

**MUNYARADZI KEREKE**  
v  
**(1) FRANCIS MARAMWIDZE (2) THE PROSECUTOR GENERAL**  
**N.O.**

**SUPREME COURT OF ZIMBABWE**  
**UCHENA JA, CHIWESHE JA & KUDYA JA**  
**HARARE: 15 NOVEMBER 2022 & 31 MAY 2024**

*T.W Nyamakura* and *L.Madhuku*, for the appellant

*C.Warara*, for the first respondent

No appearance for the second respondent

**KUDYA JA:**

**Judgment No. SC 53/24**  
**Criminal Appeal No. SC 257/21**

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- [1] The appellant appeals against the dismissal of his appeal against conviction and sentence by the High Court (“the court *a quo*”) on 21 May 2019.
- [2] On 11 July 2016, the appellant was convicted by a Regional Magistrate (the trial court) at Harare of one count of rape. He was sentenced to 14 years’ imprisonment of which 4 years imprisonment was suspended for 5 years on the customary conditions of future good conduct. Dissatisfied, he unsuccessfully appealed to the court *a quo*, against both conviction and sentence.
- [3] The second respondent (the Prosecutor General), did not participate in the appeal. He filed a letter with the Registrar of this Court in which he indicated that he would abide by the decision of the court.

## THE BACKGROUND

- [4] The matter proceeded by way of a private prosecution by the first respondent, in his capacity as the guardian of NT (the complainant). He was appointed the legal guardian of the complainant and her elder sister [TT] on 9 December 2008. He is the two girls' maternal grandfather and father of their mother Chipo. He is also the father of Philippa and Kingstone (the husband of Sally). On the dissolution of the girls' biological parents (Chipo and Richard)'s customary union, Chipo's parents (the first respondent and Elizabeth) took the two girls into their custody at their Greendale house. At all material times Chipo resided in the United Kingdom, while Richard lived in the United States of America.
- [5] Richard is the elder step-brother of Patience, the wife of the appellant. Richard's mother died when he was 7 years old. His father married Patience's mother Amy and begot Patience and Calvin. **Judgment No. SC 53/24  
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- [6] The appellant is a polygamist. He consummated a customary union with Patience in 2007. At the time of the alleged rape, the appellant had two sons (MM and KM) with Patience, who were 4 years and four months old respectively. He rented a house for them in Vainona Harare. The house was guarded 24 hours a day by security guards.
- [7] The private prosecution prevailed against indomitable hurdles placed in its way by a generally lackluster investigation by the police. It also overcame the spirited refusal by the Prosecutor-General to prosecute the appellant and his unlawful refusal to issue a certificate *nolle prosequi* (not wish to prosecute), to the first respondent. The requisite certificate constitutes a condition precedent for the institution of a private prosecution

by a private party imbued with a substantial and peculiar interest in the matter. See *Sengeredo v S* CCZ 11/14 at p 4; *In Re: Prosecutor-General of Zimbabwe on His Constitutional Independence and Protection from Direction and Control* 2017 (1) ZLR 107 (CC) at 113; *Telecel Zimbabwe (Pvt) Ltd v Attorney General of Zimbabwe NO* 2014 (1) ZLR 47 (S) and *Levy v Benatar* 1987 (1) ZLR 120 (S) at 121G.

In addition, the appellant fervently fought to avoid the institution of the private prosecution until his antics were stopped by the Constitutional Court. By the time the private prosecution commenced in earnest, a period of 5 years had elapsed from the time the alleged offence was committed.

- [8] The record of proceedings shows that after the allegations came to light, under the guise of fighting corruption, the appellant (in person or by proxy) embarked on a one-sided barred crusade against senior ZANU (PF) politicians, his former boss and governor of the Reserve Bank of Zimbabwe (RBZ or central bank), the former director of the RBZ's Financial Intelligence Unit, the Director-General of the Central Intelligence Organization and one of his divisional directors. The record further shows that the appellant also levelled unfounded and unproven allegations of misconduct against any one he perceived to be working in cahoots with the complainant, including one David Butau, the first respondent and his wife and the private prosecutor. It must be recorded, in his favour, that the record further shows that he flighted in the public print media a public apology to his former boss and governor after his conviction by the trial court.

## **THE TRIAL**

[9] A total of 15 witnesses testified at the trial. These comprised eight prosecution witnesses, six defence witnesses and a single witness called by the trial court. A total of 19 documentary exhibits were produced.

[10] The appellant was charged, firstly, with one count of indecent assault on TT (born on 1 September 1995) and secondly, of one count of rape on NT (born on 4 June 1999). The two girls are sisters. The appellant is married in a polygamous union to their paternal aunt, Patience. He did not stay with her but would occasionally visit her at will. The aunt often invited them to her Vainona home over weekends and school holidays to “play” with her two sons.

[11] The respective dates of the alleged indecent assault and rape were an unknown date in March 2010 and 21 August 2010. The two sisters were 14 and 11 years old. When they testified on 11 January 2016, they were 20 and 16 years old.

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[12] The trial court acquitted the appellant on the indecent assault charge on the basis that the prosecution had led insufficient evidence to sustain a conviction beyond a reasonable doubt. The court found that TT did not make her first report of indecent assault to the two witnesses who testified on that report. She had done so to Phillipa, who was not called to testify. It therefore disregarded the evidence of these two witnesses for the reason that it constituted inadmissible hearsay. The trial court proceeded to assess whether or not her testimony, standing on its own, established the offence of indecent assault. This is how it did so at p 29 of its judgment:

“We are left with the evidence of complaint only. Let us see if it is satisfactory enough and reliable to find a conviction on its own. The fact that she had to wait for the suggestions of Phillipa to report the assault will obviously have an effect on her credibility especially when we consider that she was grown up aged 15

years. She was also aware that what was done to her was wrong. Also accused never threatened her. Also, when she was testifying, she failed to relate much detail surrounding the sexual assault. She could not even tell the court the position she was in when the accused allegedly fondled her breasts and buttocks and kissed her; she could not even tell the position the accused was in when he allegedly fondled her. She could not recall whether they were sitting or standing. Her evidence lacks detail which is not expected of a girl of her age and the level of her education at the material time. This coupled with the fact that she waited to be asked whether she was sexually abused by the accused makes her evidence to be unsatisfactory.

The evidence of the prosecutor as regards count 1 falls far short of proving the accused's guilty (*sic*) beyond any reasonable doubt, since there is so much doubt which remains in the mind of the court. Like whether the complainant was really indecently assaulted by the accused or she felt she cannot be left alone when the second complainant was relating her ordeal to Phillipa and Sally.”

The trial court was therefore acutely aware of the requirements for assessing the credibility of a complainant. It did not, however, make any adverse findings of credibility against TT. The uncontested acquittal makes it unnecessary for this Court to advert any further to the evidence pertaining to this charge. **Judgment No. SC 53/24  
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[13] The complainant gave a graphic account of the rape incident. She was good with babies. Her aunt invited her to her Vainona home to play with her infant sons, especially the younger one. She was there between 20 and 27 August 2010. She shared the bedroom with her paternal grandmother, Anna. Anna slept on the bed while she slept on a floor mat. She was awoken from sleep early on Sunday morning (22 August 2010) at 3 am by her aunt to baby sit and soothe the restless and crying KM to sleep. The aunt went into the kitchen to prepare food for the appellant, who sat in the sitting room and appeared to have just arrived at the house. She had to pass through the sitting room on her way to her aunt's bedroom. She mentally noted the time from the wall clock, which was in the sitting room. She lulled the baby to sleep. She thereafter watched over him as she sat on the bedroom couch watching TV. She dozed off.

[14] She was awoken by the appellant. He took out a gun, placed it on the dressing table and demanded obedience from her. He sat next to her muttering some things she did not understand. He fondled her breasts and vagina and kissed her all over her face. He pushed her backwards, pulled her black and white dress up and pulled down her pair of peach panties to knee level. He inserted his penis into her vagina. He did some up and down movement. It was painful. He muffled her screams by clamping his hands over her mouth. The sound of footsteps from the lounge stopped him in his tracks. She pulled her panties up and ran to her bedroom. Her grandmother was fast asleep. Her dress was wet. She whimpered herself to sleep. When she woke up, she washed stains of blood from her dress, panties and sheets and hung them to dry on the washing line. She went to church in town by public transport. Her maternal grandmother (Elizabeth) attended the same church. When Elizabeth asked her if she was alright, she retorted that she was. She went back to Vainona, where she retrieved her dress and panties from the washing line and placed them in her bag. She later donated these two items together with other apparels to charity. She stated that she was in physical pain for approximately two days and that she resumed her normal walking gait after that period.

[15] On 23 August 2010, TT came to Vainona from a Joshua Generation Youth camp in Glen Forest. The complainant hinted to her about what had transpired and swore her to silence because she was uncomfortable to talk about it. The two sisters went back to Greendale on 27 August 2010.

[16] On 30 October 2010, the complainant visited her maternal uncle Kingstone and his wife Sally in Avonlea, Harare. She told Sally in the privacy of her bedroom what had happened to her in Vainona. She testified that she was influenced by various radio and TV advertisements, which urged “victims of sexual abuse” to stop suffering in silence.

She was comfortable with Sally. She, therefore, only wanted Sally to let her UK based mother to know what had happened to her. The complainant further permitted Sally to cascade the information to her husband on that day and to Philippa and her maternal grandparents on the following day. The complainant revealed the full details of what transpired in Vainona at her maternal family gathering held in Greendale, in the evening, on Sunday 31 October 2010. The first respondent invited Patience to that family gathering, but she was constrained to attend by transport difficulties. The first respondent duly reported the “rape” at Highlands Police Station (HPS) late that night.

[17] The police at HPS recorded a scene report from the first respondent and a statement from the complainant, her sister and Sally until the early hours of 1 November 2010. The maternal family entourage accompanied a HPS policewoman to Parirenyatwa Hospital, where the two sisters were medically examined. Dr Chanakira examined the complainant and compiled a medical affidavit. He observed a broken hymen with two healed tears on her vagina. A digital examination by one finger elicited no response while two fingers caused her to wince. He concluded that penetration had been effected. The sisters were soon thereafter taken to Mbuya Nehanda Maternity hospital for counselling, and later to Sally Mugabe Hospital (Harare Hospital) for further management. They attended at Harare Hospital on 2 and 9 November 2010.

[18] The case was later transferred to Borrowdale Police Station (BPS), where the complainant was re-interviewed by Woman Constable Monica Kativhu. The officer-in-charge, Chief Inspector Mbiringa conducted an inspection-*in-loco* at the Vainona home and drew various sketch plans on the indications of the complainant, TT, Patience, Anna and Calvin. He first drew the sketch plans from the paternal witnesses on 15

November 2010 before he drew the sketch plan from the two sisters, on 26 November 2010.

[19] The complainant's version of the events that transpired before and after the rape incident was confirmed, in material respects, by the evidence of TT, Sally, the first respondent and Dr Chanakira.

[20] The court, acting in terms of s 232 of the Criminal Procedure and Evidence Act, called the evidence of the deputy head of Emergency and Casualty Department at Parirenyatwa hospital at the time, Dr Chiratidzo Lorraine Jeyacheya, to resolve the dispute of whether or not Dr Chanakira was on duty on 1 November 2010. She produced the duty rosters for casualty doctors for 30 and 31 October 2010 and 1 November 2010, which positively demonstrated that he was on duty during the graveyard hours between 12 am (midnight) and 8 am on 1 November 2010.

[21] The prosecution also called the evidence of Mirirai Chiremba, the then Director of Financial Intelligence and Security at the Reserve Bank of Zimbabwe and his deputy in charge of security Grasham Muradzikwa. The appellant was his superior and a "powerful man" in his position as an economic advisor to the central bank governor. The long and shot of Chiremba's evidence was that a distraught appellant surrendered his RBZ issue CZ pistol, 22 rounds of ammunition and cleaning kit to him at around 7am on Sunday 22 August 2010 at the Harare Kamfinsa Bon Marche car park. The reason he proffered for surrendering it was that he had "a minor dispute with a relative". On Monday 23 August 2010, the appellant generated an RBZ Firearm Rationalization policy document. The document was backdated to 14 June

2010. The appellant coerced and directed Chiremba to back date the return and surrender of the pistol, ammunition and cleaning kit to 14 June 2010. Chiremba sought to surrender the pistol to his deputy who studiously refused to back date it. Resultantly, Chiremba kept the pistol in his own safe at the central bank. The pistol was still in his safe even as he testified in June 2016.

[22] Muradzikwa confirmed that he declined to back date the return of the pistol, for fear that it would raise audit suspicion. He further stated that his master firearms register showed that the appellant never surrendered, as he was required to do, the pistol to him even at the time he unceremoniously left the central bank in 2012. The witness' records showed that the pistol was yet to be surrendered even as he testified in June 2016. He further asserted that, the purported rationalization policy only targeted the appellant and no one else at the central bank.

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[23] The evidence of the two security gurus at the RBZ showed that the appellant had a pistol on Sunday 22 August 2010 at 7am.

### **THE DEFENCE CASE**

[24] The appellant denied the rape allegation. The essence of his defence was an alibi. He stated that he visited his Vainona home with his elder brother Cletos Kereke on 20 and 21 August 2010, between 8 pm and 8.20 pm. He went to Vainona on the first date, to pay his security guards and alert his mother-in-law (Anna) that his wife and son would be home on the following day. The son had been hospitalized on 12 August 2010 and was discharged at midday on 21 August 2010. The appellant went back to Vainona, on the second date, to see whether the mother and son had settled in. He left Vainona and

returned to the medical complex he was building in Arundel Harare. He was there until 8.55 pm and left for his Mandara home, where he arrived at 9 pm. He left the following morning at 8 am. He produced his nine paged detailed warned and cautioned statement as an exhibit. In the statement, he detailed his movements between the medical complex, Vainona and Mandara. He, however, failed to mention therein that the security guards at his Mandara residence kept an occurrence book (OB) in which they recorded any comings and goings.

[25] The appellant's wife, Patience, confirmed that the complainant was at her home between 20 and 27 August 2010. She also affirmed that Anna, Calvin, her elder son, and their 14-year-old cousin, the gardener, maid and guards were also at the Vainona home. She further confirmed that her husband and his elder brother paid her a fleeting visit between 8 pm and 8:30 pm on 21 August 2010. He did not return to the house until 23 August 2010. She asserted that she never had a couch in her bedroom. She disputed complainant's version concerning the alleged rape. She only received a report of the rape from the first respondent on 1 November 2010. She immediately telephonically alerted the appellant.

[26] She recalled that between the date of the rape and the report, her two nieces had threatened to fix her if she did not pay their outstanding school fees. She stated that her first statement to BPS was attested before a legal practitioner (Takudzwa L. Takawira) in central Harare on 10 November 2010, at the instance of the appellant's erstwhile legal practitioners, *Messrs Tawanda Herbert Chitapi and Associates*. She prevaricated on whether she went for the commissioning alone or with her mother and brother. The second statement was recorded by the police at BPS. Her version of the events of

21 August 2010 was generally corroborated by her mother, Anna and brother, Calvin. These two witnesses, however, clearly stated that Patience drove them to the legal practice where their statements were commissioned. Anna intimated, for the first time in her evidence-in-chief that she was in the invariable habit of praying at 6 pm, 9 pm, 12 mid-night, 3 am and 6 am. She therefore refuted her granddaughter's testimony that anything untoward ever happened to her at or around 3 am on 22 August 2010. She, in fact asserted that the complainant was fast asleep at that time. She denied ever seeing the complainant being awoken from sleep in the early hours of 22 August 2010. However, her affidavit statement is silent about her prayer life. She asserted therein that she fell asleep soon after 9 pm on 21 August 2010. The further weakness of her evidence was that her prayer life was not canvassed with the complainant or any of the defence witnesses who testified before her.

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[27] The appellant's brother, Cletos, confirmed the appellant's version. He was with the appellant from Friday 20 August 2010 at 6 pm until they parted company on Sunday 22 August 2010 at 10am. He asserted that the appellant was at his Mandara residence at 9 pm on 21 August 2010. He spent the night there and only left for his Arundel medical complex on Sunday 22 August 2010 at 10am. He also asserted that he attended at the offices of the legal practitioner who commissioned his affidavit statement with Patience, Anna and Calvin. He further confirmed that their respective statements were commissioned separately.

[28] The key witnesses to the appellant's alibi were the security guards at his Mandara residence, Taurai Bwanaisa and Norest Ngoro. Bwanaisa worked at this residence between January 2010 and 2014 before he was redeployed to the Arundel medical

complex. Ndoro joined Bwanaisa in March 2010 and left for personal reasons in November 2011. These two witnesses' evidence was generally the same. It was to the following effect. The appellant resided at the Mandara residence with one of his wives and their three children. They knew her as Tinashe's mother and not by her name Elizabeth. They were always on night duty together. They kept an occurrence book in which they recorded unusual events that occurred at the residence. They were instructed by the appellant on how to complete this book. On 20 August 2010, Tinashe's mother and her children left the residence in the afternoon for their farm in Chinhoyi. They were not at home during the period in question. The long and short of their evidence was that the appellant and Cletos arrived at the residence on 20 August 2010 at 9pm and left at 10 am on the morning of 21 August 2010. The two brothers then returned to the residence at 9 pm on 21 August 2010 and left at 10 am on 22 August 2010. On each occasion, Bwanaisa was the one who recorded this information in the occurrence book.

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They distanced themselves from a certified copy of the occurrence book the prosecutor used to cross examine them. The book was opened on 5 January 2010. It emerged during cross examination that the appellant did not actually stay at the Mandara residence but was an occasional visitor. The only entries in the book related to the appellant's movements on 21, 22 and 23 August 2010, and 28 September 2010. His other occasional visits were not recorded. In addition, the movements of the wife and her children and visitors were not recorded. Nor were the first visits by Ndoro and the RBZ messenger who accompanied him to the residence, when he commenced duty in March 2010. They did not also record the visits made by the various handymen whom they asserted attended to repairs at the residence. Notwithstanding the record in the

occurrence book, the two security guards parroted the appellant's version of the events between 20 and 23 August 2010, almost word for word. They even asserted that he arrived at the Mandara residence at 7:30 pm on 23 August 2010.

[29] Chief Mukanganwi (born Alphaeus Njodzi Chinhamo)'s evidence constituted a muted attempt to elevate the rape allegation to a political conspiracy against the appellant by the triumvirate of a Vice President, National Chairman and Political Commissar of ZANU (PF). He asserted that in June 2013, the appellant was deemed by the triumvirate to be unfit to represent the party in the Bikita West Constituency because of a litany of misdemeanours which included the rape allegation and accusations of purloining confidential documents belonging to the RBZ.

#### **THE FINDINGS OF THE TRIAL COURT.**

[30] The trial court perceived the issues pertaining to the rape to be: **Judgment No. SC 53/24**  
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- (a). whether the appellant was at the Mandara residence at the time of the alleged rape.
- (b). whether the appellant was being falsely implicated for his refusal to pay the two sisters school fees and flight tickets to the United Kingdom.
- (c). whether his political enemies were behind these "fabrications".
- (d). the credibility of the state witnesses and especially the complainants.
- (e). whether the appellant unlawfully inserted his penis into NT's vagina.

[31] The Regional Magistrate considered the totality of the evidence adduced before him in his 51 paged judgment. He assessed and measured the prosecution version against the defence version and the probabilities. He exercised caution and conscious advertence

to the risk of false incrimination. This was despite the abandonment of the cautionary rule and corroboration in sexually related offences in our law, which was pronounced in *S v Banana* 2000 (1) ZLR 607 (S) and *S v Nyirenda* 2003 (2) ZLR 64 (H). The trial court further applied the six criteria for assessing the evidence of young children in sexual matters, which are enumerated in *S v Sibanda* 1994 (1) ZLR 394 (S) and *S v Zulu* SC 228/97 at p 1. These are that young children have unreliable memories, are suggestible and egocentric, are prone to mixing fact and fiction, lie and fantasize about sex. It applied the principles enunciated in *S v Nyirenda, supra, S v V* 2000 (1) SACR 453 (SCA), *S v Makanyanga* 1996 (2) ZLR 231 (H) at 237K and *Schwikkard and van Der Merwe: Principles of Evidence*, 3<sup>rd</sup> ed p 551, on the assessment of the probative value of a report of a sexual assault. It found that her report to Sally, some two months after the incident, was voluntary and not prompted by coercion, intimidation or leading questions. It further held that the voluntariness of the report was not negated by the advertisements in the electronic media, which implored victims of sexual abuse against suffering in silence.

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[32] The trial court found that her conduct and sentient feelings during and after the rape incident were consistent with that of an immature eleven-year-old girl. She was not only ashamed and confused but felt responsible for the incident. The trial court held that such conduct accorded with the psychological response of victims of sexual abuse recognized in local and international literature. Such a response, as exhibited by the complainant and underscored in the *Nyirenda* case, *supra*, at p 73E-F, devalued and invalidated the old and discarded male centered physical and emotional perspective or standard reaction to rape that invariably associated sexual abuse with screaming, crying, torn apparel, preservation of evidence and immediate reporting. The trial court

did not gloss over the purported intrinsic and extrinsic inconsistencies between the complainant's statements to HPS and BPS on the one hand and between her version and the contents of the scene report given by the first respondent at HPS on the other. Rather, on the strength of the pronouncements in the *Sibanda* case, *supra*, at 398G-H, it found that the purported inconsistencies related to peripheral and not to the core issues of the sexual assault. The trial court adjudged her to be a credible witness.

[33] This conclusion was premised on the following findings. Her account of events was graphic and her delivery on the core issues was consistent. On the other hand, the defence evidence was rehearsed, contrived and demonstrably false. An assessment of the totality of the evidence showed that the prosecution had established beyond a reasonable doubt that the defence of alibi was false. The alibi defence did not reach the threshold of reasonable truth. The complainant's version was also corroborated by the medical report and the evidence of the two RBZ witnesses. The credibility of Chiremba and Muradzikwa's evidence was based firstly, on their demeanour. Secondly, on the probabilities. The first probability was that, the appellant, as a financial advisor, lacked the remit to, on his own initiative, initiate, formulate and implement the RBZ firearm rationalization policy. The second was that it was inconceivable that such a policy would solely affect and apply to the appellant and his firearm.

[34] The trial court, accordingly, found him guilty as charged. It sentenced him to 14 years imprisonment of which 4 years was conditionally suspended. The sentence resulted from a finding that the aggravation far outweighed the mitigation.

[35] Aggrieved, the appellant appealed to the court *a quo* on five grounds against conviction and on a single ground against sentence.

### **THE APPELLANT'S CONTENTIONS A QUO**

[36] In the court *a quo*, the appellant impugned the trial court's factual findings on credibility and corroboration. Mr *Mpofu*, for the appellant contended that these factual findings were inconsistent with the intrinsic and extrinsic contradictory evidence of the complainant and that of the other state witnesses. On the strength of the pronouncements in *S v Makomeke* HH 118/11, he argued that these contradictions ought to have been resolved in the appellant's favour. He also argued that the act of sexual intercourse, with panties on her knees, that was described by the complainant, was objectively incapable of performance. Mr *Mpofu* further submitted that the trial court wrongly found that the appellant's alibi could not reasonably possibly be true. He contended that the reasoning process of the trial court cast the burden of proving the alibi on the appellant instead of requiring the prosecution to disprove it. He, therefore, contended that the appellant's alibi ruled out the possibility of any sexual act ever having taken place between the appellant and the complainant. Mr *Mpofu*, relying on the pronouncements made in *S v Isolano* 1985 (1) ZLR 62 (S) at 63C-H, *Hama v NRZ* 1996 (1) ZLR 664 (S) at 670A, and *Chioza v Siziba* 2015 (1) ZLR 252 (S) at 258D implored the court *a quo* to interfere with the factual findings of the trial court on the ground that they were manifestly unreasonable.

[37] He also feebly argued that the sentence was manifestly excessive so as to induce a sense of shock.

### **THE RESPONDENT'S CONTENTIONS A QUO**

[38] *Per contra*, Mr Warara for the prosecution supported the conviction and sentence imposed by the trial court. He argued that the trial court had, on the evidence, properly found that the appellant physically perpetrated the act of sexual intercourse. He submitted that the trial court had correctly dealt with the purported contradictions in accordance with the requirements prescribed in such cases as *S v Simbarashe* SC 16/14 at p 6. He strongly argued that the trial court had also followed the prescription (approved by this Court in *S v Muhomba* SC 57/13 at p 8) by NAVSA JA in *S v Trainor* 2003 (1) SACR 35 (SCA) at para [9] that:

“[9] A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety. The compartmentalized and fragmented approach of the magistrate is illogical and wrong.”

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[39] Regarding the purported alibi, counsel submitted that the trial court placed the *onus* of disproving it on the prosecution. He argued that the trial court correctly found that the prosecution had established that the alibi was patently false. Mr Warara, therefore, urged the court *a quo* to dismiss the appeal in its entirety.

### **THE FINDINGS OF THE COURT A QUO**

[40] The court *a quo* dismissed all the grounds of appeal that were raised by the appellant. It was satisfied that the issues raised on appeal “were fairly and adequately explored and dealt with by the learned trial magistrate.” It further held that “the threshold of the standard of proof required in a criminal case” had been satisfied. It was satisfied that the sexual act objectively took place in the manner described by the complainant.

[41] The court *a quo* further upheld the trial court’s treatment of the purported inconsistencies in the prosecution case. It contextualized the purported inconsistencies in the physical and psychological traumatic realms that often afflict victims of sexual abuse. In this vein, it observed at pp 13-14 of its judgment that:

“The reality is that victims more often than not are assaulted by people they know, are raped in their own home or the home of a relative or friend, are not likely to face force or an armed offender, are not seriously physically injured other than the rape itself, and do not report to authorities. Research demonstrates that most rapes are committed by someone the victim knows.”

And at pp14-15, it pertinently remarked that:

“In addition, many victims cannot or do not resist a rape or other sexual assault. There are several reasons. Many victims fear serious injury or death. In addition, the trauma that is associated with rape and sexual assault may prevent a victim from actively resisting an attacker. Events that are traumatic and overwhelming cause some victims to “freeze with fright” and become immobilized. Decades of research has documented that only about 15 to 20 percent of victims report the crime to police.

There are many reasons for not reporting or delaying a report. Victims are faced with the decision to contact the police in the immediate aftermath of a rape, when they may be traumatized and are trying to make sense of what has happened. In the aftermath of the rape victims experience a wide range of physical, psychological, and emotional symptoms both immediately and in the long term. These symptoms may include fear, anxiety, anger, depression, phobias, panic, disorder, and obsessive-compulsive disorder. A rape victim may experience all, some or none of these reactions. As a consequence, victims may behave in a manner that appears counter intuitive, but is in fact merely a normal expression of the victims’ unique strategy of coping with the overwhelming stress of the assault.”

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The court *a quo*, therefore, rejected the appellant’s reliance on the myths and fallacies that sought to profile and stereotype the conduct of a victim of sexual assault during and after the rape. It underscored that these patriarchal stereotypes had rightly been discarded in the *Sibanda* and *Nyirenda* cases, *supra*.

[42] The court *a quo* also confirmed the propriety of the manner in which the trial court dealt with the appellant's alibi. It rejected the appellant's attack thus:

“Where a court rejects the evidence of an alibi testimony, it follows that the court would have by implication found that the defence of alibi had been disproved. Therefore, in my view, the court correctly adverted to the appellant's defence and rejected it as false. It found that the appellant had been untruthful on not just the issue of the alibi defence but the pistol and his presence at Tovey Road, Borrowdale, on 22 August 2010.”

[43] It further declined to interfere with the sentencing discretion exercised by the trial court. This was on the basis that the appellant was not impugning the process but merely the final product, which in any event accorded with sentences in kindred matters.

[44] The appellant was dissatisfied by the dismissal of his appeal and appeals to this Court on the following grounds.

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### **THE GROUNDS OF APPEAL**

[45] “1. The High Court, with respect, failed to take into account material misdirections that saddled the judgment by the trial magistrate, which when taken in their context should have resulted in the overturning of the appellant's conviction, more particularly in that:

1.1 The trial court failed to apply the correct test in assessing the appellant's defence of an alibi, and in doing so failed to take into cognizance the fact that the respondent led no rebuttal evidence.

1.2 The evidence of former guards Norest Ngoro and Taurai Bwanaisa was rejected on the basis that they had motive to protect the appellant as he was their boss when in fact as of the time of the trial no

employer employee relationship existed and consequently, they had cause to perjure themselves.

1.3 And perhaps the most important factor the court failed to take into account is that the magistrates invented hitherto unknown presumption that if it found that the witnesses at Mandara (*sic*) had been coached then it meant that the witnesses in Borrowdale Norest Ngoro and Taurai Bwanaisa were also coached and this unduly coloured the court's assessment of the alibi evidence.

2. The High Court materially misdirected itself in confirming the magistrate's finding that the witnesses in Mandara (*sic*) Patience Muswapadare Taruvinga *et al*, were coached by the appellant based on an alleged anomaly that their statements were in affidavit form or that they were commissioned by the same legal practitioner. In proceedings as such, the High Court seriously misdirected itself in failing to find that in our law, no requirement exists that witness statement (*sic*) must take a particular form or that using the same legal practitioner by witnesses in a way suggests coaching.

3. The High Court erred with respect in failing to give due regard to the following material inconsistencies in the evidence of NT, the complainant:

3.1 That in her report at Borrowdale Police Station she did not mention the firearm and only did so after being prompted by the first respondent.

3.2 That in their statement both TT and Patience Muswapadare stated that the (*sic*) NT only stated that she had been fondled.

3.3 That her conduct on the morning of the incident and her prevarication in evidence on the dates, the issue of the gun and the fact matrix of

how the rape occurred could only point to a witness not worthy of belief.

4. The High Court, with reference to the appellant's version during the trial, failed to consider that Mirirai Chiremba, could have but did not produce evidence beyond self-corroboration by Muradzikwa and that it was inconceivable that he would have kept a gun he suspected was used in criminal offence without any official documentation. The High Court misdirected itself in finding as it did that Mirirai Chiremba was coerced into signing the form by the appellant as alleged by him or at all.
5. With respect, the High Court materially misdirected itself in overemphasising the rejection of the appellant's witness by the trial magistrate on the basis of unproven allegations of witness coaching. Had the Court found as it was bound to that the respondent led no evidence of coaching or inducement of witnesses, it would have found that the appellant's defence was reasonably possibly true.

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#### **AD SENTENCE**

6. The High Court erred in failing to find that the trial court found that the sentence proposed by the prosecutor was draconian, it could not impose an almost similar sentence contrary to its own finding.
7. For a single count of rape, the High Court erred in failing to find as it should have that sentence of 14 years was so manifestly unjust so as to induce a sense of shock.

#### **RELIEF SOUGHT**

The appellant is seeking the following relief:

1. That the instant appeal succeeds with costs.
2. That the whole judgment of the court *a quo* which is the subject of this appeal is set aside in its entirety and is substituted with the following:

“(a). Appellant’s appeal succeeds.

(b). That the judgment of Mupeiwa *Esq.* in the matter of Francis Maramwidze v Munyaradzi Kereke in the matter under case number CRB R46/16 on 11 July 2016 is set aside and substituted with the following:

‘In the result the accused is found not guilty of the crime of rape and is therefore acquitted.’”

### **THE CONTENTIONS BEFORE THIS COURT**

[46] Mr *Nyamakura* for the appellant submitted that the court *a quo* misdirected itself in upholding the trial court’s finding that the defence of alibi was contrived. He argued that the findings of the trial court in this respect were improperly premised on the police interviews and not police investigations of the defence witnesses. He contended that the lack of investigation was not and could not be cured by the responses given by the defence witnesses under cross examination. He further argued that the lack of investigation could also not be cured by the process of inferential reasoning undertaken by the trial court. He vehemently argued that the alibi having been clearly raised at the earliest opportunity in the appellant’s warned and cautioned statement, the police was legally and duty bound to seriously investigate it. He also submitted that an alibi could not be discharged by credibility findings favourable to the complainant and adverse to the appellant.

[47] Mr *Nyamakura* further argued that the trial court appeared to have placed the onus on the appellant to prove his alibi, when the law cast the onus on the prosecution to disprove it. He relied on *Mushanawani v S* SC 108/22 at pp 12 and 17, *S v Musakwa*

1995 (1) ZLR 1 (S) at 2F-H; *S v Mutandi* 1996 (1) ZLR 367 (H) at 370A-C and *Chimwidze v S* HH 297/15 at p 2. Counsel also contended that, the failure by the prosecution to produce the original OB into evidence, negated the finding of the trial court that the testimonies of the security guards could not be reasonably possibly true. He strongly argued that the prosecution had dismally failed to establish beyond a reasonable doubt that the defence witnesses had been coached.

[48] Counsel also submitted that the sentence was draconian and should for that reason be interfered with by this Court.

[49] The main thrust of Mr *Nyamakura's* submission was however that the trial court and the court *a quo* should have accepted the appellant's alibi and acquitted him of the charge of rape.

[50] *Per contra*, Mr *Warara* for the first respondent supported both the judgment of the court *a quo* and that of the trial court. He submitted that this was not a proper case for this Court to interfere with the factual findings of both these courts. He argued that the witnesses' statements were the outcome of the investigations conducted by the police. Further that it was the proper function of a court to assess the cogency of the evidence adduced during trial by all the witnesses. This can only be done by measuring the evidence in chief against the answers provided in cross examination and comparing them with the totality of the extrinsic evidence from other witnesses, the documentary evidence and the probabilities. He contended that it was in the exercise of such power that the trial court found that the veracity of the prosecution evidence far outweighed that of the defence. It was also on the same basis that it concluded that the defence of *alibi* could not withstand the force of the prosecution evidence. He further contended that the court *a quo* rightly upheld these findings, supported as they were by the totality

of the evidence adduced before the trial court. He also submitted that the proposition by appellant's counsel that an alibi could be considered in isolation of the totality of the evidence was impractical and contrary to law. He relied on *R v Hlongwane* 1938 NPD 46, *S v Mushanawani* SC 108/22 at pp 6-7 and *R v Biya* 1954 (2) SA 514 (A) at 521C-D for his submissions.

[51] Mr *Warara* strongly argued that the findings against the appellant's alibi were properly supported by the findings of the trial court. Firstly, that the appellant had consistently lied. Secondly, that the predominant recording of only the appellant's normal movements on the dates surrounding the date of the rape to the exclusion of real unusual occurrences such as the commencement of duty by Ndoro, Mai Tinashe's and her children's purported prolonged absence from the residence between 20 and 24 August 2010 and the visits by handymen and other visitors to the residence. Thirdly, the dilemma posed to the alibi by the common cause fact that the appellant and Mai Tinashe's monogamous marriage had been dissolved under case No. HC 4254/08 in 2008. Fourthly, the believed and damning testimony of Chiremba and Muradzikwa. Fifthly, the word for word similarities in the appellant and his elder brother's evidence, whose record in the OB showed that he visited and left the residence on 21 August 2010. Sixthly, the practical impossibility that the appellant could have taken 5 minutes to drive from the Arundel medical complex to his Mandara house. He argued that his time of arrival was designed to coincide with his two security guard's OB record. He strongly argued that the quality of the prosecution testimony destroyed his alibi. See *S v Masawi* 1996 (2) ZLR 452. He therefore submitted that the cumulative effect of these factors demonstrated that his guilt was consistent with all the proved facts and was the only reasonable inference that could be drawn from these facts.

[52] In regards to the sentence, he submitted that the long-term emotional damage to NT negated any perceived misdirection or harshness.

[53] He prayed for the dismissal of the appeal in its entirety.

## **THE ISSUES**

[54] The grounds of appeal raise two issues. The first is whether or not the appellant was properly convicted. The second is whether or not the sentence that was imposed on him was appropriate.

## **THE LAW**

### **The burden of proof**

[55] Our criminal law is codified by the Criminal Law (Codification and Reform) Act **Judgment No. SC 53/24**  
[Chapter 9:22] (the Criminal Law Code), which came into effect on 1 July 2006. **Criminal Appeal No. SC 257/21**

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Section 18 of the Criminal Law Code deals with the incidence of onus in criminal matters. The provisions relevant to the determination of this appeal provide as follows:

#### **“18 Degree and burden of proof in criminal cases**

- (1) Subject to subs (2), no person shall be held to be guilty of a crime in terms of this Code or any other enactment unless each essential element of the crime is proved beyond a reasonable doubt.
- (2) Subsection (1) shall not prevent any enactment from imposing upon a person charged with a crime the burden of proving any particular fact or circumstance.
- (3) Where this Code or any other enactment imposes upon a person charged with a crime the burden of proving any particular fact or circumstance, the person may discharge the burden by proving that fact or circumstance on a balance of probabilities.
- (4) Except where this Code or any other enactment expressly imposes the burden of proof of any particular fact or circumstance upon a person charged with a crime, once there is some evidence before the court which raises a defence to the charge, whether or not the evidence has been introduced by the accused, the burden shall rest upon the prosecution to prove beyond a reasonable doubt that the defence does not apply:”

Subsection (1) places the burden to prove each and every essential element of a crime on the prosecution, beyond a reasonable doubt. In similar vein, sub (4) equally places the onus on the prosecution to disprove beyond a reasonable doubt any defence raised by an accused person. On the other hand, subs (2) and (3) merely cast upon an accused person the evidentiary duty to establish his defence on a balance of probabilities. It is axiomatic that the prosecution bears a higher degree of onus than an accused person.

[56] The meaning of proof beyond a reasonable doubt was provided by LORD DENNING in *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB) at 373H, which was cited with approval by DUMBUTSHENA CJ in *S v Isolano* 1985 (1) ZLR 62 (S) at 64G-65A, in the following manner:

“... and for that purpose, the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

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### **THE DEFINITION OF RAPE**

[57] The offence of rape is created by s 65 of the Criminal Law Code. It is not necessary to recite the provisions of this section. Suffice it to say that rape is the forced act of vaginal or anal sexual intercourse by a male person against a female person. The slightest degree of penetration suffices to found the offence. In terms of s 64 (1) of the Criminal Law Code, “a young person of or under the age of twelve” is legally incapable of consenting to sexual intercourse. In the present appeal, by operation of law, as the

complainant was under the age of twelve, she could not consent to sexual intercourse. Any penetrative penial vaginal act on her by a male person would constitute rape.

### **THE POWERS OF AN APPEAL COURT**

[58] It is trite that an appeal court is slow to interfere with either the factual findings of or the exercise of discretion by a trial court. See *ZINWA v Mwoyounotsva* 2015 (1) ZLR 935 (S) at 940F, *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-D, *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A where this Court stated that:

“These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court.”

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[59] In the context of a criminal appeal, the pronouncement made by this Court in *S v Isolano, supra*, at 63B- 64A is apposite.

“There is no doubt that on the record there are contradictions in the evidence of both the State and defence witnesses. Those contradictions standing by themselves as they do on the printed record are not the only basis upon which the magistrate came to his conclusion on the facts. The witnesses appeared before him. He observed their demeanour. He could see which of them were telling the truth or falsehoods. There are many authorities of this court and persuasive authorities from other jurisdictions on the proper approach of an appellate court to the consideration of a decision based on fact. I find the remarks of LORD MACMILLAN in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 (HL) at 590B-D very appropriate in this case. He said:

‘The appellate court had before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case, but it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the

incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion, but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone completely wrong'

See also *Hughes v Graniteside Holdings (Pvt) Ltd* S-13-84 (unreported) at 10-14. The reasoning in the above cases equally applies to the instant case. The magistrate made an adverse finding on the credibility of the appellant and his witness and that finding was based on the facts before him and his observation of the witnesses that appeared before him. There was no misdirection on his finding of credibility. It is my view that an appellate court should not disturb that finding without having been shown that the magistrate's decision on credibility was wrong.'"

The above sentiments patently demonstrate that clearly an adverse finding against an accused person would tilt the scales of justice against him. Once credibility is assessed in this way, the trial court cannot justifiably be accused of the gross misdirection of storing the reasons for its findings in its mind as contemplated in *S v Makawa* 1991 (1) ZLR 142 (S) at 146D.

[60] In terms of s 189 (2) of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (the Criminal Code), a failure to provide material facts upon which a defence is based attracts an adverse inference, which may be used to corroborate the prosecution case. Similarly, in terms of s 257 of the Criminal Code, an adverse inference which may be used to corroborate the prosecution case may be drawn against an accused person who fails to mention in his warned and cautioned statement, any fact material to his defence. The section reads:

**"257 Failure of accused to mention certain facts to police may be treated as evidence**

Where in any proceedings against a person evidence is given that the accused, on being—

- (a) questioned as a suspect by a police officer investigating an offence; or
- (b) charged by a police officer with an offence; or
- (c) informed by a police officer that he might be prosecuted for an offence;

failed to mention any fact relevant to his or her defence in those proceedings, being a fact which, in the circumstances existing at the time, he or she could reasonably have been expected to have mentioned when so questioned, charged or informed, as the case may be, the court, in determining whether there is any evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he or she may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.”

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[61] In our law, a primary court is required to assess the totality of the evidence bearing on the rape. This principle was articulated by this Court in *S v Gwaunza* SC 66/91 and *S v Kaseke* 1996 (1) ZLR 51 (S) at 55D thus:

“In short, the court must, on the totality of the evidence adduced, consider whether the complainant is a credible witness. It is only if the court is satisfied that the complainant is a credible witness that it may proceed to look for some evidence, independent of her testimony, which shows, or tends to show, though such evidence by itself need not necessarily demonstrate, that the appellant was the offender - corroborative evidence: *S v Ngara* 1987 (1) ZLR 91 (S) at 97D.”

In addition, at p 63F, the same court emphasized the need to take into account the immaturity of a young person, in the assessment of its testimony. Again, at p 65B, the Court also remarked that:

“The magistrate also found corroboration in the lies told by the appellant in evidence: *S v Gijima* 1986 (1) ZLR 33 (S) at 38-39; *S v Mhlanga supra* at 78B-C; *S v Katerere* S-55-91; *S v Chigova* 1992 (2) ZLR 206 (S).”

Clearly, the lies of an accused and his witnesses do corroborate the prosecution case.

This position is set out in the *Chigova* case at p 220C-D in the following way:

“If corroboration of the complainant's testimony is required in this case, it is to be found in the pejorative character of the appellant's testimony - see *S v Chigwada* S-206-88; *S v Katerere* S-55-91 - and the evidence of his witnesses who had obviously been suborned to support his false testimony. It seems to me to be established that, because of the clandestine nature of the offence and the defence proffered herein, where an accused person charged with rape is found to be lying, evasive or inconsistent in his evidence, this may be taken as supportive of the complainant's allegations and the lie told in these circumstances may be considered as being of a character which was capable of being corroboration, in the sense that it disclosed a guilty mind”.

[62] In assessing the testimony of a young person of or under the age of twelve the court is further required to take into account the six criteria articulated in the *Sibanda* case, *supra*. In doing so, it must guard against treating the immature young person as a mini-adult person. It must be alive to the fact that young persons generally have great powers of recall on the core issues pertaining to the sexual attack than on the peripheral ones. Thus, any contradictions and inconsistencies that arise in their evidence must be measured against these two broad facets. The process of ascertaining the credibility of the complainant is subject to the general weighing up of the merits and demerits of the prosecution evidence against that of the defence and measuring them against the probabilities and improbabilities. At the end of the day, the court must be satisfied that notwithstanding any defects or contradictions, the truth has been told. See *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139-140 and *S v Madeyi* SC 128/20. In the latter case a 10-year-old girl reported the offence after 8 months and was only examined by a doctor some four years later.

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### **ALIBI**

[63] The treatment of an alibi is settled in this jurisdiction. The manner in which courts must approach the defence of alibi has been set out in several decisions of this Court

and the High Court. Some of the relevant cases, are *Mushanawani v S, supra* at pp 12 and 17, *S v Musakwa, supra* at p. 2F-H and *S v Mutandi, supra, S v Manuwa*, HH 47/12 and *S v Masawi*, 1996 (2) ZLR 472. The principle that emerges from these cases is that the prosecution bears the onus to disprove beyond a reasonable doubt the veracity of the defence of an alibi. On the other hand, an accused person who raises such a defence has an evidentiary burden to prove on a balance of probabilities that it is reasonably possibly true. The defence should be raised at the earliest possible opportunity after an accused person becomes aware that he is under investigation, preferably before he proffers his defence outline in court. This is because the police must be afforded an opportunity to investigate it. Where the defence is raised in the defence outline or at trial, the evidentiary burden to establish it on a balance of probabilities falls on the accused person. However, in terms of s 18 (4) of the Criminal Law Code, the prosecution retains the overall onus of establishing beyond a reasonable doubt that the alibi is false.

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[64] In *S v Mhlanga* 1987 (1) ZLR 70 (S) at 77H-78A, this Court dealt with the appellant's testimony on alibi in the following manner.

“In the instant case the appellant's evidence was not believed. He testified that his wife was living with him during the month of December 1985. He then called his wife to give evidence in support of his "alibi". She testified in support of her husband. She told lies on his behalf. Her evidence differed from the statement she made to the police. Under cross-examination she changed her evidence and told the court that she came to Bulawayo in December for short periods. She could not remember the dates she visited the appellant. She was trying to support his "alibi". Her evidence was false.”

See also *S v Madeyi, supra*.

The treatment of the defence of alibi in the *Mhlanga and Madeyi* cases, *supra*, demonstrates that the veracity of an alibi can be destroyed by contradictions elicited from the defence witnesses in cross examination.

## **THE APPLICATION OF THE LAW TO THE FACTS**

### **Whether the appellant was properly convicted**

[65] The five grounds of appeal against conviction cumulatively assail the propriety of the conviction. Mr *Nyamakura* contended that the court *a quo* erred in upholding the treatment of the defence of alibi by the trial court. He contended that the trial court's factual finding that the alibi evidence of the two security guards was contrived and false, improperly reversed the incidence of onus from the prosecution to the appellant. He contended that it was a gross misdirection for the court *a quo* to place on the appellant the duty to prove his alibi instead of casting the duty to disprove the alibi on the prosecution.

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[66] Mr *Warara* disagreed with these contentions. He supported the trial court's assessment of the security guards' evidence. He strongly argued that the prosecution had placed before the trial court evidence which disproved the defence of alibi beyond a reasonable doubt. He therefore argued that the trial court had correctly incorporated the adverse finding against the security guards alibi evidence into the other evidence that established that the alibi could not reasonably possibly be true.

[67] The trial court was acutely aware that the incidence and level of onus that fell upon the prosecution to disprove the appellant's defence of alibi was beyond a reasonable doubt. Again, on pp 47-48 of its judgment, it stated that:

“It was conceded by the prosecution that the accused is only expected to raise that defence and it is up to the prosecution to disprove it. The cases of *S v Musakwa*, *S v Mutandi* 1996 (1) ZLR 367 (H) and *S v Mhlongo* 1992 (1) SACR 207 (A) at 210D are authority for that proposition. The prosecution has however managed to show that the witnesses called to support the alibi, namely Patience, Calvin, Anna Muswapadare and Cletos Kereke were all influenced and cannot be believed. The prosecution has also demonstrated that Taurai Bwanaisa and Norest Ngoro cannot be trusted with telling the truth and that their evidence is suspect.

.....

Suffice it to say the evidence of the two guards will be difficult to believe in the absence of other concrete evidence because since (*sic*) the accused prevailed on Mr Chiremba to sign exhibit 6B and coached Cletos Kereke and other defence witnesses’ chances are that he coached the two guards.

I also fail to understand why he should decide to go to (the Mandara residence) with his brother...a house where his wife and children were not present leaving (the Vainona house), where his family was. Why would he not allow Patience to cook for her brother-in-law. Why would he go to a house where there was no one”

[68] The court *a quo* affirmed the approach taken by the trial court in dealing with the alibi evidence of the two security guards and the other defence witness, at pp 18-20 of its judgment in these words:

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“The court *a quo* considered the defence witnesses’ evidence. It concluded, after a careful and detailed analysis, that no weight can be attached to this evidence as these witnesses were apparently coached on what to say by the appellant. The court pointed out the anomaly surrounding the fact that the witnesses’ statements were in affidavit form, were commissioned by one lawyer and were given on the same date. He ruled that these witnesses were lying and they were lying at the behest of the appellant who faced serious charges. Where a court rejects the evidence of an alibi testimony, it follows that the court would have by implication found that the defence of alibi had been disproved. Therefore, in my view, the court correctly adverted to the appellant’s defence and rejected it as false. It found that the appellant had been untruthful on not just the issue of the alibi defence but the pistol and his presence at Tovey Road, Borrowdale, on 22 August 2010.

The relevant page of the occurrence book was certified by the police. The two witnesses disowned it. The court also determined that their evidence was a direct effort by the appellant to adduce favourable evidence by influencing them on what to tell the court.

In our view the court *a quo* properly assessed the evidence and correctly found that the State had found the guilt of the appellant proven beyond a reasonable doubt.” (My underlining for emphasis)

The underlined words show that the court *a quo* accepted the adverse factual findings of the trial court against the defence witnesses. It also appreciated the result of a finding of credibility that was favourable to the complainant had an adverse effect on the credibility of the alibi defence raised by the appellant and supported by his defence witnesses. In other words, the court *a quo* was satisfied that, on the totality of the evidence adduced before the trial court, the complainant had told the truth while the appellant had lied. A lie, by any measure, is constituted by evidence which cannot reasonably possibly be true. An adverse finding against the appellant similarly translated to an automatic finding that his witnesses, whose supportive evidence was called at his behest, had also lied.

[69] In our adjectival law, the credibility of any witness is premised upon the intrinsic and extrinsic consistency of the witness' evidence with that of other witnesses and any relevant exhibits. The trial court dealt with the defence of alibi when it determined the issue of whether or not the appellant was at the Mandara residence at the time of the alleged rape. The trial court summarized the evidence of the two security guards. It then assessed and measured the complainant's evidence against the evidence adduced by other prosecution witnesses on the one hand and by the appellant and his defence witnesses, on the other. It also applied the legal requisites that are set out in the *Sibanda* and *Nyirenda* cases, *supra*, for assessing her evidence. It thereafter found her to be a credible witness and conversely found the appellant to be an untruthful witness.

[70] Having called the alibi evidence to support his defence, the trial court could not simply accept such evidence at face value. It was required to measure its cogency in the same

way that all evidence is assessed. The effect of the adverse finding against the appellant's alibi evidence is that a court completely discounts it. Such a finding effectively affirms the credible evidence adduced by the prosecution and assists the prosecution to prove its case beyond a reasonable doubt. A practical reference to how courts implement this principle in the daily functions appears from the cases of *S v Mhlanga* and *S v Madeyi*, in para [64] of this judgment. The application of this principle by the trial court did not amount to a reversal of the onus that fell upon the prosecution to prove its case beyond a reasonable doubt. The submission by Mr *Nyamakura* that it did so is incorrect. It is dismissed for lack of merit.

[71] Mr *Nyamakura* also contended that the trial court's finding that all the defence witnesses were coached was incorrect, as it was not based on any hard evidence adduced by the prosecution. The trial court used the word "coaching" interchangeably with "influenced". In his fifth ground of appeal, the appellant interchanges it with "inducement", and in para. 1.2 of his first ground of appeal, with "motivation". The bases upon which the trial court held that Cletos, Patience, Anna and Calvin (The Vainona witnesses) had been coached is found at p 44 of its judgment. It stated that:

"The above proves to me beyond any reasonable doubt that these witnesses were lying as regards how their statements were recorded and commissioned. There is no other reason for lying on these aspects other than that their statements were pre-recorded before these witnesses went to the police. Even the accused's affidavit statement was pre-recorded; this is clear from the declaration of the officer-in-charge who recorded the statement; and I quote: "I certify that the above statement was made freely and voluntarily by Munyaradzi Kereke who is in his sound and sober senses and tendered through his legal practitioner Tawanda Herbert Chitapi."

The court *a quo*, as shown in para [68] above approved this finding. The fact that the statements of the Vainona witnesses, like the warned and cautioned statement of the appellant, were pre-recorded on affidavit, and that the affidavits had been

commissioned by the same legal practitioner was considered and confirmed to be an “anomaly” by the court *a quo*.

[72] It was common cause that these witnesses are related to the appellant by consanguinity (blood) and affinity (marriage). The trial court held that the evidence of the Vainona witnesses also fell into the category of an alibi, as it effectively sought to distance the appellant from the scene of crime at the time of its commission. It premised its finding that these witnesses had been coached or influenced and suborned by the appellant to adduce exculpatory false evidence on his behalf on the following three bases. The first was that like the appellant’s warned and cautioned statement, their written statements were commissioned by a commissioner of oaths. The second was that they lied (to the trial court) that their respective statements were recorded at BPS, at whose instance the commissioning had been done by a legal practitioner in private practice in central Harare. The third was that the lies were designed to conceal the fact that the statements had been prepared and pre-recorded at the direction of the appellant and his legal practitioner before they took them to BPS.

[73] In analyzing the evidence of the appellant’s wife, the trial court, *inter alia*, stated that she had asserted that she had deposed her commissioned statement at the instigation of the appellant’s erstwhile legal practitioner. The appellant did not assail that finding of fact in the court *a quo* or in this Court. It was common cause that the appellant’s own warned and cautioned statement was also commissioned at the instance of the said legal practitioner. It was also common cause that the statements of these four witnesses (the brother, wife, mother-in-law and brother in-in-law) were also commissioned. The finding by the trial court that these commissioned statements were done at the instance of the appellant and not by the police (as adduced by the witnesses), was also not

impugned. The evidence on record showed that the police neither had the desire, interest nor inclination to commission the statements. This is clearly established by the further common cause fact that, after the submission of the commissioned statements, the police proceeded to record unsworn statements from each of these witnesses. In our view, the police would not have taken this further action had they been involved in the recording of the commissioned statements.

[74] This Court agrees with Mr *Nyamakura* that our law does not prescribe the format in which a statement is recorded nor condemn witnesses' statements merely because they have been commissioned before the same legal practitioner. The import of his submission was, however, that the trial court erred in ascertaining the reason behind the deposition of the commissioned statements and their further commissioning by the same commissioner of oaths. It is an incontestable fact that an affidavit statement carries more weight than an unsworn statement. A deponent to such a statement cannot easily resile from it. He or she may have to contend with the specter of perjury if he or she does so. Such a statement irrevocably binds the deponent to its contents. It seems to us, to be inconceivable that the police would have had any abiding interest in requesting the Vainona witnesses (as adduced by the witnesses) to have their exculpatory statements recorded and commissioned in affidavit form.

[75] The facts that the trial court found proved were therefore that the four exculpatory statements were commissioned at the instance of the appellant and not the police. The affidavits froze and preserved their contents. They inured to the benefit of the appellant. The trial court further found them to be diametrically opposed to the truthful evidence of the complainant. The statements were false. The only reasonable inference

that the court could and did draw from these proved facts was that the witnesses were induced by the appellant to depose to false evidence in both their statements and in court. See *R v Blom* 1939 AD 188 at pp 202-203. The court *a quo* confirmed this finding. It is clear to us that when further regard is had to the close bonds, forged by blood and marriage, between the appellant and these witnesses, we cannot and do not find the trial court's findings to be irrational or outrageous.

In terms of the law, set out in para [58] of this judgment, we can only interfere with a factual finding, if it is based on a wrong fact or principle of law or if it is obviously wrong. The court *a quo* correctly applied the principles of inferential reasoning and found that the four witnesses' sole basis for lying was that they were influenced by the appellant to do so. He had already conscripted them as his defence witnesses before the police even interviewed them. He was the greatest beneficiary of their exculpatory evidence. The findings of coaching were therefore based on circumstantial evidence.

The use of circumstantial evidence to make findings inheres in our law. We therefore find the affirmation of the trial court's finding, in this respect, by the court *a quo* is unassailable. The contention that it could not be properly done in the absence of other evidence is ill taken. As the court reasoned, the other evidence that established coaching was the credible evidence of the complainant, backed as it was by the medical evidence of Dr Chanakira and the gun evidence of Chiremba.

In the circumstances, Mr *Nyamakura*'s submission in this respect is also dismissed for lack of merit.

[76] Mr *Nyamakura* further attacked the trial court's projection of the adverse findings it made against the appellant and the four witnesses to the security guards. He also

assailed the finding by the trial court that the security guards' motive for giving false evidence was to protect their boss. He contended that this was an incorrect finding as they were no longer employed by him at the time that they testified. He further submitted that the prosecution failed to lead evidence in rebuttal of the alibi evidence adduced by the security guards. He contended that the answers proffered by the security guards in cross examination could not subsist as adequate evidence of rebuttal.

[77] In our estimation, a wholesome, rather than a piecemeal consideration of the trial court's reasoning process does not support the attacks. The reference by the trial court to its adverse findings against the Vainona witnesses and its application to the security guards was syllogistic in nature. It was inconceivable that they could have been credible witnesses when the evidence of the complainant had been found to be credible beyond a reasonable doubt. Their evidence could also not have been adjudged credible after the adverse findings against the testimonies of appellant and the Vainona witnesses. A closer scrutiny of the trial court's judgment shows that it further disbelieved the two security guards' concerted rejection of the contents of the certified copy of the occurrence book. The trial court held that the contents of the certified copy of the OB that were canvassed with them during cross examination were accurate. This finding was not challenged on appeal *a quo* and to this court. The failure to do so poses an insurmountable hurdle for the appellant. The scanty contents of the OB established that the security guards were coached to adduce evidence favourable to the appellant. The two guards conceded that their statements to the police and evidence in court were premised on the contents of the OB. Both these documents do not relate to the purported events of 20 August 2010, which they, however, brazenly testified on before the trial court. The only reasonable inference to be drawn from their sudden and remarkable recall could only be attributed to coaching. They both unwittingly

conceded that they were instructed by the appellant on how to complete the OB. Clearly, the condition and contents of the certified copy of the OB shows that it was a hatchet job that was done to support a false alibi.

[78] The other disquieting features of their respective testimonies are enumerated in para [28] of this judgment. It was established in evidence that the appellant did not actually stay at the Mandara residence but stayed in Greystone Park. He would occasionally visit the Mandara residence. The only entries in the book covered the appellant's movements on 21, 22 and 23 August 2010, and 28 September 2010. His other occasional visits were not recorded. In addition, the movements of the wife and her children and visitors were not recorded. Nor were the first visits by Ngoro and the RBZ messenger who accompanied him to the residence, when he commenced duty in March 2010. They did not also record the visits made by the various handymen whom they asserted attended to repairs at the residence. Notwithstanding the record in the occurrence book, the two security guards parroted the appellant's version of the events between 20 and 23 August 2010, almost word for word. They even asserted that he arrived at the Mandara residence at 7:30 pm on 23 August 2010.

[79] A careful reading of the record of proceedings establishes a further factor that demolishes these security guards' evidence. We find it strange, that while the appellant employed security guards at both the Mandara and Vainona homes, only the security guards at the Mandara home kept an occurrence book. The absence of a similar book at the Vainona home strongly suggests that the raising of the Mandara OB book was done after the commission of the offence. It was done to deflect the credible evidence of the complainant. This is supported by the established failure of the appellant to

mention the existence of the OB in his commissioned warned and cautioned statement. In terms of s 257 of the Criminal Code, such a failure proves beyond a reasonable doubt that the OB was indeed a latter-day creation that was designed to deflect the rape charge. If it had been in existence, the appellant would surely have adverted to it in his 9 paged warned and cautioned statement. Like the testimonies of the Vainona witnesses, the creation of the OB and evidence of the two security guards was deliberately designed by the appellant to remove him from the scene of crime on that Sunday morning.

[80] This brings us to the remaining contentions that were taken by Mr *Nyamakura* in his oral submissions in this Court. The first was that certain discrepancies in the complainant's evidence in court and her statements at HPS and BPS devalued the cogency of her testimony. We do not agree. The findings of the trial court and the court *a quo* are unassailable. The purported inconsistencies did not form part of the complainant's evidence in court. They appeared in documents that were compiled by the police. The complainant disputed those discrepancies and suggested that they could have been a result of the misapprehension of her statement by the police. In court, the complainant stated that the appellant produced a pistol while the HPS statement indicates that she said that he had pointed the pistol at her. The other discrepancy concerning the pistol was that she did not mention the pistol in her statement to Woman Constable Kativhu at BPS. She only did so at the prompting of her guardian. The complainant stated that she had mentioned it but the policewoman had left it out.

The record of proceedings shows that she consistently mentioned the pistol when she first made her full report on 31 October 2010. She also did so in her report at HPS. She

also did so in court. The trial court correctly found that the anomalies at HPS and BPS could only fall on the fallibility of the police officers who recorded her statement, over which a witness has little or no control. Its finding was based on the pronouncements articulated by this Court in *S v Chigova, supra*, which appear in para [62] of this judgment. In any event, as correctly found by the trial court and confirmed by the court *a quo*, by reference to the *Sibanda* and *Nyirenda* cases, *supra*, these purported inconsistencies would have been of a peripheral nature. They would not have undermined the probative value of the complainant's core story that, before the appellant ravished her, he produced a pistol, which had a chilling effect on her.

We would only add that the HPS and BPS statements do not devalue the complainant's testimony at all. They actually demonstrate that the appellant was armed with a pistol.

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[81] The second contention was that the offence of rape was, in the circumstances described by the complainant impossible of performance. This argument was given short shrift by the complainant, during her cross examination by appellant's counsel. She asserted without equivocation that, unlike the panties of the anatomically correct doll in the VFC, her panties had an elastic band whose elasticity enabled the appellant to forcefully ravish her.

[82] In this respect, the court *a quo* diligently undertook an odyssey (amply supported by the detailed footnotes) of how local, regional and international research has shaped the modern discourse that has changed the old approach which courts used to assess the evidence of woman and the girl child in sexual matters. The impact has been phenomenal. The victims of sexual abuse are now being treated with empathy, respect and sensitivity and not with skepticism and suspicion. The courts appreciate the

physical, emotional and traumatic effects of rape. These often manifest themselves in physical pain, the disruption of life patterns and thought processes, inability to sleep, anxiety, anger, phobias, fear, mistrust, trauma, prolonged depression and other counter-intuitive coping mechanisms. This has resulted in the abandonment of fallacies, myths and stereotypes. The courts have discarded the archaic thinking that generally associated rape with resistance, screaming, crying, physical injury, torn clothes or preservation of evidence and prompt reporting and pay particular regard to the circumstances of each case.

[83] At p 18 of its judgment the court *a quo* gave short shrift to the defence of impossibility that was propounded by the appellant in these words:

“Mr *Mpofu* urged this court to conclude that penetration of an eleven-year-old virgin was a virtual impossibility given the fact that this was said to have happened when she sat in a couch. His argument implies that because appellant is an adult he could not possibly effect penetration on an eleven year old in that situation. Impossibility as a defence is only available in situations where an accused has a positive duty to act. The argument of impossibility of the *actus reus*, in my view, is not sustainable as it is not premised on any evidence of the physiology of either the complainant’s or appellant’s anatomy. It makes an assumption of what in reality constitutes some of the myths of rape to be fact. Such an argument cannot possibly avail the appellant. As I pointed out, it is based on a wrong premises. I reject it accordingly.”

In our view, the defence of impossibility is unsustainable, especially in view of this Court’s sentiments in *Nyazika v S* SC 150/92 at pp 2-3, in a similar case wherein the appellant claimed that it was impossible for him to rape a woman in the confines of a 323 hatch back, with jeans drawn to her knees. McNALLY JA pertinently remarked that:

“First, improbable things do happen. Second, people have different personalities. I do not think it has been demonstrated that a strong man could not force a slight woman through the gap between the front seats into the back, follow her through, place her on his lap, and achieve intercourse.

.....

As to personalities, a man who is arrogant, self-confident, strong, and driven by the immediacy of his sex drive, may do things which another man might consider risky or impossible. A woman who is quiet, shy and slightly-built may react differently from a powerful, boisterous, extrovert woman. I make no judgment on these particular two. I have not seen them. I have seen a photograph of her. I have read the magistrate's assessment that she is "thin, small size and very light". Of the appellant, the magistrate says: "he is big, strong and athletic...The events may perhaps be described as somewhat improbable but by no means impossible."

[84] The further submission that the complainant's credibility was irreparably hurt by her failure to make a full report to TT on 23 August 2010, and later to Patience, together with her conduct during the day light hours on that fateful Sunday, is not supported by case authorities. In its judgment the trial court dealt with all these issues. The complainant testified that on 23 August 2010, she did not make full disclosure about the sexual attack to TT. She merely told her that the appellant had touched her breasts and implored her not to tell anyone.

The trial court applied the three abiding factors for determining the credibility of a young child that were articulated in *S v Nyirenda, supra*. These are, firstly, that the report must be voluntary and not forced or induced by threats or leading questions. Secondly, that it should be made at the earliest possible opportunity to a person the complainant is comfortable with and thirdly, that she testifies. The trial court found that the person to whom the complainant was comfortable with was Sally. It found that her failure to make a full report to TT, like that of the girl in the *Sibanda* case, *supra*, showed that she did not really appreciate that she had been wronged. The report, however demonstrated that something untoward had been done to her by the appellant. The complainant explained that she was overwhelmed by shame and felt that she was the one who had done wrong. At p 31 of its judgment, the trial court found that, in view of her immaturity, her explanation was reasonable and resonated with the sentiments expressed in *S v Sibanda, supra*, at 395F-G that:

“The complainant - unfortunately, in terms of conventional evidential practice did not report the incident to the first available sympathetic witness. Indeed, she did not even tell her mother the full extent of what had taken place. She simply told her that her teacher had been "touching" her breasts, her buttocks and the front part of her body.

The evidentiary requirement that a rape victim should report the crime as soon as possible after its occurrence proceeds from the assumption that she is aware that a wrong has been committed against her. Now, it is abundantly clear from her evidence that the complainant was in a state of confusion over whether what had happened was wrong. That she felt a sense of shame over the incident is self-evident, but, in my view, in a child's mind the concept of a respected teacher doing something which other adults will agree was wrong is likely to cause confusion.”

In the light of the above sentiments, we cannot interfere with the findings of the trial court, which were confirmed by the court *a quo*. They are neither irrational nor outrageous.

[85] Mr *Nyamakura* also attacked the acceptance of the evidence of Chiremba and Muradzikwa on the unsustainable basis that there was no documentary record that Chiremba ever kept the appellant's gun in his custody. It was common cause that the appellant surrendered the firearm to Chiremba, who secured it in his safe at the RBZ. Chiremba stated and Muradzikwa confirmed that the gun and its paraphernalia were never surrendered to Muradzikwa, who was the actual official custodian of all RBZ firearms. It must, as day follows night, be clear that the firearm was in Chiremba's safe after the appellant surrendered it. It is also apparent that the only reasonable inference that can be drawn from the proven fact that Chiremba kept the gun in his safe and neither surrendered it to Muradzikwa nor returned it to the appellant was because it had forcibly been foisted on him by the appellant. Such coercion is apparent from Chiremba's helplessness and inability to act.

The evidence of these two RBZ security gurus established that the only copy of the surrender of the weapon was retained by the appellant. The purported rationalization was initiated, formulated and implemented by the appellant. The appellant acted outside his remit. He apparently was “feared” by even senior central bank personnel such as Chiremba and Muradzikwa because of his close proximity to the governor. It was also common cause that the appellant embarked on a relentless crusade, under the guise of fighting corruption, against the ZANU (PF) triumvirate, referred to in para [29] of this judgment, his former boss and Governor of the Central bank, the then serving Director-General of the Central Intelligence Organization and one of his minions. His unfruitful but concerted efforts demonstrate that he was indeed a man whom Chiremba and Muradzikwa had every reason to fear. It appears from the evidence on record that his roots ran deep in the upper echelons of the police force and the National Prosecution Authority, who desperately fought in his corner. He did not spare even the private prosecutor. All these facts demonstrate that he was a fearsome character, who took no prisoners, who must have coerced Chiremba in the manner he asserted in his testimony.

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[86] We agree with Mr *Warara* that the appellant’s five grounds of appeal against conviction are devoid of merit. We, accordingly dismiss them in their entirety.

### **THE PROPRIETY OF THE SENTENCE**

[87] Grounds 6 and 7 decry the purported harshness of the sentence. It is common ground that that an appeal court may only interfere with a sentence that is unconscionable. See *S v Chiweshe* 1996 (1) ZLR 425 (H) at 429D; *S v Ramushu & Ors* S-25-93 and *S v Nhumwa* SC 40/88 at p5 and *S v Sidat* 1997(1) ZLR 487 (S) at 491.

[88] At the material time, s 65 (1) of the Criminal Law Code prescribed a sentencing range for rape of “life imprisonment or any shorter period”. At the time the trial court sentenced the appellant, in terms of s 51 (4)(a) of the Magistrates Court Act [*Chapter 7:10*], the maximum jurisdiction of a regional magistrate was pegged at 20 years imprisonment per count. There is really nothing out of the ordinary with the sentence that was imposed on the appellant. The trial magistrate properly weighed the mitigatory circumstances against the aggravatory ones. He rightly paid regard to the aggravating circumstances listed in s 65 (2) of the Criminal Law Code on the age disparity between the appellant and the complainant, the fact that the appellant was in *loco parentis*, the specter of transmitting sexually transmitted infections and diseases, bearing in mind his further status as a polygamist and the emotional harm visited on the complainant. The trial court did not overlook his large nuclear family consisting of more than 20 offspring, his mighty fall from grace and the consequent financial, social, emotional and moral effect it had on him and those who were near and dear to him.

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[89] The approach adopted by the trial court accords with both statute and precedent. The sentence neither induces a sense of shock nor is it disturbingly inappropriate. The court *a quo* properly upheld it. The appeal against sentence is therefore unmeritorious and must also be dismissed.

### **DISPOSITION**

[90] The submission that, in the absence of rebuttal evidence other than evidence derived from cross examination, an alibi in rape cases would, as a matter of course, prevail is not part of our law. The submission is contrary to the approach taken by this Court in *S v Mhlanga*, in para [64] of this judgment and in *S v Madeyi*. In these cases, the defence

of alibi was measured against the totality of the evidence bearing on the sexual assault and found wanting. After all, cross-examination constitutes an irreplaceable and invaluable tool for ascertaining the probative value of any evidence. The prosecution did not lead any special evidence in the mode suggested by the appellant, other than the evidence of the complainant, the witnesses to whom the report was made, other relevant witnesses and the medical evidence. This evidence was then measured against the evidence of the alibi and the other evidence adduced by the appellant and his witnesses.

[91] The further submission that special rebuttal evidence is required to establish coaching is also not part of our law. The existence or non-existence of coaching like an alibi, is a question of fact, which depends on the particular evidence led during trial. There is therefore no magic to the determination of coaching.

[92] The complainant was the primary witness, whose testimony passed the requisite threshold of credibility set out in case law. It was also supported, especially by medical evidence and the deliberate lies that were propagated by the appellant and his witnesses.

[93] We are therefore satisfied that the defence of an alibi was properly disproved and shown to be false beyond a reasonable doubt. Similarly, the prosecution established beyond a reasonable doubt that all the defence witnesses were coached by the appellant. The defence of an alibi and the other exculpatory evidence of the defence witnesses were clearly shown not only to be reasonably untrue but also to be palpably false.

[94] In the circumstances, it is ordered that:

“The appeal be and is hereby dismissed in its entirety”.

**UCHENA JA** : I agree

**CHIWESHE JA** : I agree

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