ALEX DUBE

versus

THE STATE

HIGH COURT OF ZIMBABWE

MUTEVEDZI AND NDHLOVU JJ

BULAWAYO, 14 October and 13 December 2024

Criminal Appeal

M. Ndlovu for the appellant

B. Gundani for the respondent

MUTEVEDZI J: Misunderstood, misinterpreted and at times deliberately twisted. All these are curses that bedevil the case of *Banana v The State* 2000(1) ZLR 607 (SC). But when the revered jurists who presided over that case prescribed the parameters within which a rape complaint is admissible, they could not have imagined that one day the law relating to the admissibility of complaints in sexual matters would stand to be measured with the clinical exactness that some legal practitioners advocate for. In my view, many of the principles which are sometimes ascribed to the case of *Banana* are not part of the ratio of that decision but are simply the ingenuity of lawyers seeking to create avenues of escape for their clients. In equal measure, and as I will endeavour to demonstrate in this judgment, it appears to be time for the Supreme Court to revisit its decision in Banana to clarify some of the misconceptions that continue to beleaguer this aspect of our criminal law.

[1] The background to the allegations against the appellant was that he raped the complainant, a girl aged eleven (11) years, who lived in a remote area where cellular phone connectivity was erratic. There was some specific point where villagers would go to make calls or receive messages on their cellular phones. On the fateful day, the complainant was sent by

her aunt Belisi Ncube (Belisi) to receive messages. It was sometime in December of the year 2022. The place was colloquially called the network point. We will refer to it as such in this judgment.

[2] The state alleged that when she got to the network point, the complainant was accosted by the appellant. He called her to where he was and she obeyed. It was further alleged that he then took her behind some trees where he ordered her to remove her clothes. Once again, she complied by removing her track bottom and pants. The appellant undressed at the same time. He mounted her and had unprotected sexual intercourse with her once without her consent. When he was done, he threatened the complainant with death if she ever revealed the abuse to anyone. The cat was only let out of the bag on 26 December 2022. The complainant was asleep when Belisi noticed her scratching her privates with her thighs spread apart. She also noticed that there was discharge from the girl's vagina. She asked the complainant what the problem was. It was then that she revealed the abuse by the appellant. A report was later made to the police. Needless to state, the appellant was subsequently arrested and charged with the rape of the minor in contravention of *s 65(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]* ***(The Code).***

Proceedings in the court a quo

[3] The state's case hinged on the evidence of three witnesses. The complainant testified first. In summary, she said she met the appellant at the network point. He asked her for airtime but she informed him that the phone was not hers. He then called her to where she was and inquired if she wanted sweets. Being the child that she was she unsurprisingly said she did. The appellant then undressed her and undressed himself. He forcibly had sexual intercourse with her. After the intercourse, the girl narrated, that he threatened her with death if she divulged her ordeal to anyone. The child also revealed that before the abuse by the appellant, she had also been abused by another man called Innocent. She had after the abuse was discovered told her story to Belisi her aunt, the nurse at the clinic and the investigating officer before her narration in court. She revealed that Innocent had defiled her whilst she was herding goats but the appellant had abused her at the network point.

[4] The complainant admitted that when she went home, she did not divulge to anyone, what had happened at the network point. She conceded that she had also not reported the abuse by Innocent at the time that it occurred. She confirmed that it was only after her aunt had found her scratching her privates in her sleep that she disclosed that Innocent and the appellant had raped her. From her evidence, the complainant was a witness who struggled with dates. All she could do was state, imprecisely whether the abuse had taken place before or after Christmas. She further stated that she knew the appellant because they resided in the same village; that he had a grinding mill to which she and other children regularly went and that she had submitted to his demands for sexual intercourse because she was afraid of him.

[5] The complainant also stated in her evidence that when she was taken to the clinic for examination, she narrated to the nurse what had transpired. She said the appellant had suddenly arrived in the midst of her narration forcing her to abruptly halt telling her story. Once more she testified that she did so because she was scared of the appellant. She further disclosed that she was scratching her privates because she had developed a rash a day after the abuse by the appellant. Before the abuse by Innocent and the appellant, the girl said she did not have any sexual experience.

[6] During cross-examination, counsel for the appellant interrogated the girl extensively. He asked her to precisely state what her aunt had said before she disclosed the abuse. The exchange was as follows:

> Q. You said you only told your aunt after she asked you?
> A. Yes after she found me scratching
> Q. Do you recall the actual question?
> A. Yes
> Q. What did she say?
> A. She woke me up and asked me what it was, I said it was itching and she asked what had caused the rash. I then told her I had been raped.
> Q. Was she upset when she saw you scratching yourself?
> A. No she wasn't angry, she just asked me well
> Q. This was after how long Inno Had raped you?
> A. It was after a week.

[7] There were various other questions on other subjects. What is apparent is that the complainant remained consistent that the persons who had raped her were Innocent and the appellant. As will be evident later, the ground of appeal that was central to this appeal was

the sexual complaint. It is the reason why the above exchange and the summarized evidence were crucial to the determination of the issue.

[8] Belisi's evidence was that the appellant was once married to her younger sister. Her testimony was that two or three days after the complainant had gone to the network point, she had gone into the bedroom where the complainant and other children slept. She found the complainant scratching her privates in her sleep. She said she woke up the complainant to ask her what was wrong. She illuminated her with a torch light and noticed sores on her privates. She said she woke up the complainant's sister whom she also examined. She however did not have any sores. She then quizzed the complainant about what had happened. It was then that the complainant disclosed that she had been raped by the appellant on the day that she had been sent to the network point. The witness then repeated the story earlier told by the complainant when she narrated how the rape had occurred. She further testified to the occurrences at the clinic including how the complainant stopped telling the nurse what had occurred when the appellant suddenly came into the room. She said Innocent's relatives were also there at the clinic when the girl narrated the abuse.

[9] As already stated, the other witnesses were the investigating officer and the nurse who medically examined the complainant.

[10] In the face of the above evidence, the appellant's defence was that he was being falsely incriminated. He said he suspected so because previously he was in an adulterous relationship with the Belisi the complainant's aunt. When rumour about their illicit affair started spreading, he said he had terminated the relationship for fear of reprisals from her husband. He argued that the network point where the rape allegedly took place is a public place where there are always people. He said it was not possible that he could have committed the alleged rape in such a place without being seen. His other line of defence was that a boy called Phillip who is the son of Belisi was rumoured to have abused the complainant in the days leading to the allegations against him. Phillip had suddenly and unceremoniously disappeared from the village.

[11] The appellant called to his aid the testimony of Lungani Hadebe. His evidence was simply to try and demonstrate that at the time the allegations arose, Philip was still in the village and

that it was him and not the appellant who had possibly abused the complainant. For the purposes of this appeal, we need not detail that evidence. The appellant also called Abigail Dube. She is Belisi's husband's sister. Her evidence was that she had caught Belisi and the appellant having sexual intercourse in some bush in October 2022. She had however not told her brother about the affair. Instead, she said she had confronted the appellant about it. Her testimony was obviously intended to buttress the appellant's story that the rape allegations were concocted after he terminated his relationship with Belisi. Asked to describe the network point, she said the place is a bushy area near the shops. Asked why she was now talking about Belisi and the appellant's relationship in an open court when at first, she said she had kept quiet to protect the couple's relationship, she did not give a clear answer.

Findings by the court aquo

After analyzing the evidence, the court aquo made several findings ranging from the credibility of witnesses to whether or not the appellant had had sexual intercourse with the complainant. Before it did so, it cautioned itself in the following terms:

> "The court is very much alive to the caution that it must exercise when dealing with child testimony. Such caution however should be positive testimony. In the case of *S v Karidzamba* HH810/18 the court held that when dealing with child testimony the court should ask itself the crucial question whether the evidence of the child is trustworthy or not? The court should also consider whether the child is able to narrate with clarity; whether he or she understands the importance of being truthful and whether he or she understands what he/she is saying."

[10] After sounding the above caution, it went on to find that:

> "The court *in casu* had no reason to doubt the evidence of the complainant. Though a child, she managed to narrate giving sufficient details of the offence. It is common cause that she complained against two persons, that is the accused and one Innocent Dube. The fact that she was able to differentiate and not mix between the accused and Innocent Dube convinced the court that her evidence was trustworthy. It is common cause she narrated the incidents to her aunt, the nurse at the clinic, to the police officer and also to the court. In all those narrations, there was no point in time when she attributed the incidents of Innocent Dube to the accused or vice versa."

[11] Critically, for purposes of the present appeal, the court a quo appeared to have remained alive to the issue with which it was confronted. It acknowledged that the appellant

had protested against the admissibility of the complaint. It stated that he had argued that it had not been spontaneous and was therefore inadmissible for want of compliance with the requirements set for admissibility of complaints in sexual matters. Further, it stated that the appellant had argued that on the date that the complainant returned home after the alleged rape she was supposed to have immediately made a report. The appellant had also further alleged that during cross-examination, the complainant had said she was not afraid. Because of that, an opportunity had presented itself for her to make a report. The fact that she had not at that stage made a report rendered her complaint inadmissible because there was a delay.

[12] To the above issues, the court a quo's findings were that:

> " One must not lose sight of the fact that the complainant is a 12-year-old girl who at the time was aged 11. She had been threatened with death by the accused a male adult aged 56 years. She had no reason to doubt the threats made by the accused person. She thus cannot be faulted for not immediately making the report when she got home on what had befallen her. In fact, the manner in which the matter came to light reveals the resolve she had made. She, because of the threats had resolved not to divulge. Were it not for the fact that her aunt found her scratching her private part she was not going to divulge. This does not prove that she was not being candid but that she had taken heed of the threats made by the accused. It was her evidence that she developed the rash soon after the rape ordeal. Even after developing the rash, she chose to keep quiet which again shows that she was convinced the accused was to carry out his threats."

[13] The trial magistrate proceeded to make further analyses of the admissibility of the sexual complaint in this case and determined that it was admissible because it satisfied all the requirements of admissibility. On that and other bases, she ultimately convicted the appellant and sentenced him to fifteen years imprisonment.

Proceedings before this court

[14] The appellant was aggrieved by both the conviction and the sentence imposed on him. He appealed against both. In his original notice and grounds of appeal filed on 23 July 2023, he raised twelve (12) grounds against conviction and three (3) against sentence. The numerous grounds against conviction were a rumble in the jungle. I don't need to restate them here. They were not only circuitous but also appeared to attack every line of the trial magistrate's reasoning. It would appear that at the time the appeal was filed, the respondent

alerted the appellant to those defects. The appellant purported to attend to the issues almost a year later on 24 September 2024. Through his counsel, he gave, in terms of *rule 41(10)* of the *High Court Rules, 2021* ***(the Rules),*** a notice to amend the grounds of appeal. Although the respondent did not say anything and appeared to acquiesce to the appellant's motion the amendment remained a nullity for two reasons.

[15] The first is that *r 41(10)* of the Rules is not the vehicle through which notices and grounds of appeal are amended. Instead, the appropriate provision is *r 95(6).* It provides that:

> *(6) The Prosecutor-General or an appellant may amend his or her notice of appeal by lodging a notice in five copies with the registrar setting out clearly and specifically the amendment to the grounds of appeal-*
>
> *(a) In the case of an appeal against conviction or conviction and sentence, as soon as possible and in any event not later than twenty days after the noting of the appeal;*
>
> (b) *In the case of an appeal against sentence only, as soon as possible and in any event not later than ten days after the noting of the appeal.* **(My underlining for emphasis.)**

[16] Needless to point out, the purported amendment was not only made in terms of the wrong provision of the law but also contravened the provision under which it ought to have been sought. I am not sure whether the use of the wrong provision was out of ignorance or was deliberately intended to hoodwink the court. It may have been the latter because *r 41(10)* does not prescribe any timelines within which an amendment to the pleadings is sought. That would have allowed the appellant to seek an amendment of his notice of appeal at any stage of the proceedings before judgment. But the fallacy of it is that that rule and the section under which it falls do not regulate appeals which are only generally catered for in *Part XVI* of the Rules. Amendments of notices of appeal as already stated are provided for under *r 95(6).* Under that rule, an amendment to a notice of appeal cannot be made later than twenty days after the noting of an appeal. The amendment in issue here was made more than twelve months after the initial notice of appeal. It was hopelessly out of time. To say it was null and void would be an understatement. As such the notice of appeal that we related to in this case was the original one filed on 23 July 2023 with all its mistakes and other faux pas. The appellant through his counsel could barely make any argument about the invalidity of his grounds of appeal. It was the reason that he sought, at the hearing, to abandon grounds numbers 3,5,6,7,9, 10, 11 and 12 and to delete several

aspects of those that remained. The abandonment was permissible. What could not be done was to substitute the abandoned grounds with anything else as that would have amounted to permitting an amendment of the notice of appeal through the back door. In the end, the remaining of the grounds of appeal were couched as follows:

Ad conviction

a. The court a quo misdirected itself by holding that the complainant was credible and that it believed her over the defendant. In this, it failed to place due weight on the material inconsistencies in the complainant's testimony especially relating to when the alleged rape occurred. It also failed to take sufficient consideration of the deficiencies in the whole complainant relating to the alleged ordeal, especially considering the allegation that this was complainants second rape ordeal from different persons. (sic)
b. The court a quo misdirected itself in dismissing the appellant's defence that it was a fabrication as the complainant's aunt was his jilted lover when this was confirmed by the defence witness Abigail Dube who court took the position of not believe as according to it she aimed to absolve the appellant. (sic)
c. The court a quo erred in finding that the complaint was admissible and that it was made voluntarily, and that it was not a result of questions of a leading and inducing or intimidating nature when the facts before it was that it was made after serious questioning in the middle of the night while complainant had already expressed fear of assault by her aunt she allegedly reported to after being questioned. (sic)
d. The court a quo erred in finding that there was 'bush' behind which the rape allegedly occurred when all the evidence be it from the defence or the state's own caser that the place of alleged occurrence was a public place with clear visibility to passers-by and people at the nearby shops. (sic)

Ad sentence

a. The court erred in sentencing the appellant to 15 years in terms of the recent amendment being the Criminal Law (Codification and Reform) Amendment Act, 2023 which came into effect (the week of 17th July 2023) after the appellant had been charged and tried and was awaiting judgment on 21 July 2023 thereby contravening the principle of non-retrospective application of the law as well as contravening s 70 (1) of the constitution of Zimbabwe on an accused's right to a fair trial in terms of knowing a charge as well as its consequences before being tried. (sic)
b. The sentence imposed by the court a quo is excessive and harsh as to induce a sense of shock and revulsion
c. The court a quo erred by paying lip service to mitigation and not attaching due consideration to the appellant's personal circumstances that he is 56 years old, first offender, with 8 children 2 of whom are minors and one of which has serious health issues that he was looking after. (sic)

The order which the appellant prayed for was that:

> WHEREFORE appellant prays that the appeal be upheld and for the setting aside of the verdict of guilty and in its place that a verdict of not guilty and acquitted be retained. (sic)

[17] At the hearing, we took serious umbrage with the above grounds of appeal. As can be seen, many things are wrong with them. They are largely incomprehensible. They were far from meeting the standard expected of grounds drawn by a legal practitioner. Even if it were to be accepted that drafting grounds of appeal could be an onerous exercise for

inexperienced legal practitioners (which it should not be), there is no excuse for someone who went through law school to struggle with the construction of plain English sentences. Mr *Ndlovu* who appeared for the appellant was at pains to convince us that the grounds of appeal were valid. The respondent, on the other hand, had already taken the stance that the grounds of appeal were invalid and prayed that the appeal be struck off for that reason.

[18] It is worrisome that despite the clarity of the law and the numerous decisions of the superior courts which serve to explain the concepts, a surprisingly high number of legal practitioners still do not understand how to draft grounds of appeal in a notice of appeal. The trend did not start recently. It is a sickness that the courts have been grappling with for some time now. In the case of *S v Sikelo Mutali* HH 317/17 CHITAPI J expressed the frustrations which the courts are faced with as a result of shoddily and incompetently drawn grounds of appeal. On p. 4 of the cyclostyled judgment, His Lordship remarked that:

> "I do not know what it should take to educate errant legal practitioners on how to properly draft and compose notices of appeal. The courts can only speak through their judgments and cannot call counsel for lecturers and to examine them on the issue. Were this possible, it would be a better option in that counsel who fails an exercise on drafting notices of appeal would work hard to learn to properly draft such notices and hopefully pass. The process of appeal is not to be approached perfunctorily. It is not a walk in the park nor should it be a trial and error exercise. Appeals are a make-or-break process in that a person who has already been tried and convicted by a competent court will be taking the competent court on review by another court. Practitioners must apply their minds to the appeal process more so because the appeal court has for long lamented the dearth in competence of legal practitioners in drafting notices of appeal."

[19] In the case of *Chikura N.O & Anor v Al Sham's Global BVI Limited* SC 17/17, the Supreme Court remarked that:

> "It is not for the Court to sift through numerous grounds of appeal in search of a possible valid ground; or to page through several pages of 'grounds of appeal' in order to determine the real issues for determination by the Court. The real issues for determination should be immediately ascertainable on perusal of the grounds of appeal. That is not so in the instant matter. The grounds of appeal are multiple, attack every line of reasoning of the learned judge and do not clearly and concisely define the issues which are to be determined by this Court. The Court must not be left to guess what the appellant is challenging exactly from the decision of the court a quo."

[20] Equally, in *Zimbabwe Anti-Corruption Commission v Gibson Mangwiro and Anor* SC 11/2022, the Supreme Court citing with approval the words of LEACH J in *Sonyongo*

v Minister of Law and Order 1996 (4) SA 384 at 385F held that grounds of appeal are invalid if they:

> "specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet."

[21] In yet another Supreme Court admonishment MAKONI JA in *Mahommed v Kashiri* SC 85/19 at p 9 of the cyclostyled judgment observed that:

> "The applicant's first ground of appeal simply complains that the court below was wrong in making a particular finding and should have instead made a different finding. The basis of the attack is not stated…Further, the ground of appeal does not indicate why the finding of fact or ruling is to be criticized as wrong, is said to be wrong." And as it was so eloquently pitched by GARWE JA in *Zimbabwe Open University v Ndekwere* SC 52/19 at para [41]
>
> > "The gross aberration on the facts was not articulated. It remained a bald allegation impugning findings of fact. It did not state how and in what way the arbitrator grossly erred in reaching the conclusion that was sought to be impugned. In these circumstances, it remained an attack against a simple finding of fact and, clearly, does not raise any issue of law".

[22] The biggest lesson which is drawn from the above authorities is simple. It is that drawing up a notice of appeal should not be a desultory and half-hearted approach. If not taken seriously, it will result in "cursory and meaningless grounds" of appeal. An appellant is required, not just as good practice, but as a rule of law, to set out clearly, concisely and specifically his or her grounds of appeal. A failure to observe that rule invalidates the grounds raised in the notice of appeal.

[23] In this case, and as already stated, we could not put a finger as to what exactly if anything the first ground of appeal complained about. It started as if the appellant was impugning the trial court's finding that the complainant was a credible witness before veering off to talk about the time within which the rape complaint had been made and ended with an attack on the general deficiencies which the appellant said had been noted in the sexual complaint. As can be seen, it is a ground which appeared to attack both findings of fact and law in one fell swoop. It is a ground which required us to dissect it to find what the real issues were. If in the end, (which we were never sure of), the complaint was about the admissibility of the sexual complaint, then the ground would have also fallen foul of the requirement that grounds of appeal must not be repetitive because it is essentially the same issue that is raised by ground 3. Needless to say, the ground failed to

meet the standard of a precise and concise ground of appeal. For those reasons, we struck it off.

[24] The second and fourth grounds of appeal attacked the trial court's findings of fact. In the case of *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/01 at pp 5-6 of the cyclostyled decision, the Supreme Court held that if an appeal is to be related to the facts:

> "There must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. And a misdirection of fact is either a failure to appreciate a fact at all or a finding that is contrary to the evidence actually presented." (My underlining for emphasis)

[25] Concerning the above consideration, I remain alive to the fact that what is critical in the end is not the specific mention of the underlined words in the *Reserve Bank v Granger* (supra) case but that the ground must demonstrate the premises upon which the judgment of the lower court is being contested clearly and concisely. A ground is invalid if it straddles across everything like the two grounds were formulated in this case. It is unacceptable if it is presented in a way that makes it incomprehensible. Both the second and fourth grounds in this case do not show what it is that is outrageous and defies logic about the findings of fact by the trial court. In other words, the allegation against a trial court's finding of fact must go beyond simply alleging the wrongness of the finding. It must be shown from the ground of appeal, that the court could only have been out of its senses for it to have arrived at such a decision. In this case, the basis upon which the trial court's findings of fact were attacked are not clear from the two grounds of appeal. Such failure goes to the root of the grounds and renders them invalid. For those reasons, we equally struck off the two grounds.

[26] Ground 3 was equally conspicuous by the inelegance with which it was formulated. Although we took issue with that, it was apparent that the ground raised a point of law regarding the admissibility of the sexual complaint. *Rule 95* of the High Court Rules, 2021 deals with the form of appeals from the Magistrates' Court to this court. The proviso to *sub-rule (10) of r 95* provides that failure to comply with the specifications cited in the sub-rule shall not automatically render the appeal a nullity. It further permits a judge at the hearing of the appeal, to condone any such failure. In any case, the law as stated in the case of *Christopher Sambaza v Al Shams Global Limited* SC 3/18 at p. 10 of the cyclostyled judgment is that: -

> "A clear and concise ground of appeal in an otherwise valid notice of appeal cannot be disregarded because there are other defective grounds of appeal in the same notice of appeal. It should be considered while the defective grounds of appeal should be struck out."

[27] It was with the realization of the critical issue that the appellant's third ground raised that we bent backwards and determined ground three on the merits. In the end, we found it without. Thereafter, we had no choice but to dismiss the appeal. We gave *extempore* reasons for that decision. Later, the appellant through his counsel, notified us of his request for detailed reasons for our decision. The request led to this judgment.

The issue of determination

[28] As is apparent, the only issue in this appeal is whether or not the sexual complaint was admissible.

The law

[29] In the introductory paragraph of this judgment, I pointed out that the leading authority on the question of the admissibility of sexual complaints in this jurisdiction is the case of *Banana v the State* (supra). For purposes of clarity in the discussion that will follow, I must restate right from the onset that before *Banana*, the rule under Roman Dutch law was that there were categories of witness testimonies which were regarded as suspect. Complainants in sexual matters were one of those categories. For clearly irrational reasons, the evidence of complainants in sexual crimes was, as a rule, supposed to be treated with circumspection. To state the obvious, the rule required that a complainant in a sexual matter must not only be believed but that in addition to being satisfied with the credibility of that complainant, the court was required to further ask itself if it had not been deceived by a plausible witness. It therefore was, required to seek attestation or evidence which excluded the danger of false incrimination.[1] It was a rule steeped in preconceptions of past eras and was influenced by a discredited understanding of the mental disposition of female persons.[2] As held in *Banana* the rule simply 'exemplified a practice that placed an additional burden on victims in sexual cases which could lead to grave injustice to the victims involved.' The Supreme Court after reviewing various decisions which had been handed down in sister

[1] See cases such as *S v Mupfudza* 1982 (1) ZLR 271 (S); *S v Makanyanga* 1996 (2) ZLR 231 (H) at 241A-C; *S v Zaranyika* 1997 (1) ZLR 539 (H)

[2] See Schwikkard P.J. and Van Der Merwe S.E. *Principles of Evidence*, 4th Ed, Juta 2015 at p. 595

Roman-Dutch jurisdictions concluded that the cautionary rule in sexual matters served no purpose and was premised on irrational grounds. It struck down that requirement from our law. But that in itself wasn't the end of the matter because the Honourable Chief Justice said:

> "It is my opinion that the time has now come for our courts to move away from the application of the two-pronged test in sexual cases and proceed in conformity with the approach advocated in South Africa…I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I would emphasize that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully."

[30] With the above holding which followed in the footsteps of the South African Supreme Court of Appeal's decision in *S v Jackson*,[3] it meant that Zimbabwe also retained unwarranted residues of the cautionary rule. The same criticisms that were levelled against the *Jackson* decision bedeviled *Banana*. It was because of the hesitancy to make an unequivocal pronouncement that the cautionary rule in sexual offences was dead that arguments still rage that what *Banana* like *Jackson* before it did, was to simply reformulate the cautionary rule and not abolish it.

[31] Yet I remain convinced that *Banana* abolished the cautionary rule in sexual offences. Other South African decisions have interpreted *Jackson* to have had the same effect. For instance, in *S v M*[4] the judge held that he could not apply any general cautionary rule to the complainant's evidence merely because it was a rape case but would look at the evidence as a whole and the reliability of what had been placed before the court. I entirely subscribe to that approach. For me, *Banana* is not only good authority but is law that binds me. The problem is the wrong interpretations which have been ascribed to it in many instances. The Supreme Court made various other pronouncements in the same case which are strangely often ignored. For instance, it held that in every case, including sexual cases, the requirement is simply that the prosecution is obliged to prove the accused's guilt beyond a reasonable doubt, nothing less and nothing more. It equally held that it is permissible to convict an accused based on the testimony of a single witness as long as the

[3] 1998(1) SACR 470 (SCA)
[4] 2000(1) SACR 484 (W) 501

court was convinced that the single witness spoke the truth. That was so, even where the witness's testimony was unsatisfactory in some respects. In essence, the court said that corroboration of the single witness's testimony which tended to show that his/her story was not concocted is just a bonus for prosecution. It must be treated like any other feature in the trial which gives the court confidence that it can rely on the single witness's evidence. It is however not essential.

[32] I understand the above principles to therefore mean that it is not a requirement for a rape victim or any other sexual matter to have told his/her story to another person. To demand that it be so is to require that there be corroboration to the victim's story. That in my view, would be retrogressive as it amounts to taking the law back to the discarded two-pronged approach which existed before *Banana*. As such, a person accused of rape or any sexual crime may be convicted on the evidence of the complainant in that matter alone. There is no requirement that he/she must have complained to another person before reporting to the police.

[33] Critically, the court in *Banana* decided that evidence that a complainant in an alleged sexual crime made a complaint to someone else soon after the crime occurred, and the conditions of that remonstrance, are admissible in evidence for purposes of demonstrating that the complainant is consistent in his/her evidence and that he/she did not consent to the act. It is there to reduce the suspicion that the complainant may have fabricated the allegation against the accused. Once again, it did not say it was mandatory. As per *Banana*, the requirements for admissibility of a sexual complaint are:

a. It must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature.
b. It must have been made without undue delay and at the earliest opportunity, in all the circumstances, to the first person to whom the complainant could reasonably be expected to make. (My underlining.)

[34] I may need to further state that the admission of evidence of a sexual complaint is premised on the exception to the admission into evidence of a person's previous consistent statement which in turn is an exception to the broader rule against hearsay evidence. It is called the rule against self -corroboration. It is a tool which is used to rebut allegations of recent fabrication. The reason for its admissibility in sexual offences is that sexual offences

can easily be manufactured and contrived. Ordinarily, therefore, a witness is not allowed to adduce evidence of his/her previous consistent statement. To accept the testimony where a witness says he/she told another person that the accused raped or sexually abused him/her is to accept the previous consistent statement of the victim. I have noted that oftentimes, prosecutors and legal practitioners appear to lose sight of that fact. It is for the above reasons that strict conditions are laid for the admission of such evidence. When those conditions are breached, what is rejected is not the testimony of the victim of the sexual crime but only the previous consistent statement sought to be introduced through the person to whom it was told. If a court rejects such a previous consistent statement, all it would have done is to reject evidence that could have corroborated the victim's testimony. Yet it cannot be ignored that corroboration is not a requirement. A court can completely reject the evidence of the sexual complaint but still convict an accused based on the uncorroborated but credible evidence of the complainant in court.

[35] It is for the above reasons that I made the earlier recommendation that it may be necessary for the Supreme Court to revisit *Banana* to settle the unrelenting debates around these issues. But a more compelling reason may be the progress that other jurisdictions which we previously followed in this regard have made in dealing with the problem. For instance, South Africa passed the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Zeffert DT and Paizes AP, *The South Africa law of Evidence,* 2nd Ed; LexisNexis, Durban, 2007 at p. 450 argue that the amendment was necessitated by a realization that the South African common law and statute did not deal adequately and effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual offences. The new provisions deal with what has been called secondary victimization and traumatization. The sections provide that:

> 58. Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence; provided that the court may not draw any inferences only from the absence of such previous consistent statement.
> Evidence of delay in reporting
> 59. In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

[36] The above provisions have bridged the gap created by the misinterpretations that stemmed from the *Jackson* decision in 1998. They have shut the door and swept out the

residues of the cautionary rule which remained in the South African criminal law. *Zeffert* and *Paizes* argue that the drawing of adverse inferences against a victim of sexual abuse for failing to complain is an act of relying on sexual mythology. They contend at p. 451 that:

> "The sections prevent …the perpetuation, by the uniformed, of the erroneous belief that relevance can exist in a vacuum, that a mere failure to complain always has significance irrespective of the nature of the complainant, her or his state of mind and any other factor that could have led to her or his failure."

[37] The direction that South Africa has taken is not only progressive but conforms with modern doctrines of victim-sensitive adjudication of cases.

[38] In Namibia, the rule requiring courts to treat the evidence of a complainant in a sexual offence case with special caution was also abolished. The courts are forbidden from drawing any negative conclusions solely from the fact that a complainant did not tell anyone else about the rape, or delayed before laying the charge. The Combating of Rape Act 8 of 2000, in sections 5 and 6 provides as follows:

> **"Abolition of cautionary rule relating to offences of a sexual or indecent nature**
> *5*. No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence.
>
> **Evidence of previous consistent statements**
>
> *6*. Evidence relating to all previous consistent statements by a complainant shall be admissible in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature: Provided that no inference may be drawn only from the fact that no such previous statements have been made. (my emphasis)
>
> **Evidence of period of delay between commission of sexual or indecent act and laying of complaint**
>
> ***7.*** In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent act and the laying of a complaint." (my underlining)

[39] My take is that adopting similar mechanisms is the only way to extricate victims of sexual assaults and abuse from the historical and dubious sexual mythology which requires them to satisfy some obscure conditions before their complaints could be admitted in court.

Application of the law to the facts

[40] In this case, the appellant's protestation regarding the sexual complaint is that it was not made voluntarily. The appellant alleged that the complaint *'was made after serious questioning in the middle of the night while complainant had already expressed fear of assault by her aunt she allegedly reported to after being questioned.'* As I indicated earlier, we had to read between the lines to understand the ground of appeal. Thereafter we made every effort to allow the ground to stand. In the end, we understood the ground and counsel for the appellant confirmed it, to mean that the complaint was made after impermissible questioning by the complainant's aunt; that the aunt had also threatened the complainant with assault and that the questioning had occurred at night.

[41] In her evidence in chief at pp 38 of the record of proceedings onwards, the complainant stated the following regarding the rape:

> "The phone rang as people from home were now phoning. He dressed up and told me not to tell anyone. He threatened to kill me if I told anyone. I then went home. I did not tell my aunt. She found me scratching my body at night. She asked me what the problem was of which I then told her that they had raped me."

[42] Under cross-examination by counsel for the appellant which appears from pp 42 of the consolidated record of proceedings onwards the following exchange took place and which we also captured under paragraph 6 of this judgment was as follows:

> Q. You said you only told your aunt after she asked you?
> A. Yes after she found me scratching
> Q. Do you recall the actual question?
> A. Yes
> Q. What did she say?
> A. She woke me up and asked what it was. I said it was itching and she asked what had caused the rash. I then told her that I had been raped.
> Q. Was she upset when she saw you scratching yourself?
> A. No she was not angry, she just asked me well

[43] The above exchanges directly contradicted the assertion made by counsel in his submissions and his heads of argument that: -

> "the complaint was inadmissible because it was not made freely and voluntarily despite numerous opportunities availing themselves but was made under coercive conditions. He further argued that there was a delay in making the report from the alleged discovery to the opening of the case leaving room for bias and under influence to make a false allegation." (Sic)

[44] The complainant was aged only eleven years at the time of the rape. She was a child. I said earlier, that not only storms but hurricanes and cyclones have been created out of the requirements for admissibility but that hullabaloo is sometimes misplaced. That a

complainant made a sexual complaint late does not mean that she is lying. It must not affect the complainant's evidence. It is the timeous making of the complaint to another person which makes the admission of the previous consistent statement admissible. Whether or not the time that was taken before the report was made was reasonable is the discretion of the trial court. [5] The exercise of that discretion is informed by various considerations such as the age of the complainant, her understanding of the sexual act, and the availability of opportunity for the complainant to speak to a person that she could confide in among others. Failure to make the complaint or making it unduly late does not make the evidence of the complainant in court inadmissible. A complainant in a rape case may choose not to tell anyone but walk straight into a police station and make her report.

[45] In addition, I do not read the requirements in *Banana* to say that a victim of sexual abuse must not be questioned. Often legal practitioners run with the requirement and stop midway through it. They create a myth which makes it appear like the requirement says the report *must have been made voluntarily and not as a result of questions.* Yet in reality, the law qualifies the types of questions that a victim may be asked. It allows all other questions to be asked of the victim except questions of a *leading and inducing or intimidating nature.*

[46] Put differently, the questions must not be intended to bring about an outcome that the questioner desires. If it were the law that there wouldn't be any questions, I doubt that the abuse of the majority of minor children would see a successful prosecution. Because of their immaturity children sometimes, in fact, more often than not, do not understand the nature of sexual activities and their consequences. Children can take threats against them very seriously and can choose to live with the burden of sexual abuse for fear of reprisals from their abusers. Fear generally restricts children's thinking capacities which are already low because of the immaturity of their brains. In our everyday experiences, it is not uncommon to observe that to engage in a conversation with a child, asking the child open-ended questions is one of the surest ways of succeeding in that conversation. It builds

[5] See the cases of R v Gannon 1906 TS 114 and R v Cummings [1948] 1 All ER 551

rapport with the child and helps develop their brains. It assists them to think how they want to behave and in the fulness of time helps them increase self-control.[6]

[47] In this case, the complainant's aunt found her scratching her privates. The question that she asked the child was what is the problem?[7] An examination of that question appears to me wholly unnecessary because its essence is plain. Nothing is leading about it. There is no suggestion of anything bad having happened in it. The evidence that counsel for the appellant elicited from the girl under cross-examination buttresses this point. She said that when the aunt asked her she was not angry. In the girl's own words, the aunt asked her well. That can only mean that the aunt asked her in a way that any concerned parent or guardian would do. It is preposterous to suggest that in a situation like the one in this case, a parent who observes that his/her child is in distress must simply keep quiet and not ask questions about why the child is in perturbation. Counsel wanted to make much out of the Belisi's evidence that she lit the room with a torch and woke up the girl from her slumber. It was perfectly normal. That witness then said she inspected the rash on the girl's privates. She also inspected the other girl who was in the room. It shows that she did not suggest to the complainant or the other girl that they had been abused by anyone. The allegation of rape was voluntarily made by the complainant not against the appellant alone but also against another man called Innocent Dube.

[48] Further, the suggestion that the appellant could not have abused the complainant because she had been abused by another person(s) is irrational. The appellant cannot be exonerated merely on the ground that the complainant was unfortunate as to be abused by other people. The court a quo exhaustively dealt with this aspect. It concluded that the child was forthright that she had been raped by two people, that is the appellant and Innocent. It noted that she did not mix up those episodes of abuse and attributed each to the responsible person.

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[6] Some of the ideas were accessed from: https://www.naeyc.org/our-work/families/guiding-children-using-questions#:~:text=Asking%20children%20open%2Dended%20questions,increases%20self%2Dcontrol%20over%20time.;

[7] In the case of *Gittleson v R* 1938 SR 161 it was held that the degree of prompting which may render a complaint inadmissible is the discretion of the trial court

[49] The courts cannot and must not adopt an armchair approach to sexual abuse particularly that which involves children and hide behind the so-called timeous and spontaneous report of abuse requirements. Instead, courts are designed to protect children from such abuse. What is important in every case is to assess whether or not the guilt of an accused has been proven beyond reasonable doubt. That guilt is not entirely dependent on the victim especially where he/she is a child, having reported the abuse to someone else. If the child's evidence is satisfactory in court it must be enough to ground a conviction. What concerns me is that the admissibility requirements have been elevated to some inviolable status to such an extent that at times police officers to whom the sexual crimes are reported have been dragged to court to represent the first person to whom the sexual complaint was made. Ordinarily, the police station is not the place where a complainant in a rape case is expected to walk to and report first but such is not prohibited by law. More so, when a complainant does that he/she is not confiding to the police officer like they would intimate to someone close to them. It is simply reporting a crime in the same manner that one would report a burglary. If that is not understood, then the warning that an extra burden must not be imposed on victims of sexual crimes which was sounded in *Banana* would be lost.

[50] Commenting on the role of the courts as the guardians of minor children, Dr. David Wright, Child Development Consultant on the Flathead Reservation remarked that:

> "The sobriquet 'upper guardians' of minors which is given to the courts is not an idle one. It means exactly that. It will be the antithesis of the status of guardianship if the courts were to start creating onerous requirements for abused children, expecting them to open up on their own and reveal the abuses they would have suffered."

[51] The strict interpretation that some want to attach to *Banana* would leave children open to exploitation because of their age. *S 81 (1) (e) of the Constitution of Zimbabwe* provides that every child has the right to be protected from economic and sexual exploitation among other abuses. The Gender Bench Book: First Edition, 2023; Judicial Service Commission at p. 61 is emphatic that s 81 of the Constitution is:

> "A Mini-Bill of Rights for children within the main Declaration of Rights. It identifies specific rights that accrue to children only, whilst not precluding children from accessing the benefits of all other rights and freedoms in Chapter 4 of the Constitution. The rights and freedoms in s 81 are critical in the fight against SGBV, discrimination based on gender, sex or marital status, and all forms of gender inequality that characterise Zimbabwe's society."

[52] As such, the Constitution endows children with certain, additional criminal justice protections that are not available to adults. The interpretation advocated for by a section of legal practitioners places an albatross on the necks of victims of sexual abuse, particularly children. That unjustifiable burden was the reason why the application of the cautionary rule in sexual crimes was discontinued. Unfortunately, it is being resurrected from the graveyard and then smuggled into courtrooms through the back entrances. The courts must be vigilant and tightly secure those doors to ensure that the prosecution is simply required to prove its case without imposing the herculean task upon victims of sexual abuse, of satisfying some conditions, that they are not even aware of.

[53] The revelation of the rape in this case was made a few days after it occurred. The was nothing undue about the period between the abuse and the reporting. I doubt that it could have changed anything even if it had been made a lot later than it was. What seems to be forgotten or ignored is that in *Banana*, the pronouncement was that the report must have been made without ***undue*** delay and at the earliest opportunity, **in all the circumstances,** to the first person to whom the complainant could reasonably be expected to make. The phrase in all circumstances means that given the difficult nature of the situation, the entire context of a particular situation or event must be considered before conclusions are drawn. In *Banana*, the Supreme Court was not only dealing with a mature man but with a man who was also a soldier. It took that man years to report the abuse. If a sexual assault could scare a soldier from reporting for that long what would it possibly do to an eleven-year-old rural girl who had been threatened with death by her tormentor?

[54] In conclusion, the evidence of the complainant as assessed by the trial magistrate was wholly satisfactory that she was raped by the appellant. If it was required, then corroboration was obtained through the evidence of her aunt Belisi to whom she first divulged the rape ordeal. That revelation met the thresholds as stipulated in *Banana*. As such we had no apprehension in dismissing the sole ground of appeal which remained standing after we struck of the others for want of compliance with the law. In the end, we found the appeal against conviction to be without merit and dismissed it in its entirety.

The appeal against sentence

[55] Following his conviction, the appellant was sentenced to 15 years imprisonment. The court sentenced him in terms of the new *s 65(2)* of the Code, a provision which created two tiers of mandatory sentences for rape. The first one prescribes a minimum of fifteen years where the rape was aggravated whilst the second one specifies a minimum of five years imprisonment where the rape was committed in the absence of aggravating circumstances.

[56] The above provision came into effect in July 2023. The crime with which the appellant was convicted was committed in December 2022. It was not permissible therefore to sentence the appellant in terms of a provision that came into effect way after the offence had been convicted. The trial magistrate conceded the error in her response to the grounds of appeal.

[57] In the case of *Greatermans Stores (1979) (Private) Limited T/A Thomas Meikles Stores and Anor v The Minister of Public Service, Labour and Social Welfare and Anor* CCZ 2/18 the Constitutional Court defined the principle of retrospectivity in the following terms:

> "Retrospectivity involves the application of new rules to transactions that have already been consummated. A retrospective statute is one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute. The most obvious kind of retrospective statute is one which reaches back to attach new legal rights and duties to already completed transactions."

[58] The court added that *s 70(1)(k)* of the Constitution specifically proscribes the retrospective (ex post facto) application or enactment of criminal laws. There is therefore no gainsaying that when the legislature amended s 65 of the Criminal Law Code, it did not intend the amendment to operate retrospectively. It was impermissible for the trial court to use that law in sentencing the appellant. The court aquo therefore used a wrong principle of the law in its assessment of the appropriate sentence for the appellant. For that reason, we allowed the appeal against sentence. We set aside the sentence which had been imposed and, in its place, substituted the following:

a. The offender is sentenced to 15 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition that within that period he does not commit any

offence involving sexual intercourse or sexual violence for which he is sentenced to imprisonment without the option of a fine.

b. The remaining 12 years shall be effective.
c. The 8 months imprisonment which the offender had already served before the hearing of this appeal shall be taken as part of the effective sentence."

MUTEVEDZI J……

NDLOVU J……Agrees

Ndlovu Mehluli & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners