THE STATE
versus
ENERST MUPFARANYUKI

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 15 February 2012

Criminal Review

BHUNU J: The accused was employed by the complainant's parents as a domestic worker residing at Gwari Village under chief Zimuto in Masvingo Province. He is alleged to have raped his former employer's 11 year old daughter sometime in April 2009. The offence only came to light more than a year later in August 2010 when it was discovered that she had contracted a sexually transmitted disease.

The complainant did not lodge a voluntary complaint immediately or within a reasonable time to anyone. Upon discovering that the complainant had developed an itchy condition on her genitals her mother suspected sexual abuse but the complainant refused to disclose the culprit. She was then taken to a local clinic where the nurses confirmed that she had been sexually abused resulting in her contracting a sexually transmitted disease. Despite close questioning by her mother and the nurses she consistently refused to disclose her paramour

In her desperate bid to uncover the identity of her child's molester the mother threatened not to take her to hospital for treatment. It is only after such threats that the child succumbed and alleged that it was the accused who had raped her in 2009. The complainant was allegedly raped in April 2009 and the accused left her fathers employment at the end of January 2010 and yet the complainant was not prepared to voluntarily disclose the identity of her molester 5 months after the accused had left employment and gone away.

The accused denied the charge. The onus therefore, fell squarely on the state to prove its case against the accused beyond reasonable doubt. The 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 of convicting an innocent person. The inherent danger of convicting an innocent person in cases of this nature in the past prompted the courts to adopt the now discredited cautionary rule of practice which went rather too far in trying to give undue protection to the accused person. Despite the disuse and abandonment of the archaic cautionary rule there is however, still need to handle sexual offences with extreme care and due diligence.

This prompted me to remark in the case of *Lawrence Katsiru* v *The State* HH – 36-07 that:

The proper modern approach in handling cases of a sexual nature was laid down in the well known case of *S* v *Banana* 2000 (1) ZLR 607 (S) at pp 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* v *W 1949* (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* v *Makanyanga* 1996 (2) ZLR 231 where 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 given to the testimony does not mean that conviction must necessarily ensue. 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".

The complainant's conduct in this case instills a measure of doubt in the mind of a reasonable court acting carefully. She did not make a report within a reasonable time to a person she would reasonably have been expected to make the report. She only made the report more than a year later after being subjected to extreme pressure and coercion. Her explanation for her failure to make a voluntary report is that she had been threatened with assault by the accused. In her evidence in chief she had this to say:

> "I felt pain as he did it. I did not cry because he had threatened to assault me He got off me after I had told him that I was feeling pain. I rose and wore my pant. I noticed nothing on my thing. The accused also wore his trousers. He threatened to assault me if I would tell anyone. I then went out of the house. Accused remained inside for a while and later came out".

I did not tell anyone about what had transpired because I had been threatened. The matter came to light when I was feeling pain and I was scratching I did not know what I was producing from my vagina. I was producing whitish staff. My mother took me to the clinic.

Q. When did you start producing whitish staff?

A. I don't recall but it was in the same year in 2009. Mother took me to the clinic in 2009. Mother got to know about the discharge when she saw me scratching myself. At the clinic the nurses examined me. Gurajena Clinic in Zimuto. We were told there was no medicine. We went back home but we had been referred to Masvingo General Hospital I did not disclose to the nurses about the rape. I didn't disclose to mother either. When we went to the clinic the accused was no longer employed at our home. I did not report to anyone because I had been threatened. I

> finally reported the rape on 30 August 2010 to my mother. We were seated near Masvingo General Hospital I wanted to be treated and given medicine. I still had the same problem. My vagina was itching again and mother noticed me scratching."

According to her mother when the nurses at the clinic discovered that she had been sexually abused they questioned her in her presence and she flatly refused to disclose her molester. This is what she had to say in her evidence in chief:

> "I took her to Gorejena Clinic, the nurses asked what the problem was. I told them that she was scratching herself. She was invited to lie on the bed. Later on they called me back into the room. They told me that complainant had had sex with a man. They tried to ask her but they failed to get an answer. They said that complainant had totally refused to open up. They advised me to go home with her and talk to her nicely so that she can freely disclose what happened. They said that if she refused to open up I should take her to the general hospital."

The complainant's explanation for her refusal to disclose the identity of her molester sounds hollow and unconvincing because, she did not reside with the accused. She resided in town whereas the accused resided in the rural areas and had already left her parents' employment. She was allegedly raped when she had paid a casual visit to their rural home

Even long after the accused had left her father's employment she was still not prepared to name the person who had sexually abused her. She only came up with a name in a desperate attempt to get treatment for the horrible sexually transmitted disease that she had contracted. Her mother had placed her in an invidious position where she had to come up with a name of the person who had sexually molested her or else she was not going to get medication for the serious disease that she had contracted.

The mere fact that the complainant vigorously attempted to shield the culprit who had sexually molested her, gives room to a reasonable suspicion that she might have tried to shift the blame to the accused in a bid to protect the real culprit. It would have been helpful to find out the incubation period of the disease she was suffering from. Could the incubation period have taken more than one year before the symptoms were noticeable? Without expert evidence there is no way of knowing but this introduces some doubt in the mind of the proverbial reasonable man.

A perusal of the record of proceedings shows that the accused challenged the production of the medical report and yet the court accepted it without calling the doctor. The doctor's evidence was critical in establishing when the complainant could have possibly contracted the sexually transmitted disease because the accused had put this fact in issue.

Having regard to the paucity of evidence, inconsistencies and questionable behaviour of the complainant in the circumstances of this case, I am of the firm view that it was wholly unsafe to convict the accused.

It is accordingly ordered:

1. That the conviction and sentence be and are hereby quashed and set aside.

2. The accused is found not guilty and acquitted.

3. The registrar be and is hereby directed to tissue a warrant of liberation of the accused from prison forthwith.

DUBE J: agrees…….