Judgment No. HB 86/2003
Case No. HCA 156/2000
CRB REG 554/2000

GEORGE NYIRENDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE AND NDOU J J
BULAWAYO 14 AND 7 AUGUST 2003

Ms A Masawi for the appellant
L Masuku for respondent

Criminal Appeal

NDOU J: The appellant was convicted by a Regional Magistrate sitting at Bulawayo on 4 October 2000 on a charge of rape. He was sentenced to eight years imprisonment with two suspended on condition of good behaviour. Aggrieved by his conviction the appellant appealed to this court.

The salient facts are that the complainant and the appellant are neighbours staying in the same block of flats in the Iminyela Suburb of Bulawayo. The complainant's father and the appellant are friends resulting in the complainant regarding the appellant more of a father to her. At the time of the trial the appellant was aged 37 years and the complainant had turned 15 years. On 30 June 2000 at about 1000 hours the appellant went to the complainant's house. The complainant was home alone. He found the complainant ironing clothes on a table in the kitchen. The appellant sat on a sofa in the kitchen and read a newspaper. After the complainant had finished ironing, she sat on a chair far from the accused and started to read a novel. The appellant stood up and went in front of the complainant.

There was a serious dispute on what happened thereafter prior to the arrival of the complainant's father. Although the appellant strongly denied having had sexual

intercourse with the complainant during the trial, Ms *Masawi*, on his behalf, conceded in her submission in this court that sexual intercourse took place. Having regard to the medical report I find that the concession was properly made. Dr Chiwora who examined the complainant a day after the alleged rape observed bruising and wounds in her genitalia. The only issue that remains is whether such sexual intercourse was consensual.

It is common cause that the complainant's father entered the house after the sexual act through the sitting room door as the complainant left the house through the door which led from the kitchen to the toilet. The complainant's father, a member of the Zimbabwe Republic Police, changed into civilian clothes from the police uniform. He then joined the appellant and the two chatted over a continental sporting event that was being highlighted on the local television. I will examine the evidence.

Complainant (a juvenile)

When the complainant left the toilet she went into her father's bedroom. The father followed her there. According to the complainant this is what transpired in the bedroom-

> "My father came into the bedroom and asked me what had been happening. My father gave me a choice that if I did not want to explain to him what had been happening I could go and explain to our neighbour a certain old lady your worship. Accordingly, I went o see the old lady who is our next neighbour.
> Q - Yes, you went next door?
> A - But my father had already told Pretty Ntini (next door lady) that I should explain to her what had been happening."

In short, she did not tell her father and Pretty Ntini about the alleged rape. Fear was cited for such failure to report. She feared the appellant. She went back home but her father was determined to find out "what had been happening" between her and the appellant and she testified further –

> "I then went back home your worship. Then my father asked me to go and call my cousin, Sibusisiwe Mthethwa. Accordingly, I went and called Sibusisiwe Mthethwa and the two of us came back home together. Then my father asked me to tell Sibusisiwe Mthethwa, explain to her, after which then Sibusisiwe Ntini (sic) and myself proceeded to Mpopoma Township where Sibusisiwe Mthethwa resides your worship. After our arrival there, at her residence I proceeded to tell her what had happened. I told her what accused had done to me your worship …. I told her that accused had raped me. Thereafter Sibusisiwe went back and told my father what I had said to her. But while Sibusisiwe was explaining to my father I remained outside. Then my father later advised me to go with Sibusisiwe Mthethwa to her residence at Mpopoma Township where he said I should spend the night."

She also stated that she was a virgin before the appellant ravished her. She stated that she only told Pretty Ntini that the appellant had, on a previous occasion attempted to fondle her breasts. Ms Ntini asked her if she had fallen in love with the appellant and she said no. She, however, did not tell her about the alleged rape. Sensing her strange conduct the trial prosecutor canvassed the issue further and this is what transpired –

> "Q - You told us that you were afraid to tell Mrs Ntini, what is it that you were afraid of at that time?
> A - I was afraid that should I do so Mrs Ntini would confront the accused with the matter before I had told my father, that is what I was afraid of …"

She stated that she has known the appellant since her birth and she and the appellant related well. The same goes for the relationship between her family and the appellant's family. She further stated that the sexual act took place whilst both she and the appellant were in a standing position. The appellant had removed her pants and pulled down the fly of his trousers. I prefer not to go into the graphic details about the sexual act.

Under cross-examination she agreed with the appellant that she usually read his newspapers. Her interest being Boyd Maliki cartoons and court cases. She also

conceded that she did not scream during the alleged rape. In her own words – "Initially I resisted and then you told me not to resist nor scream or else you would beat me." She stated that her pants were torn during the rape and on realising this she threw them away without telling anyone. She discarded them about two or three days after the rape. In this regard the appellant questioned her conduct –

"Q - Was it still blood stained when you discarded the pants?
A - I first of all washed the panties, thereafter on discovering that they no longer fitted me, discarded them.
Q - Can you please tell the court why you decided to wash the pants?
A - I thought to myself it would not do to discard the panties in their blood stained state ad they were your worship."

She testified that during the rape she broke free and ran away to the toilet. She stated that when her father arrived she was already in the toilet. He knocked on the toilet door and asked what she was doing in there. She told him that she was doing her laundry. Under cross-examination she had difficulty in explaining where she got the strength to do laundry soon after a rape. She initially was unable to answer. She later stated that she was afraid to come out of the toilet. When she came out of the toilet she was not crying. She went to her father's bedroom. He followed and asked why she had removed the skirt that she was wearing and placed amongst the laundry. She stated that she was afraid of telling him and he told her to go and inform Ms Ntini. She was asked why her father would become suspicious when she had earlier told him she was doing some laundry and in this regard the record reflects –

"By court to witness

Q - His question is, why ask you that question in the bedroom when he knew you had been doing laundry in the toilet?
A - My father had taken the skirt that I had been wearing out of the water where I had soaked it and having taken the skirt out of the water he then asked me the question – what has been happening?

Q - Particularly why did he ask you that question, what made him to ask you that question?
A - I think my father noticed a blood stain on the skirt and that is what prompted him to ask the question, I believe …
Q - What happened to the skirt thereafter?
A - After my father had seen it
Q - After the father had inspected the skirt that was thrown into the water. What happened to it thereafter?
A - I washed it together with the other laundry."

She stated that after a few days i.e. after the report had been made to police her mother arrived from their rural home. Her mother asked her what happened. She explained to her. Her mother beat her up. She was questioned in this regard –

"A - After which then my mother beat me for the reason that she stated I had not told the old lady, the next door neighbour the truth.
Q - But why did she beat you up because the matter had already been reported to the police and you were a rape victim?
A - My mother beat me up because she suspected that I had fallen in love with you.
Q - Why was she suspecting that?
A - I do not know what made her suspect that?"

Complainant's father: E Mhlophe

His version is different from that of the complainant in many respects. He arrived at the house around 1100 hours from his communal home. He opened the door and he heard a noise made by his bedroom door, which startled him as he knew that it being a Sunday the children had gone to church. He entered and as he was doing so he saw that complainant, instead of welcoming him back home, she simply proceeded to the toilet. Meantime the appellant was seated on a sofa reading a newspaper. He immediately followed the complainant to the toilet and he met the complainant coming from the toilet. He got to the toilet and was further surprised to find a skirt that she had been wearing in the tub. The complainant was by then wrapped in a big towel. He stated that he "could see that she was reluctant to look"

him in the face. He did not ask her anything instead he went to Ms Ntini but he found she had gone to church and only succeeded to talk to her in the evening. He stated that what made him suspicious was the noise of his bedroom door and "the complainant avoiding to look me in the face." He wanted to know why the complainant was shocked when she saw him arrive. He, however, stated that there was nothing unusual about the appellant being in his house as a friend and neighbour. Under cross-examination he stated that the complainant had placed the skirt that she had been wearing in a tub without water. The skirt was not soaked in water with other items of laundry. The skirt, however, had a wet spot/"stain" which made him suspicious. He conceded that he did chase away the complainant after she was interviewed by Ms Ntini. He said he did so in anger. After he chased her away she went to his niece Sibusisiwe's residence. He stated that he was only advised of the rape on the morning of 31 January 2000 i.e. a day after the day of alleged rape. He later changed and agreed with the appellant he was informed on the evening of 30 January at around 2000 hours.

Pretty Ntini

She testified that the complainant's father approached her and asked her to talk to the complainant after he found her and the appellant together in the house and he was suspicious. The complainant came and she explained to her that her father was "uneasy about the manner in which he had found her and the accused." She asked the complainant "what was happening". The complainant told her that nothing happened on that day. She, however, told her that on a different day the appellant tried to fondle her breasts. The complainant left. She told her father that she was denying. She later

returned in the company of Sibusisiwe and the latter informed her that the complainant had made a report to her about the incident.

Sibusisiwe Mthethwa

She stated that on the fateful day the complainant's sister approached her. As a result she went to complainant's residence. It was around 1900 hours and the complainant was seated outside the house alone, and she was crying. She asked her why she was crying. The complainant did not answer her. She confronted the complainant's father who advised her to ask the complainant herself. She took the complainant into the house and questioned her in the absence of her father. The complainant told her that the appellant had been fondling her breasts. She suggested that the complainant accompany her to her place of abode so that they can spend the night together. On the way to her residence she asked the complainant if that appellant had only fondled her breasts. The complainant was adamant that the appellant did nothing to her apart from attempting to fondle her breasts. She persisted asking her and later the complainant eventually said the appellant fondled her breasts and ended up removing her panties and raped her. Upon hearing this she took the complainant back to Ms Ntini. She is the one who informed Ms Ntini about what the complainant had just told her.

Appellant – George Nyirenda

He was the sole witness in support of his defence. He failed to explain why the complainant's father would frame him. When asked about the bruising of the complainant's genitalia as observed by the doctor he gave an explanation that maybe they were caused by someone with long nails. The evidence does not show that she was examined by any of the witnesses. In fact it is on account of such medical

evidence of sexual intercourse he struggled to give any meaningful explanation therefor. It is not surprising that a concession was made that the appellant had sexual intercourse with complainant.

The trial magistrate found that the complainant was a credible witness. It is trite that the assessment of the credibility of a witness is the province of the trial court. In *S* v *Mlambo* 1994(2) ZLR 410 (5) at 413 GUBBAY CJ said –

> "The assessment of the credibility of a witness is *par excellence* the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense."

In *Soko* v *S* SC-118-92 at pages 8 of his cyclostyled judgment EBRAHIM JA said–

> "A court of appeal will not interfere with a trial court's assessment on credibility lightly. There has to be something grossly irregular in the proceedings to warrant such interference. This is because the trial court by having the witness before it is better able to make all other factors relevant in assessing credibility. The Appeal Court, on the other hand, is confined to the record."

In *Mbanda* v *S* SC-184-90 at page 7 of his cyclostyled judgment GUBBAY CJ said –

> "An appellate court must never overlook that the trial court's living through a drama of a case is in a unique position to evaluate the evidence in its proper perspective. To justify the conclusion that the assessment made by a trial court of the credibility of the witnesses is wrong, an appellate court must be persuaded that the finding defies reason and common sense. Questions of credibility are *par excellence* the province of the trial court" – see also *Zulu* v *S* HB-52-03.

I will adopt the above approach in *casu*. I hold the view that the finding by the trial court that the complainant is credible defies reason and common sense. That the

complainant lied in many respect is beyond dispute. Further there are material discrepancies between her version and that of her father. I, however, have no problems with trial court's findings on the credibility of her father, Ms Ntini, Sibusisiwe Mthethwa and the appellant. The first three witnesses were correctly found to be credible. The appellant was properly found to be a liar in material respects. I do not, however, adopt an armchair approach in assessing the complainant's version. Her testimony has to be contextualised. The fact that she lied in some respects does not mean that the trier of fact has to disregard her evidence *in toto*. The trier of fact is entitled to consider her explanations for the unsatisfactory parts of her conduct. Her testimony should be assessed on the basis that there is no standard reaction to a rape. It does not follow that every rape situation should be characterised by screaming of the complainant, tearing of the victim's garments, immediate report to a relative or someone close to the victim, crying post the rape, preservation of evidence of rape etc. Each case has to be considered on its merits. It is the complainant's explanation for the irregularities or material unsatisfactory features of her evidence that I am not satisfied with. It is important to emphasise that it is incumbent upon the state to prove its case beyond reasonable doubt. If not, the appellant is entitled to a positive finding in his favour. As rightly pointed out by MPATI JA in *L* v *S* 2003(I) ALL SA 16 (SCA) at pages 21J to 22A –

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

In considering the complainant's evidence I am fully aware that the two-pronged test in sexual cases is no longer part of our practice. This, however, does not mean that I should not consider the nature and circumstances of the alleged sexual offence carefully. In this regard GUBBAY CJ, in *S* v *Banana* 2000(1) ZLR 607 (S) at 614E-G said-

> "It is my opinion that the time has now come for our courts to move away from the application of the two pronged test in sexual cases and proceed in conformity with approach advocated in South Africa. In so holding, I have not overlooked the well researched judgment of GILLISPIE J in *S* v *Magaya* 1997(2) ZLR 139(H). But having regard to the abrogation of the obligatory nature of the rule in such countries as Canada, the United Kingdom, New Zealand and Australia, as well as by the State of California (see Chaskalson; *et al*, *Constitutional Law of South Africa* at 14-62; Hatchard, 1993 *Journal of African Law* 97 at 98; (1983) 4 *Canadian Journal of Family Law* 173, I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. *Yet I would emphasise that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully."* (emphasis added)

With this in mind I proceed to consider the questionable aspects in the evidence of the complainant.

First, the complainant did not make a spontaneous report of the alleged rape to three first available sympathetic witnesses, namely, her father, Pretty Ntini and Sibusisiwe Mthethwa. Her reason for not reporting is that she was afraid that the appellant would be confronted and then assault her. Second, her father is a policeman and he arrived dressed in police uniform soon after the sexual act. What does she do? Instead of reporting she tries to avoid him and also avoids having eye contact with him by rushing to the toilet. Once inside the toilet she realised that there were stains on her garment which were consistent with sexual act having taken place. She deliberately takes steps to conceal such evidence. She changed her stained skirt and wraps herself with a towel instead. She washes the blood stained panties and later decides to dispose of them in order to destroy evidence of the sexual act. She

discarded the panties when the police had already arrested the appellant and were investigating this matter. Why would she, at that stage, take active measures to destroy evidence against the appellant? Third, she deliberately lied by saying that when her father arrived she was already in the toilet. Her father stated that he found her in the house and she avoided eye contact and did not welcome him as she normally would have. Further, she lied that she soaked her skirt in the laundry. Her father stated that she placed the skirt in the tub without water. The father cannot be mistaken in these respects as that was what prompted his suspicion. He saw the dry skirt with a wet spot on the back side. These lies are on material aspects of her evidence. Her father referred her to an elderly female neighbour. I would, however, give her credit in that the prosecution did not adduce sufficient evidence to show familiarity between the complainant and Pretty Ntini. The complainant does not necessarily confide in every female adult close to her parents. Maybe she was not close enough to Pretty Ntini to disclose issues of this kind. Their relationship should have been sufficiently canvassed by the trial prosecutor when the complainant and Pretty Ntini testified. She gave two versions to her aunt Sibusisiwe. She only came up with the rape allegations after her father chased her away. She only cried after her father chased her away. She only came up with rape allegations after persistent probing by Pretty Ntini and later by Sibusisiwe.

The circumstances and evidence suggest an air of over familiarity between the complainant and the appellant. During cross examination she agreed with him on what he pointed out to be her interests in newspapers. Looking at the overall circumstances of the case as outlined above and this over familiarity there is a smack of a love affair between the complainant and the appellant. With these material

unsatisfactory aspects of the complainant's evidence the court *a quo* could not have satisfied itself that the danger of false incrimination has been excluded. The complainant of rape was extracted from her by applying pressure on her i.e. chasing her away, persistent questioning (suggesting her explanation was not regarded as being plausible). The circumstances of the case are such that it is easy for her to cry rape and difficult for the appellant to refute.

In this case the trial court overlooked some rules of evidence. It is important to emphasise that complaints in sexual cases are admitted to show consistency and to negative a defence of consent, but not as proof of their contents not to corroborate the complainant – *South African Criminal Law and Procedure* Vol II by P M A Hunt (2nd Ed) by J R L Milton at pages 448-9; *R* v *M* 1959 (1) SA 352 (AD) at 355 and *R* v *De Beer* 1933 NPD 30.

For the complaint to be admitted it must meet the following requirements:-

(a) The complaints must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating character – *R* v *P* 1967(2) SA 497 (R) and *R* v *Orsborne* [1905] I KB 551, [1905] ALL ER 54

(b) It must have been made without undue delay but at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complaint could reasonably be expected to make – *R* v *Gannon* 1906 T S 114; *R* v *Du Plessis* 1922 TPD 153 and *R* v *P (supra)*

(c) The complainant must give evidence.

In *casu* the evidence of Sibusisiwe Mthethwa falls foul of the requirements set out in (a) and (b) above. From the judgment of the trial magistrate it does not seem that he was alive to these requirements when he considered the evidence of Sibusisiwe. This is a misdirection on his part.

In my view there is, however, sufficient satisfactory evidence that sexual intercourse took place between the complainant and the appellant. The only issue that remains is whether the trial court was justified in holding that such sexual act was not consensual. The only evidence on consent is that of the complainant. I have already alluded to the fact that her testimony was unsatisfactory in certain material respects. The approach to such unsatisfactory evidence was set out by BARON JA in *S* v *Gardner* 1982(2) ZLR 290 (S) at 295G-296A in the following terms:

> "It is of course trite that simply because a witness is shown to have lied in certain respects the court should not without more ado reject the whole of his evidence; if the aspects on which the witness has lied are by comparison peripheral or minor then the remainder of that witness' evidence is still entitled to examination, albeit with rather greater care than if he had not been shown to have lied at all. On the other hand, if the aspect on which the witness has lied goes to the root of his story, or is clearly of major importance to the story as a whole, then he cannot be regarded as a credible witness. If, therefore, the areas in respect of which the complainant moved away from the truth were areas fundamental to her story as a whole then it was a serious misdirection for the magistrate to say that he finds the truth to lie somewhere else. In a situation such as this the court does not find where the truth lie, it decides whether the witness on whose evidence the court is asked to rely is telling the truth."

In *casu* the areas in which the complainant lied cannot be described as minor or peripheral. They are central to the allegation of lack of consent. This is a fundamental issue in trial of rape. My decision does not mean that I believe the complainant consented to intercourse with the appellant; it means simply that in my

judgment it has not been proved to the standard applicable to cases of this kind that she did not.

Evidence from the appellant and the complainant was that the appellant knew the complainant from birth. They were neighbours and have been so since her birth. The appellant and complainant's father were friends all along. He obviously knew what her age was. If not, he at least must have appreciated that she was a minor. Ms *Masawi*, concedes, and rightly so in my view, that the appellant should be found guilty of statutory rape, i.e. a contravention of section 3(a) of the Criminal Law Amendment Act [Chapter 9:05] (This was the applicable Act at the time of the conviction). On a charge of rape, the latter is a competent verdict – section 211(1) of the Criminal Procedure and Evidence Act [Chapter 9:07] I will, therefore, reduce the charge accordingly.

In light of the above I am at large as far as sentence is concerned. Both counsel submit that a custodial sentence is called for. I agree. The only issue is one of the length of such imprisonment. Ms *Masawi* submits that a sentence of 12 months imprisonment with half thereof suspended will meet the justices of the case. Mr *Masuku* submits that I should look at a sentence in the region of 3 ½ years. The relevant factors in this case, are, first the age difference between the appellant and the complainant. *S* v *Five* 1988(2) ZLR 168 (S). In this case KORSAH JA at 171A said –

> "I cite the above footnote merely to illustrate that in cases of unlawful sexual intercourse the disparity between the ages of the defendant and his victim has always been acknowledged as a factor, either of mitigation or aggravation, depending on whether the difference in ages is small or great."

The appellant was aged 37 years and the complainant 15 years giving a disparity of 12 years. This is an aggravating factor – see *S* v *Chuma* 1983(2) ZLR

372(H). Second, proximity to 16 years. As the complainant is aged 15 years she is closer to 16 years. This is mitigatory – *R* v *Sithole* 1967 RLR 403. Third, as against the complainant, the appellant was in *loco parentis*. This is aggravating. The complainant regarded him "not as brother but a father." Fourth, the appellant has no intention of marrying the complainant. This is aggravating. According to GUBBAY J (as he then was) in *S* v *Nare* 1983 (2) ZLR 135(H) at 137H –

> "The rationale of this offence is to protect immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility that psychic or physical injury may be suffered. That protection is achieved not by punishing the female, but rather the male partner, who in effect is assumed to have been responsible for inducing her to engage in sexual relation."

In *R* v *Sava* 1967 RLR 367 (GD) at 368, BEADLE CJ suggested a general but nonetheless useful guide in the determination of the seriousness of this offence. The court has to have regard to (a) the age, (b) appearance and character of the complainant; age of the accused; and (c) the circumstances under which the offence was committed. Applying the above principles and also having regard to the sentences imposed in these cases I feel that a sentence in the region of two years with part thereof suspended would have been appropriate. It is common cause that the appellant served a period of seven months prior to his admission to bail pending this appeal. I will take this into account together with other personal circumstances of the appellant submitted by his counsel.

Accordingly, I would allow the appeal against both conviction and sentence. The conviction and sentence by the court a quo are quashed and substituted as follows–

> "**Verdict**: Guilty of contravening section 3(a) of the Criminal Law Amendment Act [Chapter 9:05]

Sentence: 24 months imprisonment of which 16 months is suspended for 4 years on condition the accused in that period does not commit any offence involving rape or of sexual nature and for which he is convicted and sentenced to imprisonment without the option of a fine. As the appellant had by the time he was admitted to bail undergone about 7 months of the term of imprisonment he is immediately entitle to his liberty."

Chiweshe J …….. I agrees

Masawi & Associates, appellant's legal practitioners
Criminal Division of the Attorney-General's Office, respondent's legal practitioners