellant. This is clearly provided for under Section 130 (1) of the Tanzania Evidence Act, 1967. Musch as it is not on record whether PW3 was informed of her right, her evidence against the accused did not occassion any miscarriage of the justice and her evidence did not assist the court in determining whether or not rape was committed. As shown earlier, she testified on receipt of the information about PW1 being raped. She assisted PW1 to report the matter to the Police and ascorted her to hospital. That is what she did. This evidence did not in any way prejudice the appellant.

In as far as ground three is concermed, it has been covered in ground two and there is no need for repetition.

In ground four of the appeal, the trial magistrate is being challenged for refusing to withdraw from the case when the accused requested him to do so. The advocate is of the opinion that his refusal occassioned a serious miscarriage of justice because the trial magistrate is biased. With greatest respect to the Learned advocate, this is a serious allegation. The advocate of the appellant is informed that according to the position of the law, a withdraw of a judge or a magistrate from the proceedings is not automatic once it is requested by the accused or any of the parties in the proceedings. If such a trend is allowed, it will amount to giving the parties an opportunity of choosing a judge or magistrate who would hear their cases.

In a recent case determined by the Court Appeal - That is the case of Laurean G. Rugaimukamu V Inspector General of Police and the Attorney General Civil Appeal No. 13 of 1999, the Court of Appeal gave three conditions which justify the withdrawal of a judge or magistrate from the proceedings.

1. There must be evidence of bad blood between the litigant and the judge / magistrate
2. The judge / magistrate must have close relationship with the adversary party or one of them
3. The judge / magistrate or a member of his / her close family has an interest in the outcome of the litigation other than the administration of justice.

The appellant did not give any of the above reasons. Instead he was merely suspecious that the trial magistrate was bias. The impression which I get is that the appellant having heard the evidence which was adduced against him, he was afraid of facing the obvious and he was just looking for a way of getting out of justice. What ever the case could be, it was a hopeless attempt. In as far as ground five of the appeal is concerned, it has to suffer the same results as the others. It is on record that the appellant was given an opportunity to defend himself. Mu ch as he had been attending the court throughout and he heard the evidence which was tendered, he requested for the supply of the proceedings. The supply of proceedings gave him an opportunity of raising baseless allegations against the trial magistrate, and it was also a chance for seeking for a change of venue of the trial magistrate. When the trial magistrate directed him according to the laid down practice, he refused to exercise his right and he insisted on what he had been told was not possible. Under such circumstances, he cannot be heard complaining that he was denied a right to defend himself. He was given an opportuncty to exercise his right but he refused to exercise his right.

Ground six of the appeal concerns corroboration of the evidence of the victim of the offence PW1. As correctly pointed out by the Learned State Attorney Section 127 of the Evidence Act 1967 as amended by Section 27 of the Sexual Offences (Special Provisions) Sub-Section 7, where the trial magistrate is satisfied with the credibility of the victim that she / he is telling nothing but the truth, carroboration is not required. However, in the case in which this appeal has been preferred, there was sufficient corroboration. PW2 is the doctor who examined PW1. PW2 confirmed that his examination revealed that PW1 was reped. The PF3 which PW2 had tendered in court shows that the results were highly suggestive of rape. PW2 was also challenged for having improperly tendered the PF3. This however, was just a misdirection. He was the proper person to tender it because he was the one who dealt with the examination of the victim and recorded the results.

In the last ground of the appeal, the trial magistrate is challenged for relying on the prosecution evidence which was full of lies. PW1 was the only person who could tell what exactly happened. She said she was threatened with a knife that she would be killed if she shouted. She also expressed an opinion that shouting would not even have assisted her because of the bad relationship which the appellant had with his neighbours. Immediately after the rape, she rushed and informed her sister. They went to see the wife of the appellant. The matter was reported to the Police. The victim was taken to hospital for examination and the examination revealed that PW1 was raped. Where is the contradiction? Where is the lies. What I can say is that the prosecution evidence is very consistent and the appellant was properly convicted.

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The appeal is entirely dismissed.

N.P.Kimaro

JUDGE

11/1./2001