SIMBARASHE GIBSON
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND MAVANGIRA JJ
HARARE, 18 September 2012 and 20 February 2013

CRIMINAL APPEAL

J. Dondo, for the appellant
Mrs S. Fero, for the respondent

MAVANGIRA J: The appellant was arraigned before the Magistrates Court at Harare on a charge of one count of rape as defined in s. 65 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*.] He pleaded not guilty but was convicted after a protracted trial. Upon conviction he was sentenced to 12 years imprisonment of which 5 years imprisonment was suspended for 5 years on condition of future good conduct.

The appellant now appeals against conviction and sentence. He raises thirteen (13) grounds of appeal against conviction and two against sentence. The respondent has aptly summarised the appellant's grounds of appeal against conviction, which summary I find to be a true reflection of the essence of the same. The summary is in the following terms:

"i) The court *a quo* erred in convicting the appellant on the basis of the complainant's evidence which was not credible because she gave two inconsistent and irreconcilable statements to the police and her evidence in court was contradictory to the 2 different statements given to the police.

ii) The court *a quo* erred in convicting the appellant where there was no evidence adduced to corroborate complainant's evidence.

iii) The court *a quo* erred in accepting the evidence of the complainant despite the inconsistencies and rejecting that of the appellant when his version of events was reasonably possibly true.

iv) The court *a quo* erred and misdirected itself by calling Doctor Okwanga as a

witness after the state and defence case had closed. This was tantamount to calling evidence to rebut the defence version.

v) The court *a quo* erred and misdirected itself by refusing the defence the right to reply to the submissions by the state when it was clear the state had filed its submissions after the defence."

The outline of the State case as presented to the court by the State was to the effect that on 29 August 2010 at 6.00 hours the complainant, an 11 year old girl, passed through the appellant's business premises. She was on her way to Dzivarasekwa in search of her relatives. As she was walking past, the appellant called her and asked her where she was going. He asked her if she had bus fare for her journey. She said that she had no money and he gave her $2.00 for bus fare. This was in the presence of one John, a security guard at the appellant's business premises.

At Dzivarasekwa the complainant failed to locate her relatives. She went to Dzivarasekwa police station where she remained until 31 August 2010. She went back to the appellant's place arriving there at about 15.00 hours. She saw the security guard John and asked to see the appellant. She was directed to the receptionist Emelda who showed her into the appellant's office. The appellant told the complainant to go and sleep at a cottage behind the garage. She slept in the room. During the night the appellant came and joined the complainant in the room where she was. He got into the blankets in which she was and raped her. In the morning the appellant gave the complainant US$80 to buy what she wanted. He threatened her not to tell anyone about the incident or she would be arrested.

The complainant went to Mutare where she made a report at Dangamvura Police Station from where the matter was referred to Southerton Police Station.

On a perusal of the evidence adduced before the trial court as recorded in the record of proceedings the following are discernible as the circumstances of the alleged sexual offence. These are that the complainant met the appellant for the first time on 29 August 2010. She spent the nights of 29 and 30 August 2010 at Dzivaresekwa Police Station. On 31 August 2010 she was taken to Glen View 2 police Station from where she went back to the appellant at around 1500 hours. She slept at the appellant's company premises on the night of 31 August and 1 September 2010. She was raped on the night of 1 September 2010. She was given money by the appellant on the morning of 2 September 2010. She arrived in Mutare on the same day and on that same day Mrs. Jongwe took her to the police and the offence was discovered. A medical examination conducted the following day revealed a fresh tear on the

hymen and a discharge from her vagina. The doctor concluded from these observations that the complainant may have been sexually abused and that the discharge may have been a sexually transmitted disease. He said that his findings were consistent with her allegations. The complainant named the appellant as the perpetrator.

In his defence outline the appellant denied raping the complainant or committing any other offence. He stated that the charge is fabricated and was meant to extort money out of him but because he resisted the attempts to extort money out of him, this led to his arrest. He rather portrayed himself as a Good Samaritan who offered assistance to the complainant out of pity for her dire situation. In his evidence the appellant confirmed or did not dispute all other events except the alleged spending of the night of 31 August 2010 to 1 September 2010; he also denied the rape.

In its analysis of the evidence placed before it the court *a quo* found the following facts to be common cause. The appellant attracted the complainant's attention on 29 August 2010. He asked the complainant where she was going. He gave her $2.00 on the first day of their meeting and the complainant returned to the appellant's company premises on the third day after their meeting. He gave her money to buy school uniforms. The complainant made a report of rape in Mutare on the day that she left Harare for Mutare after being given money by the appellant. The complainant was medically examined the day after she made the report. The medical report, exhibit 3, stated that penetration had been effected. The examining doctor also gave *viva voce* evidence to the effect that he had noted a fresh tear on the vagina when he conducted the examination on 3 September 2010.

The applicable law in matters of this nature was enunciated resolutely in *S* v *Banana* 2000(1) ZLR 607(s) where at 613 B GUBBAY CJ stated:

> "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."

He then stated at 614 E-G:

> "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 the approach advocated in South Africa….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."

and at 614 H to 615 A

> "It is, of course, permissible in terms of s.269 of the Criminal Procedure and Evidence Act. (*Cap 9:07*) for a court to convict a person on the single evidence of a competent and credible witness. The test formulated by DE VILLIERS JP IN *R* v *Mokoena* 1932 OPD 79 at 80 was that the evidence of a single witness must be found to be "clear and satisfactory" in every material respect."

At 615 E-H he stated:

> "In Zimbabwe, much the same approach has been adopted. In *S v Nyathi* 1977 (2) RLR 315(A) at 318 E-G, LEWIS JP warned that the test in *R* v *Mokoena supra* is not to be regarded as an inflexible rule of thumb. There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence, a commonsense approach must be applied. If the court is convinced beyond reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory. See also *S* v *Nathoo Supermarket (Pvt) Ltd* 1987 (Z) ZLR 136 (S) at 138 D-F.
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> Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution."

It was also held in the *Banana* case *supra*, that the cautionary rule in sexual cases is based on an irrational and outdated perception and has outlived its usefulness.

A perusal of the court *a quo's* judgment shows that the court was alive to the fact that sexual offences require special treatment. The court found that the merits of the 11 year old complainant based on her simple and chronological narration of events were without question. On that basis the trial court could properly convict the appellant even without corroboration. However, there was corroborative evidence placed before the court in the form of the medical report as well as the examining doctor's evidence. The evidence of Lillian Madzivadondo also corroborated the complainant's in material respects.

The court has derived much assistance from both counsel's extensive heads of argument to which they both conscientiously addressed their minds.

The respondent's counsel rightly conceded that the complainant's testimony was at variance with the state outline appearing in the record of proceedings. She also correctly highlighted the fact that two statements were recorded from the complainant pertaining to the rape allegation. One was recorded at Dangamvura Police Station not by the officer that she initially told about the rape but by another at about 8:00pm on 2 September 2011. The second

statement was recorded on an undisclosed date at Southerton police Station by yet another officer who had presumably taken over from a different officer who had been arrested for extortion. Whereas the complainant's testimony is in line with the statement recorded at Southerton, the State outline appears to have been prepared on the basis of the statement recorded at Dangamvura. State counsel also rightly observed that the major difference between the two statements is the description of the manner in which she was raped. Furthermore, that what is of significance is that events which occurred prior to the rape; the place where the offence was allegedly committed, the identity of the assailant, the allegation that she was raped and the events after the rape, particularly, that the complainant was given money by the appellant, all remain unchanged in both statements. Thus the divergence between the two was not so gross as to warrant rejection of the complainant's evidence by the trial court on that basis. By the same reason this court would not interfere with the trial court's decision to readily accept the complainant's testimony as the truth of what had transpired. This is particularly so regard being had to the fact that an appeal court will not readily interfere with a trial court's findings on credibility such being the trial court's domain. It also of significance that in her testimony the complainant said that she was raped at gunpoint. Although he denied the charge the appellant confirmed that he owned a pistol which at one point the complainant saw.

The trial court's acceptance of the complainant's evidence as reflecting the truth is justified on the evidence adduced before it. Before 29 August 2010 the 11 year old complainant was a total stranger to the appellant. She was properly warned by the court to tell the truth. She gave a simple and straightforward narration of what she said transpired, most of which events were confirmed by the appellant. She was positive and unequivocal about her assailant's identity. She exhibited no motive to lie against him neither was any attributed to her. The appellant had extended generosity to her in her hour of need. The court *a quo* consequently posed the following, somewhat rhetoric, question: "The court would ask if accused is denying sexually abusing her; why complainant would be so evil to betray a Good Samaritan in the accused's standing who had rescued her?" (*sic*).

An examination of the appellant's defence on the other hand reveals the following. The contention in his defence that the charges against him were a fabrication by the police who were bent on extorting money from him does not hold especially when regard is had to the fact that the police in Mutare got to know of the allegations first before the police in Harare were made aware of them. The appellant also claimed in his defence that he was

impotent. Although his doctor testified *inter alia* that the appellant could not perform any sexual act, he was unable to explain how the appellant had fathered a child some 4 years before, a child that the appellant initially said was his. Another curious aspect of the defence case is that although the defence outline stated that the night watchman was one Itayi Tom, it was one Remember Chiripanyanga, a bus cleaner, who testified and claimed that he was the guard on duty on the night of 1 September 2010.

For the above reasons the first three grounds of appeal as summarised above do not hold. As regards the trial court's decision to call Doctor Okwanga, it cannot in the circumstances be construed as an attempt to adduce evidence to rebut the defence version. Section 232 of the Criminal Procedure and Evidence Act, [*Cap 9:07*] empowers a court to *mero motu* subpoena a witness whose evidence is essential to the just decision of a case. Doctor Okwanga was subpoenad by the court *mero motu* for the purpose of ascertaining the effects of diabetes insofar as issues of sexual intercourse are concerned.He was meant to give a second independent opinion on the subject. The doctor who had testified earlier had been non committal on the subject and there had not been produced any proof of any tests conducted by the doctor on the appellant. In any event, it is common practice by the courts where expert medical opinion is required on a disputed or unclear point, to call a neutral party in the form of a registered government medical practitioner to assist the court. At the end of the day the trial court analysed the totality of the evidence and not merely the subpoenad doctor's evidence. The trial court then proceeded to justifiably convict the appellant.

The last of the grounds of appeal against conviction as summarised is that the trial court misdirected itself by refusing the defence the right to reply to the state's submissions. With regard to this ground state counsel has rightly observed that on a perusal of the record of proceedings there is no indication that the appellant intended to exercise that right and was denied the opportunity to do so by the court. On an overall consideration of the evidence that was adduced before the trial court it would appear that the trial magistrate's conviction of the appellant cannot be faulted as it is supported by the evidence. The appeal has no merit and cannot succeed.

With regard to the appeal against sentence, the first ground raised is that taking into account the personal circumstances of the appellant the sentence imposed is unduly harsh and severe. Secondly, that the sentence is out of line with sentences imposed in similar circumstances. Though brief, the trial magistrate's reasons for sentence show that he took the relevant considerations into account in arriving at the sentence that he did. Furthermore, it has

not been shown how the sentence is not in line with sentences passed in similar circumstances. On the other hand state counsel cited the case of *S* v *Nyaminda* 2002 (2) ZLR 607 wherein it was held that a rape perpetrated on a young girl should attract a sentence of at least 10 to 12 years imprisonment. In *casu* by reason of the appellant's personal circumstances, a sentence within the expected range was imposed but a substantial portion thereof was suspended on condition of future good conduct. There is no merit in the appeal against sentence which appeal must also fail.

In the circumstances the appeal is dismissed in its entirety.

HUNGWE J agrees