MAKOMBE MATUKU
versus
THE STATE

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

Criminal Appeal

K Manyengavana, for the appellant
J Matsikidze, for the respondent

MWAYERA J: The appellant was charged and convicted of Rape as defined in s 65 of the Criminal Law (Codification and Reform Act [*Chapter 9:23*]. The appellant was convicted of 2 counts of rape and sentenced in respect of both counts to 18 years imprisonment of which 3 years imprisonment was suspended on usual conditions of good behaviour. Aggrieved by both conviction and sentence imposed by the court *a quo*, the appellant approached this court on appeal. I must mention that the appellant's counsel properly conceded that if the conviction was proper then the sentence imposed was appropriate as it was in sync with sentences in similar cases. No argument was therefore pursued in respect of sentence.The appellant's grounds of appeal as discerned from the record are:

"1. The trial court erred in disregarding that there was no voluntary confession of rape.

2. The trial court erred in failure to give due weight to the fact that complainant did not report to anyone as soon as she had the opportunity to do so and she could not tender reasonable explanation as to why she did not report.

3. The trial court erred in failing to give weight to the complainant's testimony that she had been beaten, tortured and an egg had been placed into the vagina to solicit whether she was still a virgin.

4. The trial court erred in failing to give due weight to the complainant's testimony that she had been told what to say in court and informed that she should not dwelt from that. The evidence was thus not the independent narrative.

5. The trial court erred in placing credence in the medical report whilst the complainant stated that an egg had been placed into her.

6. The trial court erred in accepting that the appellant was the person who had sexual intercourse with the complainant whilst not giving due weight to the fact that the complainant only gave out the name of the appellant after:

(a) the complainant had been beaten
(b) the complainant had been interrogated by the police constable whom she stated she was afraid of
(c) the name of the appellant had been suggested to the complainant.

7. The trial court erred by placing credence in the witness' evidence despite that it was at par with the complainant's evidence and the witness denied the allegations raised by the complainant."

The appellant persisted with grounds of appeal against conviction. The grounds are repetitive and over emphasised. From the 6 grounds of appeal raised one could easily crystalise the grounds of appeal to 2 grounds whose import can be summarised as follows; that the trial court erred in relying on the complainant's evidence which was only revealed through compulsion in the form of assault by the police constable.

It is apparent from the record that the appellant was allegedly raped on 6 November and 1 December 2017. The matter was only revealed on 9 January upon intense questioning of the complainant by her mother and then the police constable Rosemary Nyamukondiwa. She disclosed the accused as the person who had ravished her on two different occasions. The complainant further narrated that an egg was inserted into her private parts by the state witness the constable Rosemary Nyamukondiwa as a way of ensuring whether or not she was a virgin. What emanated from the complainant's evidence is that she did not voluntarily make a report of rape to the person(s) to whom she would ordinarily be expected to make a report at the earliest opportunity.

In *S v Nyirenda* 2003 (2) ZLR it was made clear that in cases of rape the complainant's report should be made timeously to a person reasonably expected to receive a report. See also *S v Banana* 2000 (1) ZLR 607 (S). In cases of sexual nature there is need for the trial court to exhaustively analyse the evidence of the complainant juxtaposing it with the manner in which the report surfaced and the evidence of the recipient of the report. Given the nature of allegations there is need to be practically cautious on the part of the trial court so as to minimise the danger of false incrimination. See *S v Ernest Mafiranyika* HH 80/2012 BHUNU J stressing the need to be cautious in assessing evidence had this to say:

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

A close look at the court *a quo*'s reasons for judgment displays lack of due diligence and caution as conviction appears to have been anchored on the fact that complainant was a

juvenile 14 year old and had no reason to falsely incriminate her aunt's husband the uncle. The judgment ignored the basics on assessment of evidence in sexual offences. The report emanated from an assault giving more reason to test the veracity or otherwise to ascertain if the name was not disclosed through fear of further beating.

See *S v Mabvumba* HH 338-18.

In casu the complainant was subjected to questioning and was assaulted and beaten before she disclosed her ordeal at the hands of the accused. The complainant's evidence and that of the receipt of the report was parallels apart. The witness Rosemary Nyamukondiwa denied having assaulted the complainant and inserting an egg into the complainant's private parts. The witnesses could not explain why it was necessary for her to remove the complainant from her parents in seeking to find out what transpired. The parents would naturally fall under the umbrella of the people who the complainant could be expected to report sexual abuse. The fact that the recipient of the report Rosemary Nyamukondiwa a special constabulary had to go an extra mile to remove and interrogate the complaint further gives credence to complainant's testimony that she was assaulted for her to disclose the accused's name. The report was clearly not voluntarily made. A close look at the complainant's evidence and that of Rosemary Nyamukondiwa reveals discord in their versions. The complainant told the court that when she went to the accused's homestead she was in the company of her 4 year old sister and that she screamed. The 4 year old was not called to testify. The recipient of the report Rosemary Nyamukondiwa said complainant advised her that she went to accused's place alone. The compliant told the court on the second occasion she went to have her shoe repaired and the witness stated that complainant went to collect chickens. These discrepancies would have been immaterial had there been other evidence and clear evidence of the report having been voluntarily made. The report was given after assault. Also surprising is the fact that complainant a 14 year old was first raped on 6 November 2017, and then threatened with death but sometime in December 2017 she took her shoes to the killer rapist for repair. The genuineness of the rape is questionable. The complainant's mother did not testify may be she would have clarified whether or not she send the complainant for the shoe repair. Given the earlier incident and time lapse it would not be understandable why the complainant would further expose herself by approaching the accused who had earlier raped and threatened to kill her.

The issue is simply given the discord in the complainant's version and that of the recipient of the report. Did the state prove its case beyond reasonable doubt? It is not in

contention that the accused has no duty to prove his innocence. Once the accused's story is reasonably possibly true then he ought to be granted the benefit of doubt and is entitled to acquittal. In the present case a lot of gaps existed in the state case namely that the credibility of the two witnesses was questionable given that the discrepancies in their testimonies and secondly the complainant's sister who was in the vicinity was not called to testify on whether complainant screamed or not.

Thirdly the complainant's mother was not called to testify and clarify circumstances under which the complainant proceeded to the accused's residence. Further the mother was not called to testify on the benevolent change on the complainant which propelled her to invite the police constable to question the complainant. Fourthly the mention of 2 boyfriends albeit denying intimacy and insertion of an egg into complainant's private parts gave questions as to who really penetrated the complainant. Further, there was no explanation why the complainant a 14 year old was made to illustrate the sexual acts using aids that is dolls without first establishing whether or not she was capable of describing the act. Finally the matter generally was poorly investigated and prosecuted. As if that was not enough the assessment of evidence left out those omissions and glaring gaps untouched. In fact the trial court just assumed the juvenile 14 year old should illustrate using dolls. The placement of the male doll on top of the female doll was taken as enough proof for rape.

This is despite the wide curriculum in the Zimbabwean education and that complainant was in form 2 and biology is surely taught and body parts are a component. If complainant had failed to talk then the record should have so reflected and showed justification of use of illustration by dolls.

In this case there is discordance between the testimony of the complainant and that of Rosemary Nyamukondiwa the recipient of the report. The complainant stated she was assaulted by the witness. On the other hand the witness Rosemary Nyamukondiwa denied assaulting the complainant. The complainant told Rosemary Nyamukondiwa about two boyfriends. She was then assaulted and she then implicated the appellant. On the other hand the witness Rosemary Nyamukondiwa denied the complainant mentioned two boyfriends. Complainant stated an egg was inserted into her private parts in a manner indicative of aggravated indecent assault by Rosemary Nyamukondiwa. The witness denied having inserted an egg. The contradictions in the evidence are excessive such that the court *a quo* ought to have carefully analysed the evidence and with clarity shown why the complainant's version was preferred over that of the accused. Where there is doubt in complainant's evidence and where there are unexplained

contradictions it is preferable to give the benefit of doubt to the accused for the obvious danger of false incrimination. See *S v Mushore* HH 188/2011. The respondent‘s counsel correctly conceded that the complainant might have been sexually penetrated, but the question is by who. Whether or not it was by consent remained unanswered at the end of the trial. This is moreso given the report was not voluntarily made. It goes without debate in sexual offences any evidence or issues which give rise to danger of false incrimination ought to be examined thoroughly. Assuming that because complainant is a juvenile and that medical evidence confirm that the hymen was ruptured means the complainant was raped is not only dangerous but a clear misapprehension of the need to be cautious in assessing evidence in sexual offences.

Given the accused's defence of alibi which was not investigated and no evidence placed before the court to refute that he was in Harare the question is, was it safe to convict. The respondent's counsel rightly conceded to the appeal.

In the face of serious doubts on what transpired, the contradictions in complainant and recipient of the report's version and that no voluntary report was given the requisite onus of proof beyond reasonable doubt has not been satisfied. The court under such circumstances should not have convicted. See *S v Bimha* MHA 25-18. In any event the credibility of the complainant is questionable given she did not give a report voluntarily. The findings of the court *a quo* are not anchored on evidence adduced. Mere mention that complainant was credible is not sufficient. The deduction of such assertion has to be open in the evidence and sequence of events. The comments of CHATUKUTA J in *Sananza v The State* HH 590-16 wherein she quoted with approval MPHALI JA in *L v S* 2003 (1) ALL SA 16 (SCA) are pertinent and ring true in this case. It was stated:

> "In my view there is simply not enough evidence to prove the appellant's guilty beyond reasonable doubt. He is therefore entitled to the benefit of doubt."

See also *S v Nyirenda* 2003 (2) ZLR 70 which quoted with approval MPHALI JA in *S v L* wherein it was stated:

> "In my view there is simply not enough evidence to prove the appellant's guilty beyond reasonable doubt. He is therefore entitled to the benefit of doubt. The result will of course be an injustice if the appellant in fact raped the complainant but that does not justify the commission of an even more serious injustice of convincing a person without his guilty having bene established beyond a reasonable doubt."

The State has to prove its case beyond reasonable doubt and once that standard is not met then there is no room for patching up on otherwise weak State case and convicting on assumptions. It is not enough to show that the complainant's hymen was torn as conclusively

given in the medical evidence. The crux of the matter is if it was through sexual violation who violated the complainant against her wish. In this case no sufficient evidence was placed before the court as regards whether or not the accused raped the complainant. To that extent the appellant ought to benefit from the doubt and the conviction must not stand. There is evidence that an egg was inserted into complainant's private parts. That assertion ought to be investigated for if it happened then the perpetrator should be charged for aggravated indecent assault.

Accordingly, it is ordered that:

1. The appeal against conviction be and is hereby upheld.
2. The decision of the court *a quo* is set aside and substituted as follows:

Accused is found not guilty and acquitted.

MUZENDA J agrees _____

Chiwanza & Partners, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners