THOMAS MADEYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 4 September 2012 & 16 January 2013

Criminal Appeal

L Uriri, for the appellant
F Kachidza, for the respondent

HUNGWE J: The appellant was convicted by the Regional Magistrate, Eastern Division, of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] after a contested trial. He was, on 7 December 2011, sentenced to 14 years imprisonment of which 4 years were suspended for 5 years on the usual condition. Dissatisfied with both his conviction and sentence, he now appeals against both conviction and sentence. The facts upon which he was found guilty of the crime of rape in the court *a quo* can be summarised as follows.

Sometime in December 2006, the complainant and her younger brother stayed at the appellant's residence after they lost their mother. Appellant, a priest with the Anglican Church, was a family friend of the complainant's deceased mother. Around 1900 hours on an unspecified day but during the month of December 2006, complainant was playing outside the residence with other children when the appellant called her into the house. He took her into the spare bedroom where he lowered his pair of trousers, laid her on the bed and ravished her. He warned her against telling anyone of the event. She did not. Around the same time the following day he repeated the same predatory behaviour by calling her from where she was playing with other children, took her into the spare bedroom. He removed her skirt and pants, lowered his pair of trousers and again ravished her.

In convicting the appellant, the learned magistrate accepted the evidence of the complainant and rejected that of the appellant and his witnesses. He analysed the complainant's evidence, her ability to withstand gruelling cross-examination by counsel for the appellant during the trial and concluded that she was worthy of belief. He found corroboration of her evidence in the evidence of Mrs Musara to who complainant had disclosed the abuse.

In his notice and grounds of appeal it appears that the appellant takes issue with the general findings of facts by the learned trial magistrate. I say that "it appears" because the grounds set out in the notice of appeal are incoherent and, as such, do not "clearly and specifically" set out the grounds of appeal as required by Rule 22(1) of Supreme Court (Magistrates Courts) (Criminal Appeals) Rules, S.I. 504 of 1979 ("the Rules"). As an example I recite the first and second grounds verbatim:

> "1. The learned Magistrate in court *a quo* erred in conceding that the State proved beyond reasonable doubt when it is clear from the evidence that there are so many possibilities, in particular:
>
> While the doctor, who testified, said that there was definite penetration, he could not tell when the penetration took place but the notches were not fresh. The alleged abuse could have taken place prior to 2006 or even after 2006.
>
> Apart from sexual intercourse there are other factors which can stretch the hymen e.g. a finger or a solid object. This applies with more force considering that the complainant did not see the Appellant inserting his penis into her vagina.
> Any other person other than the appellant could have perpetrated the abuse. In particular, the complainant's father, Kudakwashe Fred, was considered a suspect.
>
> 2. For the stronger reason, the court did not appreciate that the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that a complainant should be believed and the Accused disbelieved. It demands that a defence succeeds whenever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion a judicial officer may entertain towards any evidence. The administration of justice would otherwise be held hostage of the plausible rogue whose insincere but convincing blandishments must prevail over the stammering protestations of the truth by the defendant, frightened or confused victim of false incrimination. (*sic*)"

Such grounds of appeal do not make it clear what the basis of dissatisfaction is, that is, whether it is an error of law or one of fact or both or a misdirection on the facts or of both facts and law.

The importance of complying with the requirements of the rules cannot be over-emphasised. Lack of compliance may result in the court regarding such notice and grounds of appeal a nullity. See *R* v *Emerson* 1957 R & N 743; 1958(1) SA 442; *S* v *Jack* 1990 (2) ZLR 166 (SC); S v *Ncube* 1990 (2) ZLR 303.

Rule 22(1) of the Rules reads:

> "The appellant shall, within ten days of the passing of sentence, or, where a request has been made in terms of sub-rule (1) of rule 3 of Order IV of the Magistrates Courts (Criminal) Rules, 1966, within seven days of the receipt of the judgment or statement referred to in that rule, whichever is the later, note his appeal by lodging with the clerk of the court a notice in duplicate setting out clearly and specifically the grounds of the appeal..."

As can be seen from r 22(1) the above grounds of appeal do not comply with the Rules of this court. The notice of appeal does not set "out clearly and specifically the grounds of the appeal".

That which the appellant is attacking in the judgment of the convicting court must be set out in the manner laid down by the Rule. A generalisation such as set out in the appellant's grounds of appeal against conviction is not good enough. It does not point out where the magistrate erred or misdirected himself. See *Emerson & Ors* (*supra*); *Du Toit* v *R* 1958 R&N 177 (SR).

A better understanding of what is required can be gleaned from Rule 51 (7) of the Magistrates Courts' Act 32 of 1944 (South Africa). RABIE JA (as he then was) in *Kilian* v *Messenger of the Court, Uitenhage* 1980 (1) SA 808 (AD) stated the Rule's requirement in an extract taken from the official translation of the judgment at 234 (p 815 of the Report) thus:

> "Rule 51(7) provides, in so far as it is relevant, that:
>
> 'A notice of appeal or cross-appeal shall state-

(a) ...

(b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.'

Such a notice requires a precise statement of the points on which the appellant relies, so that the respondent may know on which points he must prepare a reply, and so that the Court may know on which points a decision is required. See e.g. *Himunchol v Moharom* 1947 (4) SA 778 (N) at 780; *Harvey* v *Brown* 1964 (3) SA 381 (E) at 383. The magistrate must also be properly informed of the grounds on which the appeal is based, so that he can comply with the duties imposed on him by rule 51(8). Para 1 of the notice of appeal merely contains an allegation that the magistrate erred in making the order in question, without stating in what respect he erred, and it cannot be said that it contains a ground of appeal as required by Rule 51(7)."

Although Rule 51(7) of the Magistrates Courts' Act 31 of 1944 (South Africa) deals with civil proceedings it, in as far as appeals are concerned, is relevant to criminal appeals. There must be stated in the Notice of Appeal "a precise statement of the points on which the appellant relies." A statement that the magistrate "erred in fact and in law in holding that the State had proved beyond reasonable doubt when it is clear from the evidence that there are so many possibilities" is not precise enough. As I have pointed out above, it does not inform the respondent or the magistrate what it is that is being attacked. The respondent is required to prepare his answer to the allegations made in the Notice of Appeal. Rule 23(1) requires a magistrate to reply to the Notice of Appeal. He must set out in a statement his reasons for judgment and sentence and these reasons must be a reply to the grounds on which the appeal is based.

The response by the magistrate enables the appellant to amend his grounds of appeal should he wish to do so. These Rules are for the benefit of the appellant, the respondent and the court. See *S* v *McNab* 1986 (2) ZLR 280 (SC).

At the hearing Mr *Uriri*, for the appellant, sought to amend the grounds of appeal by raising an additional ground framed as follows:

"9A. The respondent is issue-estopped, in the absence of an application to withdraw an admission, from contending to the contrary of concessions made in the bail cause in B1354/11, namely that:-

9A.1 It was imperative therefore that the trial court should have treated the victim's evidence carefully.

9B.2 Respondent [the State] does not find comfort in the evidence of the complainant. On p 2 of the transcribed record the complainant talks of having been effectively penetrated into her vagina by the applicant once on two consecutive days. She would thereafter go and bath and later join other children to play.

9B.3 The complainant, who had opportunities to make a report, did not make a report at the earliest possible opportunity and "one cannot expect her at that age not to know that what had been done on her was morally wrong and criminal.

9B. 4 Given her age, it is strange that no tell-tale signs of abuse were observed on her by the adults who were present and even the other children she was playing with.

....."

In essence the additional ground of appeal is that since the respondent made submissions which amounted to concessions indicative of lack of support of the appellant's conviction, the respondent was bound by that concession and as such the matter the matter must be dealt with in terms of s 35 of the High Court Act, [*Cap 7:06*].

I need not point out again that I find this way of drafting grounds of appeal incompatible with the requirement of the Rules of Court in that it does not set out "clearly and specifically" the basis of attacking the conviction nor does it set out the basis of impugning the conclusions of law by the magistrate. I will however proceed to deal with the appeal as if they complied with the Rules.

The heads of argument filed on appellant's behalf are bulky and extensive. However the content of the heads does not match the volume upon which the content is spread. Without wishing to place any limitation upon the manner in which counsel should prepare heads of argument, it is considered desirable that the first paragraph of the heads should state clearly and specifically the submissions upon which reliance will be placed. In the succeeding paragraphs the separate submissions should be dealt with seriatim; there should, of course, be a reference in these paragraphs to the relevant parts of the record giving the relevant page and line numbers, thus: 9/16 - 30, and where the record consists of more than one volume, thus: 3/29/16 - 30; there should also be a reference to the authorities upon which reliance is placed.

I deal first with the additional grounds of appeal advanced at the hearing of the appeal as these present an interesting submission from counsel.

The doctrine of issue estoppel has been embraced by the Supreme Court as part of the law of Zimbabwe under the general rule of public policy that there should be finality in litigation. The doctrine prevents a party to civil proceedings, except in certain circumstances, from raising a contention of fact or of legal consequences of facts, where he raised the contention as an essential element of his case in previous civil proceedings between the same parties or their predecessors in title, and the contention was found by the Court, in a final judgment in those proceedings, to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion, and could not, by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him. See *Willowvale Mazda Motor Industry (Pvt) Ltd* v *Sunshine Rent*-a-*Car (Pvt) Ltd* 1996 (1) ZLR 415 (SC); *Galante* v *Galante* (2) 2002 (1) ZLR 144 (HC).

English law recognizes that the same issue should not be open to successive determinations: *nemo debit bis vexari pro una et eadem causa* and *interest rei publicae ut finis litium sit* ("no one should be disturbed twice in the same matter" and "it is in the public interest that law suits should have an end"). These maxims underpin the doctrine of *res judicata*, which has two main applications, "cause of action estoppel" and "issue estoppel". The House of Lords in *Arnold* v *National Westminister Bank p.l.c.* (1991) 2 W.L.R. 1177 was concerned only with the latter species of estoppel, but Lord Keith took the trouble to define both in the following passages (at 1183, 1184:

> "Cause of action estoppels arises when a the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.....(The) bar is absolute in relation to all points decided unless fraud or collusion is alleged..... Issue estoppel may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

Cause of action estoppel binds more tightly than issue estoppel, since the latter is relaxed where special circumstances require (which are not confined to fraud and collusion). The House

of Lords, faced with the question whether a change in case law might justify a departure from issue estoppel, decided to endorse a new exception.

There are two forms of the doctrine of res judicata: cause of action estoppel and issue estoppel. Both operate where the court has adjudicated the cause of action between two or more parties and one of them seeks to re-litigate on the same facts. Where the cause of action is the same, cause of action estoppel operates to prevent any litigation of any matter that was raised or should have been raised in the prior proceeding. Where the cause of action in the two proceedings is different, issue estoppel operates to prevent any litigation of any issue determined in the prior proceedings.

LORD GUEST in *Carl-Zeiss Stifting* v *Rayner and Keeler Ltd* [1966] 2 All E.R. 536 @ p 551 stated the requirements of issue estoppel as:

> ".....(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies....."

In *R* v *Hagan* [1974] 2 All ER 142 Justice Hogan offered a definition of issue estoppel thus:

> "Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or facts between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those parties."

It is clear that issue estoppel is related to but differs from *res judicata.* A plea of *res judicata* asserts that the cause of action is the same in both the prior and the current proceeding, so that the current proceeding should not continue, whereas issue estoppel may be raised where the causes of action in the two proceedings are different, but the same particular factual issue has arisen in both.

In criminal proceedings, the principles of *res judicata* are given effect through the pleas of *autrefois acq'uit* and *autrefois convict.* Where those pleas are not available, issue estoppel arises where the accused has been finally acquitted of a criminal offence arising out of certain conduct, is charged with a different offence, and for some reason the facts surrounding the earlier

charge become relevant. Issue estoppel "prevents the Crown from calling into question issues determined in the accused's favour in an earlier proceeding". See Martin L Friedland, *Double Jeopardy* (Oxford: Claredon Press, 1969), p 117.

It seems settled now in English law that an accused can invoke the principle of "issue estoppel" against the prosecution. This is the view expressed by Lord MORRIS, Lord HUDSON and Lord PEARCE in *Connolly* v *Director of Public Prosecutions* [1964] 2 All ER 40: 1964 A.C. 1254. The position in Zimbabwe seems to be that the plea of issue estoppel in criminal law may only be raised by the State against the accused in a criminal trial. However that common law position has been severely curtailed by statutory limitations placed on that right by such provisions as section 290 and 324 of the *Criminal Procedure and Evidence Act* [*Cap 9:07*]. *S* v *Gabriel* 1971 (1) SA 646 (RAD); R v *Kriel* 1939 CPD 221.

In light of the foregoing, I respectfully find myself in disagreement with the contention that the doctrine of issue estoppel is of application in appeal matters as contented by Mr Uriri. I hold this view on the basis that the pleas of *autrefois acq'uit* and *autrefois convict* sufficiently deal with the situations for which at common law, the doctrine of *res judicata* would have been applicable in civil matters. In any event, there is ample authority for the proposition that statutory provisions in procedural law have filled the gap which is dealt with by the common law doctrine of issue estoppel in England.

Further, applying the civil cases requirements of issue estoppel viz;

(i) that the same question has been decided;

(ii) that the judicial decision which is said to create the estoppel was final, and

(iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The second and third elements are unproblematic: if the accused was previously acquitted and either the acquittal was upheld on appeal or the State's appeal rights expired, the acquittal is final. *In casu* the parties - the State and the particular accused person (now the appellant) – are the same. But the first requirement, whether the factual issue is the same and, indeed, whether it has been decided, is often difficult to determine. I observe, however, that counsel for the appellant attached the State submissions in the bail application hearing rather than that court's

determination. No statutory rule of court nor (was) any rule of evidence was relied upon to attach the submissions by State counsel in the bail application. The filing of the submissions is irregular in the extreme as they fall foul of the rules of court. In any event as I have respectfully demonstrated, no issue relevant to the present appeal came up for decision in the application for bail nor was any such issue finally determined. The determination was not on the same issue for which this appeal was lodged but on a different issue, that is, whether the appellant is a suitable candidate for bail.

It was contented by Mr *Uriri*, for the appellant, that because the respondent had taken a considered view on the guilt of the appellant, which he expressed before a judicial forum, therefore the respondent in the present matter, the Attorney-General, cannot now put forward a different view of the same facts. With respect, I disagree with this contention. Assuming for a moment that the doctrine exists in criminal law under the guise of *autrefois acquit* and *autrefois convict* my respectful view is that the issue for determination *in casu*, is different from the issue for determination before the application for bail. As pointed out in the article by Friedland, the doctrine applies in order to prevent the State from calling into question issues determined in the accused's favour in an earlier proceeding. The doctrine operates as a shield, during trial, rather than a sword, so to speak. It would, as such, be of limited application in an appeal. The reason for the limited application of the doctrine in appeals ought to be understood in the context that an appeal is confined to the findings of the trial court rather than some other post-trial opinions expressed by different officers under different proceedings. As the question of bail was not before the trial court, the trial court, therefore, made no determination regarding bail.

The issue before the bail application was whether the appellant was entitled to bail pending appeal. Whatever submissions the respondent made in the bail application, the issues before that forum were far removed from issues which are now squarely placed before this court as set out in the grounds of appeal. Presently, the issue before this court is whether appellant was properly convicted and sentenced. The argument by counsel for the appellant is, if I may put it rather crudely, that where the Attorney-General (through his representative) took the view that there are prospects of success on appeal for one reason or another, then he cannot be heard to argue in favour of a finding that the appellant was properly convicted in the appeal hearing. The

stronger argument against the appellant under this head is that no determination of his guilt or innocence was ever made by the court in the bail application hearing.

The additional ground of appeal is therefore for these reasons, dismissed.

I now turn to consider the original grounds of appeal.

These grounds boil down to taking issue with the treatment of the single witness evidence and whether the court *a quo* unduly accepted the evidence of a child without requiring further safeguards for such acceptance. Mr *Uriri*, for the appellant, did not dwell too much on these grounds in his oral submissions before us having expended his energies on the novel ground which I have disposed of above. He however emphasised that the conviction is not safe for the reason that the complainant had not confided the abuse to the nearest person she was reasonably expected to. Otherwise he abided by his extensive heads of argument which he prepared and filed on appellant's behalf.

It is permissible for a court to convict, in a sexual case, even if there is no corroboration of the complainant, but only where the merits of the complainant and the demerits of the accused are without question. On the other hand, corroboration will not secure a conviction unless the court is in any event satisfied that the complainant is credible. In the case of young children, the degree of corroboration or other factors required to reduce the danger of relying on the child's evidence will vary with the age of the child and other circumstances of the case. The court must, in all cases, be satisfied that the danger of false incrimination has been removed before it may convict. (See: *S* v *Madzomba* 1999 (2) ZLR 214 (HC)). The present complainant viewed the appellant with respect, firstly by virtue of the trust reposed in him by her own parents, and, secondly by virtue of his position in society. As a result of threats offered to her soon after each incident of abuse, she had not reported the abuse to anyone. There is nothing abnormal in such conduct by a child of ten years. The court a quo correctly in my view, properly assessed the difficulties put in her way by the abuse at the time. It would have been better, of course, had she reported the abuse earlier, as evidence would have been gathered whilst still fresh, and the attendant recall processes would have worked more efficiently. This however does not detract from the fact that she was able to recall the incidents during which she suffered abuse at the

hands of the appellant. There is no suggestion that she could have mistaken the appellant for someone else. Nor was any factual basis laid for the allegation that her father was a suspect.

The correct approach in determining the guilt of an accused is, as pointed out in *S* v *Chabalala* 2003(1) SACR 134 (SCA) @ p139-140, to weigh up all the elements which point towards the guilt of the accused against all that are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. See also *S* v *Francis* 1991 (1) SACR 198 (A).

There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in *S* v *Webber* 1971 (3) SA 754 (A) at 758). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"

It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

In recent times it has been held that the cautionary rule relating to witnesses in matters with a sexual connotation must be dispensed with. (*S* v *M* 1999 (2) SACR 548 (SCA)).

In *S* v *M* (supra) the court said the following:

> "Prior to the decision in *S* v *Jackson* 1998 (1) SACR 470 (SCA), it had long been accepted that criminal cases of a sexual nature fell into a special category. It was said that there was an 'inherent danger' in relying upon the unconfirmed testimony of a complainant in a sexual case. This resulted in the courts adopting a cautionary rule of practice. The rule required -
>
> (a) the recognition of the 'inherent danger'; and
>
> (b) the existence of some safeguard that reduced the risk of a wrong conviction, such as corroboration of the complainant in a respect

> implicating the accused, or the accused's failure to give evidence or his obvious untruthfulness".

(See *S* v *Snyman* 1968 (2) SA 582 (A) at 585C - H)

In *S* v *Jackson* (*supra*) it was pointed out that the application of the cautionary rule to sexual assault cases was based on irrational and outdated perceptions. Although the evidence in a particular case might call for a cautionary approach, this, it was emphasised in the judgment, was not a general rule: the State was simply obliged to prove the accused's guilt beyond reasonable doubt. The factors which motivated this Court to dispense with the cautionary rule in sexual assault cases apply, in my view, with equal force to all cases in which an act of a sexual nature is an element.

In *S* v *Banana* 2000 (1) ZLR 607(SC) following the lead set in *S* v *Jackson* (*supra*) the court held that the cautionary rule in sexual cases is based on an irrational and outdated perception, and has outlived its usefulness. It is no longer warranted to rely on the cautionary rule of practice in sexual cases. Despite the abandonment of the cautionary rule, however, the courts must still consider carefully the nature and circumstances of alleged sexual offences.
See also *S* v *K* 2000 (4) BCLR (NmS).

It is trite law that the evidence of a single witness must be approached with caution and its merits weighed against any factors that militate against its credibility. A common sense approach must be adopted. Where the evidence of a single witness is corroborated in any way that tends to indicate that the whole story was not concocted, the caution may be overcome, as it may be by any other feature that increases the confidence of the court in the reliability of the single witness. Corroboration is not, however, essential.

The classic statement on the principle of corroboration comes from a civil case:

> "Corroboration may be by facts and circumstances proved by other evidence than that of a single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied". *O'Hara* v *Central SMT Co* 1941 SC 363, LP (Normand) at 379

The requirement for corroboration was re-stated more recently in *Fox* v *HM Advocate*1998 JC 94, LJG (Rodger) at 100-101 in the following, rather different, terms:

> "Corroborative evidence is…… evidence which supports or confirms the direct evidence of a witness….. the starting-point is that the jury have accepted the evidence of the direct witness as credible and reliable. The law requires that, even when they have reached that stage, they must still find confirmation of the direct evidence from other independent direct or circumstantial evidence…… the evidence is properly described as being corroborative because of its relation to the direct evidence: it is corroborative because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met.".

Evidence can be corroborative even if, taken on its own, it does not point conclusively towards a suspect's guilt. So, in a case where identification is in issue, a positive identification by one witness may be corroborated by a resemblance identification by another. Corroboration is about the number of witnesses available to prove facts. It is not about number of facts available to prove guilt. Thus, a single circumstance, such as the finding of a fingerprint in a particular place, may be sufficient to prove identity (a crucial fact) provided that the finding of the print and it being from the accused's finger are each spoken to by more than one witness. Alternatively, two separate circumstances, each spoken to by separate witnesses, may be sufficient if both point towards guilt.

In *Nivrutti Pandurang Kokate & Ors* v *State of Maharashtra*, AIR 2008 SC 1460, the Indian Supreme Court dealing with the evidence of a child witness, observed thus:

> "The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

In *State of Uttah Pradesh* v *Krishna Master & Ors*, AIR 2010 SC 3071, the Indian Supreme Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording of the evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature. Had such incident occurred, there is no reason in logic why a full blown trial where the appellant was represented by counsel would have failed to uncover it. These observations, in my view apply to the present with equal force.

The court a quo had the opportunity to evaluate the issues of credibility with the able assistance of counsel during trial. The complainant was subjected to thorough cross-examination. The trial court was satisfied that despite certain unsatisfactory features of her evidence which did not go to the gravamen of her evidence, the complainant was worthy of belief. Such a finding ought not to be lightly overturned unless there are compelling reasons on the record justifying it. I am unable to say that such compelling reasons exist in this case. The magistrate carefully considered the totality of the evidence against the appellant before rejecting appellant's protestations of innocence as false. I find no fault in his reasoning.

As against sentence, the appellant is a church pastor and a family friend of the complainant's family. His family volunteered to look after the complainant and her younger sibling out of the goodness of their hearts as in a pastor ministering his flock. I find nothing exaggerated in the language used to describe the treacherous behaviour displayed by the appellant when he changed from being the good shepherd to being the rapist that he was found to be by the court *a quo.* There is nothing unusual in the sentence imposed on the appellant. The Criminal Law (Codification and Reform) Act [*Cap 9:23*] permits the imposition of the sentence

which the magistrate imposed. There is no allegation that in assessing the appropriate sentence, the magistrate took into account factors which he was not entitled to take into account or that he had disregarded those factors which he was obliged by law to take into account. The sentence imposed sends the right message to child rapists in particular and to rapists in general that they should not expect to be treated with kid gloves when convicted of such heinous crimes. Those persons who commit this type of crime should not expect leniency when their heinous crimes finally catch up with them. Society expects that those who stand *in loco parentis* (to) take their roles seriously and protect, rather than abuse, those children in their care and custody. The sentence imposed in this case is in line with the usual sentences for this type of crime. In the result therefore I make the following order:

"The appeal against both conviction and sentence be and is hereby dismissed."

MAVANGIRA J agrees.

Kantor & Immerman, legal practitioners for the appellant
Attorney-General's Office, legal practitioners for the respondent