LAWRENCE KATSIRU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU JP & BHUNU J
HARARE, 28 and 31 May, 2007

Criminal appeal

Mr *Matinenga,* for the appellant
Mr *Phiri*, for the respondent

BHUNU J: The appellant is the leader and founding member of the Johanne Masowe Church in Marondera a well known religious sect, whereas the complainant is the daughter of his former aide one Perekedzai Rafirakumwe Ziumo.

He was arraigned before the regional court sitting at Harare charged with and was convicted after a heavily contest trial of raping his former aide's 14 year old daughter on 23 November 2003. For his pains he was sentenced to 9 years imprisonment of which 2 years were suspended for a period of 5 years on appropriate conditions of good behaviour.

Aggrieved by both conviction and sentence he now appeals to this court for redress. The appeal is premised on the following grounds of appeal

"As against conviction

1. The trial Court erred and gravely misdirected itself in not considering the *alibi* defence raised by the appellant.
2. The trial Court in making a finding that the complainant was a credible witness when she was not.
3. The Trial Court erred in finding that the crime of rape had been committed when medical evidence did not support such a finding.
4. The Trial Court erred in disregarding the evidence of two police details who testified for the state.
5. the court erred in finding that the state had proved its case beyond a reasonable doubt when in fact the state had established as conceded by it a case on a balance of probabilities

As against sentence

> The sentence imposed is unduly severe and harsh and out of line with sentences imposed in cases of a similar nature.
> **WHEREFORE** appellant prays that the judgement of the court *aquo* be set aside and substituted with a verdict that the appellant be found Not Guilty and Acquitted."

When the record of proceedings and notice of appeal were referred to the trial magistrate for her comments in terms of normal procedure, she took the easy way out and simply remarked that she had no comments to make. I must hasten to point out that when asked for his comments after presiding over a contested case, a magistrate must not take the easy way out and leave everything to the state counsel and the appeal court when it is the correctness or otherwise of his decision at stake. When confronted with a notice of appeal the trial magistrate is duty bound to make an honest reassessment of his decision in the light of the notice of appeal.

It is helpful to everyone concerned and particularly the appeal court to know whether or not the trial magistrate still abides by his decision despite the notice of appeal. If for one reason or another the trial magistrate has had a change of heart it is more honourable to say so than to fasten onto an indefensible decision or take refuge in the easy way out by declining to comment. Whatever the trial magistrate's position may be he is duty bound to give brief and concise reasons for his position after considering the notice of appeal for the benefit of everyone concerned. In doing so the trial magistrate may save precious time and costs. The ends of justice cannot be served by being prevaricative and non committal when the liberty of a citizen is at stake.

Despite the trial magistrate's non committal attitude, the state has consistently taken a clear and commendable stance declining to support the conviction, giving good and sufficient reasons for that decision. Right from the onset the trial prosecutor in his closing remarks conceded that the state had failed to prove its case against the appellant beyond reasonable doubt as is required by law saying:

> "The state concedes as initially stated that this was a case which was badly investigated. The complainant appears to have been plausible witness and the shortcomings in her evidence has exposed her to be; *S Vs Mupfudza* 1982 (1) ZLR 27 (S)."

While the trial magistrate was not bound by that concession she was duty bound to give serious consideration to it, yet in her lengthy judgment she made no reference to the concession thereby giving the unsavoury impression that she ignored the concession. Indeed it is amazing

if not surprising that the learned trial magistrate proceeded to convict without commenting on the state's apparently valid concession. The tragedy is however, that the concession at appeal level came inordinately too late to avert gross injustice being done to the appellant.

The unfortunate unconscionable net result is that the appellant has been languishing in prison since 19 January 2005 that is to say, a period in excess of 2 years imprisonment in circumstances where neither the state nor the presiding magistrate are prepared to support the conviction and sentence. In other words the appellant has been condemned to prison for a period exceeding 2 years in circumstances where no one believes that he is guilty of the offence charged or any other offence. That in itself can only amount to a grave travesty of justice if not gross injustice.

In the ordinary run of things this should really be the end of the matter without any further ado. But because of the appellant's station in life as a prominent public figure and religious leader there is need to briefly ventilate what it is that has prompted the presiding magistrate not to support her decision and the state not to contest the appeal.

It is common cause that the complainant's mother passed away sometime in 1993. At the material time the complainant was being looked after by a step mother. Despite being an orphan she was however a delinquent problem child who needed counseling. One of her problems was flirting with boys and missing her school lessons such that at one time she even missed an examination. It was then decided that she be referred to the appellant and his wife for counseling. There is controversy as to at whose instance the complainant was supposed to be counseled. The complainant said that it was at her step mother's instance whereas her father said it is the appellant who approached him requesting for permission to counsel his daughter.

That contradiction was never resolved it was however not in dispute that the appellant drove away with the complainant from a prayer meeting to his home for counseling. The complainant then alleged that the appellant raped her when they got within the precincts of his farm before proceeding to the farm house. She alleged that she bled and spoiled her underpants when she was raped. She however washed the underpants without anyone having seen the blood stains thereby destroying the evidence.

At the farm she did not make a report to anyone nor did she report at school the following day. She also did not lodge a complaint with her parents when she got home that day. She only made a report to her aunt about 6 days later.

The appellant flatly denied the charge arguing that he had probably been set up and framed by the complainant's father owing to controversy arising from religious differences.

He further pointed out that he could not possibly have raped the complainant in the presence of his niece one Roseline Majiranji who was with them throughout the journey. The presence or otherwise of Roseline at the scene of the alleged crime was never investigated by the State which failed to rebut her evidence confirming that she was present throughout the journey and no rape took place as alleged by the complainant. There being no eye witnesses to the alleged rape it was a question of the complainant's word against that of the appellant. That being the case the matter fell to be determined squarely on the basis of the credibility of witnesses bearing in mind always that the onus rested on the state to prove its case against the accused beyond reasonable doubt.

In convicting the appellant the trial court adjudged that the complainant was an honest and credible witness worth of belief. In our law it is considered that the trial court is in a better position to assess the demeanour and credibility of witnesses. This prompted ZIYAMBI JA in the case of *Moses Chimbwanda Vs Irene Chimbwanda* S.C 28/02 to remark that:

> "It is trite in our law that an appellate court will not interfere with findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage point of having seen and heard them. See *Hughes Vs Graniteside* (Pvt) Ltd S.C 13/84. The exception to this rule is where there has been a misdirection or a mistake of fact or where the basis the court aquo reached its decision was wrong."

It is therefore incumbent upon us sitting as an appeal court to determine whether or not the trial court's assessment of the credibility of witnesses falls within the above exception. The appellant has attacked the complainant's credibility as a witness basically on the basis that she was inconsistent and that she contradicted herself on material points of fact. A perusal of the record of proceedings shows that indeed the complainant contradicted herself on some material aspects of her evidence. In exposing the contradictions we can do no better than referring to the record of proceedings.

The state sought to establish that the accused had sexual intercourse with the complainant without her consent by leading incontrovertible evidence to the effect that she had been deflowered and was no longer a virgin. The appellant countered that the complainant was a

naughty girl of easy virtue who could have been deflowered by any of her boyfriends. This prompted the prosecutor to ask her during the course of her evidence in chief:

"Q. Did you have any boyfriend or did you ever had any sexual intercourse prior to that incident?

A. To be honest and I swear to God I did not have any boyfriend. To be honest, I never had sexual intercourse with any boy or anyone at all.

BY THE PROSECUTOR TO COURT:

Your worship, I intend to show the witness there are some letters which I understand the defence will be asking her questions on I just wanted her to confirm whether she knows any thing about that."

Under cross-examination she was then asked by counsel for the appellant:

"Q. So Amai A Chiwanda is the same as Nyasha Muwani?
A. what I would want to think is that she could be in love with someone using the surname Chiwanda., but I know her using the name Muwani, but all the same I also have a boyfriend who is called by the name Chiwanda or who uses that name.
Q. Who has a boyfriend called Chiwanda?
A. Myself.
Q. For how long have you known this Chiwanda?
A. We started our relationship during the time I was still at Nyamheni before I transferred to Rukodzi. We were just classmates when it started.
Q. What is his name?
A. Leeroy."

Thus after having initially vehemently denied having any boyfriend in her evidence in chief, the complainant later relented under cross-examination and confessed that she had a boyfriend after all. The confession only came after she had been shown concrete irrefutable evidence that she indeed had a boyfriend. Her behaviour in this respect can only betray a deliberate set mind to mislead and deceive the court. After the alleged rape she made two statements to the police. In her initial statement she complained of attempted rape or indecent assault saying that the appellant had inserted his finger into her female organ. A few days later she however made another statement before a deferent police officer in which she alleged that the accused had in fact raped her by inserting his male organ into her private parts. The second recording detail explained in court that when he queried the apparent contradiction the complainant said that she deliberately misrepresented facts in her initial statement because she was shy as there were many people in the room. The first recording detail did not help matters

by initially denying his own handwriting which was later conclusively established to be his by expert evidence. In court the complainant however maintained that in fact she had told the fist police officer that the appellant had infact raped her.

Faced with contradictory factual evidence from state witnesses the trial magistrate chose to believe the one saying that the complainant had told him that the appellant had infact raped her and disbelieved the other. She however lambasted and .discredited both police witnesses of attempting to defeat the course of justice. We must however hasten to point out that the complainant's conduct at the police station in recording two contradictory statements was consistent with her proven behaviour in court in initially denying that she had a boyfriend only to make an about turn when cornered.

Despite the thoroughly discredited evidence from the two police officers the prosecutor did not see it fit to impeach any one of the two police witnesses. The net result was that the state relied on two contradictory statements leaving the trial court to pick and choose which evidence it preferred and the court proceeded to do just that. That in our view constituted gross irregularity because the onus was on the state to prove its case beyond reasonable doubt and not the court. In fact the state's reliance on two contradictory statements is evidence of the fact that it did not know which state witness to believe and which one to disbelieve.

The weighing and assessment of evidence in cases of a sexual nature can be a tricky business particularly with recent developments both in the legal sphere and on the social front. On the legal sphere there has been a decisive shift from the archaic cautionary rule as propounded in the *Mupfudza* case (*supra*) which treated complainants in sexual cases as suspect or accomplice witnesses.

On the social front there has been a hysterical demand for the cleansing of society from sexual offenders at all costs. Judicial officers should however not lose sight of the basic tenets of justice and fairness or get emotionally involved. They must remain focused on doing real and substantial justice without fear or favour to all manner of people regardless of their station in life.

The proper modern approach in handling cases of a sexual nature was laid down in the well known case of *S vs Banana* 2000 (1) ZLR 607 (S) at pages 613 – 614 where the Supreme Court, the highest court in the land had occasion to remark that:

> "…the cautionary rule in sexual cases is based on an irrational and out dated 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 carefully consider the nature and circumstance of alleged sexual offences." (Emphasis added)

Thus on the basis of the ratio laid down in the *Banana* case (*supra*) the abandonment of the cautionary rule did not mean a wholesale relaxation of the court's ordinary standard of proof beyond reasonable doubt which is meant as a safeguard against condemning the innocent together with the guilty in the difficult course of the due administration of justice. On the contrary the courts must exercise special care and diligence when presiding over sexual cases for the reasons given in the case of *R vs W* (3) SA 772 at 780 where WATERMEYER J had this to say:

> "In rape cases for instance, the established proper practice is not to require that the complainant's evidence be corroborated before a conviction is competent. But what is required is that the trier of fact should have clearly in mind that cases of sexual assault require special treatment, that charges of this kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid.(My emphasis).

The required standard of proof beyond reasonable doubt was succinctly expounded in the case of *S vs Makanyanga* 1996 (2) ZLR 231 when the court observed that

> "A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, but the fact that such credence is give to the testimony does not mean that conviction must necessarily ensure. Similarly 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 be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true".

In this case it is common cause that the appellant's defence to the effect that he could not possibly have raped the complainant in front of his niece Roseline was never investigated nor rebutted. This was a valid reasonable and possible defence which the state was constrained to rebut. This the state did not do. It was therefore untenable if not grossly unreasonable for the trial court to convict in the face of an unrebutted valid defence.

Having regard to the serious inconsistencies and contradictions inherent in the state case as demonstrated elsewhere in this judgment it is not difficult to appreciate why the state made the valid concession that it had dismally failed to establish its case against the accused It

was therefore remiss and a matter off serious misdirection for the trial magistrate to convict the appellant in the face of discredited evidence and a concession from the state that it had failed to establish its case against the accused beyond reasonable doubt. That being the case the appeal can only succeed. It is accordingly ordered that:

1. The appeal be and is hereby allowed
2. That the conviction and sentence be and is hereby quashed and set aside.
3. That the trial court's verdict be and is hereby replaced by the verdict that the accused is found not guilty and acquitted

MAKARAU JP, I agree ……

Munangati & Associates, appellant's legal practitioners.
The Attorney General's Office, respondent's legal practitioners.