ARCHFORD ANESU MAGAYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 20 February 2019 and 13 March 2019

Criminal Appeal

M Mareanadzo, for the Appellant
Mr *M Musarurwa*, for the respondent

MUZENDA J: On 27 April 2016 the appellant appeared before the Regional Court sitting at Mutare facing two counts of rape as defined in s 65 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. In count one, it was alleged by the state that on the date unknown to the prosecutor but in December 2015 and at F Block Village Chief Zimunya, Mutare the appellant unlawfully and intentionally had sexual intercourse once with SHARMAINE MUKURUZADO. A female juvenile knowing that she is incapable of consent. On count 2, the state alleges that on 11 December 2015 and at F Block Village, Chief Zimunya Mutare, appellant unlawfully and intentionally had sexual intercourse with SHARMAINE MUKURUZADO a female juvenile knowing that she is incapable of consent. Appellant was at the time of his arraignment aged 17 years and complainant was aged 11 at the time of the alleged offence was committed in 2015. Appellant was a student at Chitora Secondary School.

According to the outline of the state case, on count one, on a date unknown to the state, but during the month of December 2015 at around 1700 hours, complainant was herding goats alone from the communal home, when appellant approached her and grabbed her hands, laid her on the ground, removed her pant and had sexual intercourse with her once without her consent. On count 2 it is alleged by the state that the complainant was herding a flock of goats at a nearby bush approximately 700 metres from home in the company of Lilian Nyazire. The appellant approached the complainant and Lilian Nyazire and he grabbed complainant's hands and dragged her to a nearby tree and forcibly laid her on the ground facing up. He removed her pant and had sexual intercourse with her once. On 13 December 2015, two days later after the date of the second count, complainant advised her mother that she had pains on her genitalia.

The mother examined her and observed bruises on her vagina. The complainant then related the allegations of rape. On 14 December 2015 a complaint of rape was made at the police. Complainant was medically examined on 15 December 2015 and a medical report was compiled.

On 1 November 2018 appellant was convicted after a full trial and was sentenced to six (6) years 3 years of which was suspended on the usual conditions of good behaviour. Appellant noted an appeal against both conviction and sentence. As against conviction there are two (2) grounds of appeal.

(1) the learned trial magistrate erred in convicting the appellant when the evidence of the complainant was contradictory and did not pass the credibility test. The complainant was unable to answer simple questions during the first leg of the trial.

(2) the learned magistrate convicted the appellant without satisfying himself that the dangers of false incrimination have been eliminated.

As against sentence the ground of appeal is that the learned magistrate erred in sentencing the appellant to an effective term of imprisonment despite the fact that when the crime was committed the appellant was a minor. A wholly suspended sentence would have met the justice of the case.

Appellant in his defence outline denies both charges. According to him he has never had sexual intercourse with a woman including complainant. The charges against him are fabricated, if complainant was indeed abused then, appellant says that he is not the one who did that. Whenever appellant would be in the grazing area, he would be in the company of either friends or relatives and the same appears to the complainant, she would in turn be in the company of her friends. It was impossible then to the accused for him to rape complainant without being noticed or heard by fellow villagers.

Complainant was called by the state and gave the following evidence. She was born on 16 October 2004, she is aged 11 years old and doing grade 5. Appellant is her neighbour. She stated that appellant raped her when she was herding goats and did so on two different occasions. The rape occurred in December 2015. On the first occasion appellant called her from where she was herding goats. Appellant ordered her to remove her pants which she did, and was then ordered to lie down. She complied and appellant “started to do the thing.” The prosecutor asked her to explain and she told the trial court that appellant “laid on her back” appellant mounted her and further she stated “he only lied on my top.” She was asked “is that

all he did." She replied "yes." She told her mother and she was assaulted before the mother went to the police with her. She added that she was taken to the hospital because appellant had injured he private parts with "his thing." Appellant had caused her to bleed on her thing. Appellant had got his "thing" close to hers and she bled as a result. She told her mother because she could not pass urine. She could not explain how she got injured. On the second occasion she said appellant did it again in the garden. She was herding goats and appellant invited her to the garden, she went to the garden. She was ordered to remove he panties and she complied. She lay down. Appellant removed his own undergarment, exposed his thing and mounted her. He then started to rape her. Appellant lied on his belly on top of her and did it. Asked by the prosecutor as to what appellant did, complainant became mute. On the date of resumption, appellant's legal practitioner did not attend and the trial proceeded without him. When the trial resumed the complainant told the court that she was now in the seventh grade at Gutaurare Primary School. She then explained what she meant by "his thing" and referred to a male sexual organ and that she was injured on her vagina.

During cross-examination by the appellant she confirmed that when the appellant met complainant at the pastures, appellant was with Takudzwa Chitohwa and complainant was with Lilian Nyazire. When complainant was undressed Takudzwa and Lilian were present. However at the garden on the second occasion no one else was present besides complainant and the appellant. Further when appellant allegedly undressed complainant the two Takudzwa and Lilian did not say anything and appellant and Takudzwa spoke to her and went home thereafter. After complainant's testimony there was no re-examination by the prosecutor to clarify complainant's evidence.

NYEMBESI MUKURUZADO, complainant's mother testified. She told the trial court that complainant had pains when urinating and she examined her. She saw bruises inside her vagina. She confronted complainant on how complainant sustained the bruises and complainant pointed to the appellant. She was told by complainant that appellant raped her when she was herding goats. Nyembesi then informed complainant's grandparents. She reported the matter to the police on 11 December 2015 after she had been raped on 11 December 2015. Complainant was in the company of Lilian and appellant was with Takudzwa. Complainant told the mother that she was raped twice.

Complainant told the mother that the incidences were successive on 11 and 12 December 2015. On the second occasion complainant was at the garden and appellant took her

into the garden and raped her. The garden is close to the borehole where she had gone to fetch water. The witness conceded that she assaulted complainant before she disclosed appellant's names. She said she assaulted her to force her to disclose the names of her rapist. She was asked by the witness as to who was responsible for the bruises on the vagina and complainant was afraid to tell the witness so she had to assault her.

Under cross-examination by the legal practitioner she explained that when she initially asked the complainant she did not volunteer appellant's name until she was assaulted by the mother. She assaulted complainant for the later to divulge the person who inflicted the bruises. The beating took a few minutes. She also admitted that she had previously admonished complainant against indulging in sexual activities and to the mother it was clear that complainant would not disclose if she had not been assaulted. She could not explain complainant's evidence in her statement recorded at the police station that the first occasion of rape occurred well before 11 December 2015 and that the 11 December incident was the last one. She was also questioned by the defence counsel why complainant spoke of the second occasion when she had gone to fetch water but she was sure that the 11 December 2015 was the last incident.

The third state witness was Lilian Nyazire. On the date of the testimony she was now aged 15 years doing form 3 at Chitora High School. She knows both complainant and appellant. She heard about the allegations against appellant through village gossip. However when appellant approached complainant she was with complainant. They were at the pastures herding livestock, complainant, the witness and a 5 year old girl called Anesu. Appellant was with Takudzwa, Simbarashe and other boys. She denied being present when appellant undressed complainant.

After the state closed its case the appellant testified and maintained what he had outlined in his defence outline.

WHETHER THE TRIAL MAGISTRATE ERRED IN CONVICTING APPELLANT WHEN THE EVIDENCE OF COMPLAINANT WAS CONTRADICTORY

There is a well-established rule in Roman-Dutch jurisdictions that judicial officers are required to warn themselves of the danger of convicting on the uncorroborated evidence of certain categories of witnesses who are potentially suspect. One such category concerns complainants in sexual cases.

In a long line of cases in this country of which *S v Mapfudza* 1982 (1) ZLR 271 (S) is the landmark, the so called two stage test has been applied. The first question to be asked by the court is "Is the complainant credible?" If the answer is in the affirmative, the next question is: "Is there corroboration of or support for the evidence of the complainant?" In other words, the court must not only believe the complainant, it must in addition be satisfied by an application of the cautionary rule whether it might still not have been deceived by a plausible witness. It therefore must seek corroboration or evidence tending to exclude the danger of false incrimination"[1]

In the headnote of *S v Banana* (*supra*), the Supreme Court held:

> "…. further that evidence of a complainant in a sexual case is admissible to show the consistency of the complainant's evidence and absence of consent. The requirements for admissibility are that
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> (a) the complaint must have been made voluntarily not as result of questions of a leading and inducing or intimidating nature, and
> (b) must have been made without undue delay, at what is in the circumstances the earliest opportunity to the first person to whom the complainant could reasonably be expected to have made it."[2]

Cases involving sexual assaults to be approached with utmost caution and the trial court should be seen to have specifically addressed this cautious approach in its judgment. GILLESPIE J exclusively and crisply emphasised this cardinal prerequisite in *S v Makanyanga*.[3]

> "I myself have previously said that caution, where it is required, is not demonstrated by the mere statement that one is aware of the need for caution where the assessment of the evidence shows nothing more than a superficial comparison of demeanour and probabilities."

An examination of the judgment by the Learned Regional Magistrate does not show that the alerted himself to this fundamental requirement in his judgment. He did not show by competent analysis why he believed the evidence of the complainant as opposed to that of the appellant. Failure to advertently address this cautious approach is obviously a misdirection when dealing with sexual assault cases.

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[1] Gubbay CJ in S v Banana 2000 (1) ZLR 607 (5) at 613 B-D
[2] at page 609 C
[3] 1996 (2) ZLR 231 (H) at p.241 G

In *S v Ernest Mufaranyika* [4] H-BHUNU J (as he then was) accurately summarised this requirement as follows:

> "Courts have sounded a warning time without number that sexual offences ought to be treated with special care and due diligence in order to avert the danger convicting an innocent person."

It was appropriate for the trial Regional Magistrate to exhaustively analyse the evidence of the complainant, the way the report was elicited by the mother, the place of the commission of the offence for each count, the dates of occurrence, whether it was on an unknown date in December 2015 or on 11 and 12 December 2015, a comparison of complainant's evidence and that that of her mother as well as the evidence of Lilian Nyazire and the credibility of each of them and why the evidence of the complainant was to be preferred to stand as credible. It is not adequate to state that "complainant at the time of the sexual encounter was 11 years of age and had no reason to falsely implicate the accused person." That was not enough.

The complainant did not explain a number of contradictions in her own evidence and the probabilities of her own evidence more specifically whether appellant undressed her on the presence of Lilian Nyazire. It is common cause that complainant in her evidence testified that prior to being raped appellant removed her apparel and by necessary inference Lilian should have witnessed the sexual assault. If Lilian denied that the trial court should have at least addressed that aspect of evidence in its judgment and justify why it was preferring evidence of the complainant.

Complainant was aged 14 years on the date she was giving evidence in court but she had difficulties to answer simple question posed to her. That failure goes to the route of her credibility as a witness. In addition to that she did not volunteer to report. The complainant mentioned the name of the appellant after the assault. At first she had told the mother that she had been abused but was not able to mention the perpetrator. The trial court in its judgment deliberately avoided to deal with the issue of assault preceding the mentioning of the appellant. It ought to have dealt with that aspect and then proceed to explain why such an assault could not sway it on the aspect of credibility of the complainant if it could have done that analysis it may have come out with a comparative conclusion of the evidence of the complainant. It cannot be ruled out that complainant may have been abused by a relative but was shy to disclose that and then out of fear or pain chose the appellant's name.[5]

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[4] HH-80-2012

[5] See *S v Mubvumba* HH-338-18

The evidence extracted through assault obviously limits its admissibility. [6] Maybe the complainant mentioned the name of the complainant to avoid further beating by the mother. The Learned Regional Magistrate fell into error when it did not address the corroborative evidence of Lilian Nyazire to the appellant's defence to the effect that he could not have abused complainant in the face of onlookers.

The trial court improperly in our view made reference to love nests created in the pastures, what was the effect of this love nest on the credibility of Lilian Nyazire's evidence as well as the credibility of the complainant? This is the trajectory of analysis which the trial court ought to have followed in analysing the evidence of the complainant and ruling on her credibility.

> "Whatever it may be that gives rise to the possibility of false incrimination ought to be identified by the judicial officer and addressed in such a way as shows that he was aware of the danger but considered that evidence extraneous to that of the complainant removed the danger." [7]

There are too many question marks as to details in both complainant and her mother's evidence up on which they appeared to be equivocal. The appellant on the other hand was consistent throughout and the trial court did not explain in its judgment as to why it rejected the appellant's defence. There is a reasonable possibility that the defence might be true and ought to have given the accused the benefit of the doubt. The trial court pointed out in its judgment that appellant has no reason why complainant would fabricate a case against him. He added that the manner or way in which the sexual assault was discovered was just fortuitous and gave no room for fabrication against the appellant.

To the contrary, the complainant had more reason to fabricate because she had bruises on her genitalia and had to mention a perpetrator to avoid beating by the mother. In any case, the appellant bears no onus at law to prove his innocence. As already pointed on the outset of the judgment allegations of rape are fairly difficult to disprove and in most cases when a man becomes an accused or victim of "plausible rogue whose insincere but convincing, blandishments must prevail over the slamming protestations of the truth by the diffident, frightened or confused victim of false incrimination" he must run into the mountain and hide.

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[6] *S v Kumburayi Samranza* HH 590/16
[7] *S v Makanyanga, supra* on p. 239E

However, in the same vain the trial court should thoroughly examine the evidence of the defence and explain why it should be rejected as false. Where there is doubt in the evidence of the complainant and where there are unexplained inherent contradictions on the evidence of state witnesses it is better to give the benefit of doubt to the accused.[8]

As a result, I uphold this ground of appeal.

WHETHER THE MAGISTRATE CONVICTED THE ACCUSED WITHOUT SATISFYING HIMSELF THAT THE DANGERS OF FALSE INCRIMINATION HAVE BEEN ELIMINATED

This ground of appeal is almost a repetition of the first ground of appeal. The court has already extensively covered with illustrations question marks that arise from the judgment of the Regional Magistrate and have no basis to repeat what it has already covered. The manner the confession was obtained from the complainant, the inconsistencies pointed out by the defence, the contradictions between complainant's evidence and that of the mother left a lacunae in complainant's evidence which glaringly gnaws the fabric of her credibility and moreso goes to the extent of the Learned Regional Magistrate being unable to remove the danger of false incrimination.

The trial court simply dismissed appellant's defence on the sole ground that the complainant had no reason to falsely implicate the appellant. I cannot see any defects in the appellant's demeanour or credibility and he fared well under cross examination. The trial court did not find him to be an unsatisfactory witness of bad demeanour, for less a lying witness.

There is no comment by the trial court on the demeanour of the appellant and the Learned Regional Magistrate did not show the basis of rejecting appellant's evidence other that believing the complainant and regarding her story as more probable than that of the accused. This, as pointed above herein is an error in cases where a cautious approach is required. In any case, Lilian Nyazire's evidence exculpates the appellant more particularly on count 1, the offence that is said to have occurred on an unknown date in the grazing arena.

Accordingly, the appellant is accorded the benefit of doubt and the appeal is upheld and the decision of the court *a quo* is set aside and substituted by the following:

The accused is found not guilty and acquitted.

[8] See *S v Mushore* HH 188/2011
S v Nelson Muganhu HH 179/14

Mwayera J agrees _____

Mvere, Chikamhi and Mareanadzo, appellant's legal practitioners
National Prosecuting Authority, respondents' legal practitioners