Judgment No. S.C. 115/83 Crim.
Appeal No. 202/83

KILLION FREEDOM MANHAMBARA v THE STATE

SUPREME COURT OF ZIMBABWE,
GEORGES, CJ & BECK, JA,
HARARE, OCTOBER 24 & NOVEMBER 8, 1983.

The appellant in person
P.J. Batty, for the respondent

GEORGES CJ: The appellant was charged with having raped Catherine Ndebele on 18 December 1982. He was convicted and sentenced to four years' imprisonment with labour.

The appellant is a member of the Zimbabwe National Army - a corporal and a section leader. He comes from the Mount Darwin area. At the date of the offence he was stationed at Keswa School and charged with patrolling the Manasa area. He said he first saw the complainant when he arrived at her kraal and she gave him water on his request, but she denies this meeting.

The day after this alleged meeting his group camped at a water-hole and he set off, accompanied by a member of the Zimbabwe Republic Police, in search of cigarettes which he bought at Msipa Store. On their way back they met a group of people who were walking in the direction of Msipa's Store. Among them was a girl, Thembile, to whom the policeman proposed love - presumably meaning indulgence in sexual activity. Thembile's younger sister was present and the appellant sent her to call the complainant who was among the group they had met.

The complainant told him that she wanted to go to await the arrival of her brother who was arriving that day at the station - meaning the bus stop. The appellant appears to have gone back with the group towards Msipa's Store.
Some of the group remained at the store while the complainant continued towards the bus stop, the appellant walking with her. Thembile and the policeman were walking ahead.

The complainant's evidence is that the soldiers (presumably the appellant and the policeman) were saying to them that they looked after dissidents, which they denied. The appellant's version is that he was proposing love to the complainant which she accepted.

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The complainant testified that after they had passed the store the appellant placed his rifle against a tree, held her by both her arms and "dragged her into the bush. He held her up as though she was a baby, threw her on the ground, removed her panties and had sexual intercourse with her. The magistrate noted that the appellant was a powerfully built, broad shouldered young man about 5’8" to 5'10" in his early twenties, while the complainant was about 14 years old and 4'8" tall.

The complainant said that she was crying as he had intercourse with her and the appellant told her that he did not want to hear her make a noise. The spot where this sexual attack took place was about 100 - 200 metres from the point at which she had left the group.

Having had sexual intercourse with her he left.

She also left and walked away - in what direction it is not clear. She met a group of soldiers to whom she reported that she had been raped. They took her to other soldiers to whom the report was also made. She was then

taken to her kraal. Her brother in due course arrived and learnt of the incident. His attitude was that she could no longer go back home because she had had sexual intercourse with the appellant.

The appellant’s story was that the intercourse had been entirely voluntary. Not only had she reciprocated his expressions of love but she had spared him the trouble of taking her panties off when he attempted to do this and had done it herself.

In his outline of defence the appellant stated that at one stage when he was alone with the complainant, the policeman and the other girl having gone ahead, he had told her not to be afraid of him and that if she showed signs of being frightened of him there was no need to be because he was not the sort of person who frightened people. Indeed she should tell him if she was frightened. She said she was not frightened and he then proposed sexual intercourse. She replied that the others would leave her when they went to await her brother’s arrival. He pointed out that they were behind so they could not leave her behind. He then asked her how old she was. At first she told him 17 years and then at last admitted to being 14. They then had sexual intercourse and when it was over she told him that she could not go and await the arrival of her brother because she had slept with him. Asked by the magistrate what she meant by that he replied that she meant that he had raped her. Sometime later the complainant had been brought to the base camp. At that stage the appellant was there and he states in his outline that he asked her what had

happened. Her reply was that she could not go to await the arrival of her brother because the others had left her and again because he had raped her. None of this was put to the complainant in cross-examination. The appellant was, however, cross-examined on this conversation He denied that he had raised the issue of fear because the complainant had seemed to be afraid. He had merely wanted to be certain she had accepted his proposal regarding him as an ordinary civilian and not as a soldier. He stated that when the word "raped" had been used to convey what the complainant had said in explaining why she would not go to meet her brother this had been a misunderstanding.
The word the complainant had used meant that she had been "fornicated". When asked to explain why the complainant, having had intercourse with him, had immediately thereafter complained of rape he replied that Thembile must have frightened the complainant about the affair she had had with him warning her that her brother was a cheeky man.

In his extra-curial statement made three days after the incident on 21 December 1982 the appellant had stated:-

> "When I proposed love to her she consented and I had sexual intercourse with her. After I had finished my friend came and spoke to me and the girl, and the girl said that she was going to the station. We then left her. What surprised me was her mentioning that she had been raped."

This is a significantly different version of events since his evidence makes clear that he knew immediately after the intercourse that the complainant was no longer continuing on her original mission to meet her brother.

The complainant was medically examined some four days after the incident. She showed no signs of external injury. The doctor found that she was menstruating when raped, that her hymen showed fresh perforations and that a one finger exploration of her vagina was painful.

The trial magistrate found that the complainant was a credible witness who gave her evidence in a straightforward manner. She impressed him as "a very unsophisticated shy communal dweller". In his heads of argument Mr Batty points out that in reaching that conclusion the trial magistrate overlooked the fact that the complainant must have misled the court when she stated that the appellant spoke to her in Shona and she was not under- standing him. The appellant insisted that he spoke Sindebele and after a short test the interpreter expressed the opinion that the appellant could be understood in Sindebele though he had difficulty in pronouncing some words.

Whatever the complainant may have meant when she said that she was not understanding the appellant, the fact is that her evidence indicates that at

some stages she did understand him. She testified for example

> "The soldiers were saying to us, 'You look after dissidents', and we said, 'No'."

Subsequently she said:-

> "He then had sexual intercourse with me. At that stage I was crying. As I was crying the Accused said to me 'I do not want to hear you making a noise'."

The complainant was clear that she did not understand Shona. If she did understand what was being said Sindebele must have been spoken. The apparent contradiction was not explored. It may be that the appellant spoke both Shona and Sindebele. Even a verbatim record may not convey the total atmosphere of a hearing and I would hesitate to fault the trial magistrate's assessment of the complainant's credibility on the basis that he has not said that he took into account that contradiction.

The trial magistrate correctly concluded that the complainant's story was not corroborated. He found, however, that the appellant had been clearly an unsatisfactory witness and had not told the truth. I see no reason for disturbing this finding nor do I understand Mr Batty to contend that it should be disturbed.

Mr Batty, however, argues that the magistrate failed to take into account the likelihood that the complainant had an interest or bias adverse to the appellant. He cited the dictum of QUENET FJ in Ellis v Regina 1961 R & N 468 at 471. The learned judge quoted with approval the dictum of DE VILLIERS JP in R v Mokoena 1932 OPD 79 at 80:

> "Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, etc., etc. "

In Ellis v Regina, supra, the Court held that the trial court had used fallacious reasoning in concluding that the single witness was credible. In Bvundura v S Supreme Court Judgment 125/82 in which the dictum was again

cited, the single witness was an employee whose opportunity for committing the theft of which the accused had been convicted was as ample as that of the accused. Shifting the blame to the accused if she was the guilty person was the obvious thing to do.

The only sense in which the complainant in this case can be said to have an interest adverse to the appellant

appellant is in the sense that she claims to be the victim of the crime, a situation very different from that in Bvundura v S, supra, where the witness was a likely accused. If the principle is applied as consistently as suggested it could lead to the result that an accused person could never be convicted on the sole testimony of the victim of the crime. This seems undesirable.

The appropriate test appears to be the risk of false incrimination. In Mupfudza v S Supreme Court Judgment 124/82 BARON JA, dealing with cases in which the cautionary rule should be applied, stated at page 5 of the cyclostyled judgment

> "... in all such situations the Court must not only believe the suspect witness but must in addition be satisfied that the danger of false incrimination has been excluded...
>
> Ideally the court will rely on corroboration, in its stricter sense, implicating the accused. But even in the absence of corroboration there may be circumstances which can properly satisfy the court that the danger has been excluded. These circumstances do not lend themselves to close description; the nature and sufficiency of the evidence in question will depend on the nature of the facts of the particular case."

BARON JA then quoted with apparent approval the judgment of SCHREINER JA in R v Noanana 1948 (4) SA 399 (AD) at 405 in which the judge pointed out that the risk of a wrong conviction

> "... will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice

and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

This dictum has been elucidated by LEWIS JA in Mubaiwa v S Appellate Division. Judgment 170/80 who stated that it amounted to this:-

"First of all the court has to properly warn itself.
of the dangers of accomplice evidence having done so, then by contrasting the evidence of the accomplice with that of the accused and viewing it against all the surrounding circumstances and the general probabilities of the case, it has to be satisfied beyond reasonable doubt that the danger of false incrimination has been eliminated."

A reading of the magistrate's judgment makes it clear that he carefully and correctly directed himself on the law. He asked himself whether the complainant was credible. He satisfied himself on that point. There was an area of uncertainty already mentioned as to whether the complainant understood the appellant with which I have already dealt and in relation to which I have concluded that there cannot be said to be a misdirection.

The magistrate warned himself about the danger of convicting the appellant on uncorroborated testimony.
There is no specific mention of finding reasons for eliminating the likelihood of false incrimination but the analysis indicates this as the underlying purpose.

The complainant was certainly consistent in her behaviour, She made a report to the first group of persons she met after the incident. She had not been surprised in the act or in compromising circumstances with the appellant. No

reason is suggested in the evidence, and the appellant could suggest none, why a girl who had shortly before co-operated in an act of intercourse by removing her panties should almost immediately thereafter complain of rape. The magistrate found the complainant to be a shy communal dweller. All the probabilities are

against a 14 year old girl of that background co-operating in having sexual intercourse with a man who was for all practical purposes a stranger in the bush in an area not far removed from her friends. All these matters the magistrate evaluated. He pointed out that their meeting that day was fortuitous and not by pre-arrangement. The appellant himself significantly testified that he had told her not to be afraid. The reason he gave for so doing - that he did not want the fact of his being a soldier to influence her response to him - is unacceptable. If she had been as co- operative as he says she was, walking hand in hand with him, the idea that she may have been afraid would not have occurred to him.

The appellant gives evidence suggesting that some efforts were made after the event to have the problems created resolved by payment of damages as for seduction.
This in my view does not affect the evidence relating to the nature of the appellant's act.

Any case in which an accused person is convicted of rape on the evidence of a complainant which is not corroborated clearly requires careful review. I am satisfied, however, that in this matter there has been no misdirection in law and no error in the assessment of the facts.

I would accordingly dismiss the appeal.

The sentence plainly falls within the accepted range and is confirmed.

BECK JA: I agree