LAND SINCLAIR KABOME

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI AND CHIVAYO JJ
BULAWAYO, 24 October 2024 and 27 January 2025

Criminal Appeal

K. Ngwenya for appellant
T.M. Nyathi for respondent

MUTEVEDZI J: It is not always that you find a twenty-one-year-old man being a student in a secondary school. Land Sinclair Kabome, (the appellant) was one such man at the time this rape was allegedly committed. He was doing form five and would have been at the ripe age of twenty-two years by the time he would have graduated from high school had he seen it through. It is either he was a late bloomer or had repeated some grade(s) along the way. We relate to that issue because the allegations in this case typify the reason why it is often -times dangerous to let adults pretend to be peers with children. The administrators of the school at which the appellant learnt were culpable for the horror that the complainant, a young girl who was just 13 years at the time, went through because they let a mature man ravage her. As we will demonstrate later, for that or some other reasons, they were keen to sweep that mess under the carpet.

> [1] After the allegations surfaced, the appellant was arrested despite his threats of being untouchable because of his father's alleged influence. He was arraigned before the Hwange Regional Court on the 31 August 2023 facing charges of contravening section 65 (1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] (The CODE) that is rape. Prosecution alleged that on 8 March 2023 and in a classroom at Binga High School, Binga, the appellant, a male adult had sexual intercourse twice with the complainant, a female juvenile aged 13 years without her consent.

[2] The background facts leading to the allegations as narrated by the complainant, made sad reading. The complainant and the appellant were both in boarding school at Binga High School. The complainant was in form one whilst the appellant was in the lower sixth form. On 8 May 2023, around 0720 hours, the complainant met the appellant. He proposed love (as in suggesting that the two of them become lovers) to the complainant. Taken aback, the complainant rejected the proposal. Later that same morning between 1100 hours and midday, the complainant, in a class of agriculture went to the school garden for a lesson. She was late in finishing whatever they had been doing at the garden. The teacher directed that she finishes her work whilst the others went for assembly. She left the garden when the others dispersed from assembly. It was around 1300 hours. She headed to the classroom to collect her bag. When she arrived, she was, for the second time that day, accosted by the appellant whom she found there alone. Once again, he proposed love to her but for the second time, she rebuffed that. When the complainant was going out the appellant then grabbed the victim and started fondling her breasts. He took the complainant's bag and went with it to his classroom where he threw it into a far corner of the room. The complainant followed and when she attempted to pick the bag, he grabbed her and moved to remove her skirt and pants. The complainant tried to resist but the appellant pulled out a knife and threatened to stab her. He revealed his erect penis and inserted it into the victim's vagina and had sexual intercourse with her twice without her consent.

[3] The complainant tried to approach the school matron, Brenda Siyaswekwa, to report the rape. She waved her away and said she would attend to her later in the evening as she was busy. She never did. The complainant made another attempt to tell the matron the next morning but her efforts failed once again. She then went to school and advised her friend who was a daily scholar of what had happened. She requested the friend to bring her phone the next day so that she could call her mother and advise her. The friend accepted and brought the phone. It became apparent in the proceedings that before she brought the phone to school, the friend had actually also sent a message to the complainant's mother advising her of the issue. On 10 May 2023 at around 0700hrs the complainant called her mother who was in Hwange. She spilled the beans. The mother immediately notified the school matron

through the phone. On11 May 2023, the mother visited the school and confronted the authorities about the rape of her daughter.

[4] The appellant denied the allegations. He said he had neither met the complainant nor raped her as alleged. He had arrived at the school around 0700 hours, went to assembly at 0715 hours, attended classes and went home after 12 midday. He also denied ever suggesting getting into a love relationship with the complainant.

Proceedings in the court *aquo*

[5] The state led evidence from three witnesses, namely the complainant, the complainant's mother Potani Nyoni and the school matron Brenda Siyasweka.

The complainant

[6] The background to the complainant's evidence is what we have already stated above. In detail, she said when she got the classroom to pick her books, she found the appellant by the door. He made way for her to enter. When she was going out, he grabbed the satchel and proceeded with it to his classroom. He threw it (satchel) into one corner of the classroom. The complainant followed and attempted to retrieve the satchel, but the appellant grabbed her and unbuttoned her skirt. She tried to hold the skirt, but the appellant produced an okapi knife. Her skirt had dropped to her legs. She could only hold to her skintight, which we understood to be a type of some under garment. The appellant however started scratching her with the okapi knife. He overpowered her and removed her underwear. He then pushed the complainant to the corner of the classroom with desks and made her bend backwards. He did not undress but simply pulled out his penis and inserted it into the complainant's vagina. When she screamed, the appellant stopped but threatened to stab her. Scared, she stopped screaming. He continued with rape. When he heard the voices of people who were passing by, the appellant stopped raping her. He shoved back his penis into his trousers and ordered the complainant to dress.

[7] The complainant left the classroom to the hostels where she changed her clothes. Later, she went to the dining hall where she tried to engage the matron but was advised that she was busy. The matron promised to follow her to the hostel, but as already stated, she did

not. She only came at 2100 hours to lock the gate. In the morning, she reminded the matron about the issue, but once again the woman said she would attend to her later. The complainant proceeded to school where she advised her friend and asked her to bring her phone the next day so that she could call her mother. The friend sent a message to her mother that evening and brought the phone to the school the next day as arranged. The complainant then sent a "please call me back" which is some form of an SOS advising that the sender desires to speak to the receiver but is unable to because they may not have sufficient airtime or for some other reason. As expected, the mother acted and called back. The complainant narrated her ordeal to her over the phone. The parent called the matron who professed no knowledge of the case. The complainant was later called by the senior teacher who asked her to write a report. The mother arrived at the school a day later.

[8] The complainant said she later received counselling from the Social Welfare Department. Her mother took her to the hospital where she was examined. A pregnancy test was conducted. It came out positive. After a few days, she returned to school but developed some health complications and went back home. She again sought medical help. Another pregnancy test was conducted. It was negative. She was not pregnant. She insisted throughout, that the appellant had violated her twice. Why she said twice was clear. He first inserted his penis into her. She screamed and he stopped. He threatened her and when she kept quiet, he inserted it into her vagina again. She also mentioned that she made her first report of the rape to her friend on Tuesday morning, that is the morning of the next day after the rape. A medical affidavit which confirmed the sexual violation was tendered through the complainant and was admitted by the court.

[9] Under cross examination, the complainant was adamant that although she was no longer sure of the exact time, she had met the appellant that morning, that he had proposed love to her; that she turned it down; that the appellant raped her later that day, and that she had failed to report to the matron because the matron did not give her an opportunity despite her overtures to her.

Potani Nyoni

[10] She is the complainant's mother. Her evidence was like we stated earlier. She retold the complaint in the same way the complainant had put it. It is not necessary to restate her evidence in that regard. Under cross examination, she maintained the version of the ordeal as narrated to her by the complainant.

Brenda Siyasweka

[11] Needless to state, she is the matron of Binga High School. Her evidence was that when the complainant's mother called her for the first time, she (the mother) told her there was a boy who was being a problem to the complainant. She then took the complainant to the senior teacher, who called the complainant's class teacher. The complainant narrated the rape to the three of them. The matron said on the day of the alleged rape, she had encountered the complainant on two occasions. The first time was during lunch at the dining hall and the second time was also at the same place during supper, but the complainant had not made any report to her. She said the complainant exhibited no signs that something was amiss.

[12] The State closed its case with the evidence of the three witnesses. The defence applied for the discharge of the appellant at the close of the state's case in terms of section 198(3) of the Criminal Procedure and Evidence Act [Chapter 9:07] (the "CPEA"). The application was dismissed. In the defence case, the appellant was the only one to testify.

Land Sinclair Kabome

[13] As already said, he denied the allegations. He repeated in his evidence in chief, the same averments he made in his defence outline. Even under cross examination he stuck by that.

Findings by the court *a quo*

[14] The trial magistrate analyzed the evidence that was before him. He made several conclusions and findings. Critically, at the end of its analysis, the court aquo found that the appellant had had sexual intercourse with the complainant without her consent.

[15] The first issue the trial court dealt with was the admissibility of the sexual complaint. It remained alive to the fact that the appellant had challenged the admissibility of the complaint arguing that it had not been made timeously. The court aquo explained that the complainant had not reported to the various people who were suggested to her by counsel for the appellant during cross examination for various reasons. The court's finding in that regard was stated as follows:

> "The victim of sexual assault can only reveal the assault to a person that she trusts. She could not advise her brother because they are not in good books. She may not have trusted her teachers as well. That explains why she then made efforts to inform her mother because in her mind the matron had failed her. The report of Rape was made on time in the circumstances. It complies with S v Banana 2000 (1) ZLR 607 (S) where it was held that for a complainant to be admissible:
>
> (a) The complaint must be made voluntary, not as a result of questions of leaching or inducing or intimidating nature and
> (b) It must be made without undue delay of the earliest opportunity to the person to whom the complainant could be reasonably expected to have made it."

It further stated that:

> "It cannot be argued that the complainant did not make the complaint on time. There are no timelines set when a complaint of a sexual nature should be made. The long and short of it is that it should be made voluntarily at the earliest opportunity. This is what the complainant did. The complaint is therefore admissible."

[16] The court aquo went further and held that, the complainant was a credible witness and that she had no reason to falsely incriminate the appellant. It also believed the evidence of the complainant's mother. Regarding the evidence of the matron, the trial court said it was throwing it out because in its view, it was fabricated in order for the matron to protect not only her job but also the reputation of the school given how they had handled the complainant's report of the rape. In the end the court aquo found that despite the contradictory evidence of the matron, the evidence before it proved that the appellant had had sexual intercourse with the complainant in the classroom without her consent.

Proceedings before this court

[17] The appellant was dissatisfied with the decision of the court *aquo.* He filed an appeal against both the conviction and the sentence on 13 October 2023. He attacked the conviction on nine grounds and the sentence on one. Strangely, counsel for the state supported the appeal. He said the complainant's evidence was inconsistent and that the

testimonies of the school matron and the complainant's mother should not have been admitted. His reasons for those conclusions were not apparent. The appellant's grounds of appeal were stated as follows:

> **Ad conviction**
>
> i. The court a quo erred grossly at law and fact in finding that the state proved its case beyond reasonable doubt. (sic)
> ii. The court *aquo* grossly misdirected itself by making a finding that complainant was a credible witness notwithstanding glaring material inconsistences in her evidence.
> iii. The court *a quo* erred grossly by not accepting the clear evidence of the matron who was a state witness whose evidence was not challenged in court. (sic)
> iv. The court *a quo* erred by imputing impropriety on the matron and making conclusions about her probity which were not based on any evidence and which clearly clouded its assessment of her evidence.
> v. The court *a quo* erred at law by not exercising caution in analyzing the evidence of the complainant who is a single child witness to the allegations of rape.
> vi. The court *a quo* misdirected itself in making a finding that complainant had made the report timeously in compliance with the Supreme Court ruling in *S v Banana* 2001 (1) ZLR 605.
> vii. The court *a quo* erred grossly by ignoring the fact that complainant tested positive for pregnancy hence it was probable she had had sexual intercourse with someone else prior to the 8th day of May 2023.
> viii. The court *a quo* erred grossly by not taking into account that Appellant's defence of an alibi was not disproved by the State.
> ix. The court a quo erred grossly by not addressing itself to the contents of the medical report which Appellant had raised issues about. (sic)
>
> **AD SENTENCE**
>
> x. The court aquo meted out a sentence which induces a sense of shock on Appellant notwithstanding his youthfulness.

[18] The Appellant prayed for the setting aside of his conviction and that it be substituted with the verdict of not guilty and acquitted. He equally prayed for the setting aside of the sentence imposed on him by the court aquo.

[19] At the end of the hearing of the appeal, we dismissed both the appeal against conviction and against sentence. We gave extempore reasons for that decision. Later, the appellant through his counsel requested detailed reasons for our decision. These reasons are the reasons.

The grounds of appeal

[20] The first ground of appeal raised concern that the evidence adduced by the state had not proved beyond reasonable doubt that the appellant committed rape. The third and fourth grounds both complained about the rejection of the school matron's evidence by the trial court. They were therefore one ground. The second and fifth grounds sought to impugn the credibility of the complainant's evidence. The same applied to the seventh which alleged that the complainant tested positive for pregnancy demonstrating her unreliability because that proved that she had previous sexual experience. The three grounds therefore spoke to the same issue. We compressed them into a single ground. The sixth ground attacked the admissibility of the sexual complaint whilst the allegation in the eight ground was that the court did not consider the defence of alibi raised by the appellant. At the end of it all, we read the grounds of appeal to raise the issues whether or not:

a. the state's evidence proved the crime of rape
b. the court *a quo* was entitled to find the evidence of the complainant as credible
c. the sexual complaint was admissible
d. the court *a quo* erred is rejecting the evidence of Brenda Siyasweka**,** the school Matron and
e. the court *a quo* considered the appellant's alibi defence

The law

The crime of rape

[21] The definition of rape is common cause. Section 65(1) of the CODE defines the offence of Rape as follows:

> "**65 Rape**
>
> (1) If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person, and at the time of the intercourse-
> (a) the female person has not consented to it; and
> (b) he knows that she has not consented to it or realizes that there is a real risk or possibility that she may not have consented to it."

[22] The term "sexual intercourse" is not defined in the CODE but has, on several occasions been interpreted by this court to mean "complete or partial penetration of a male's penis into the vagina of a female. In *S v Khuphe & Anor* HB-80-83 the court held that the slightest

penetration of the genitals suffices. It pointed out that it is not necessary that the hymen be ruptured. Further, in *S v Ruzive* HH-613-19 it was held that the appellant did not manage to penetrate the complainant's vagina because his penis could not fit but the young girl felt pain and that was adequate to prove legal penetration.

[23] In *casu*, the question of whether the complainant was penetrated or not did not arise. The medical report confirmed that the complainant had been penetrated. The appellant simply contended that it was not him who had penetrated the complainant. Further, he argued that the hymen tears noted on the complainant's vagina were not fresh or were healed. In its response to the 'Notice of and Grounds of Appeal,' the court *aquo* indicated that the issue of the healed hymen was only raised in the closing submissions and did not constitute evidence.

[24] Our view is that the argument raised above was unnecessary chiefly because, as illustrated, the medical definition of penetration does not accord with that of legal penetration. In medicine, the hymen has to be raptured for there to be penetration yet that is not a requirement for the crime of rape. In *S v Mhanje* 2000 (2) ZLR 20 (H) and *S v Banda* (1) 2002 (1) ZLR 156 (H) it was held that the fact that the hymen tears on the complainant's vagina were not fresh or were healed does not take away the evidence of the complainant that there was some penetration.

The admissibility of the sexual complaint

[25] In a recent judgment in the case of *Alex Dube v The State* HB 188/24 this court went some distance to explain the background to the abolition of the archaic stereotype wrought from the so-called cautionary rule in sexual matters. At page 12 of the cyclostyled judgment, it held as follows:

> "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. See cases such ass. *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). It was a rule steeped in preconceptions of past eras and was influenced by a discredited understanding of the mental disposition of female persons. 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 Roman-Dutch jurisdictions concluded that the cautionary rule in sexual matters served no purpose and was premised on irrational grounds."

[26] The rule in *Banana* is therefore plain. The complications which are at times placed on it are in our view self-created by litigants who wish to bend it to suit their nefarious interpretations. *Banana* abolished the cautionary rule. What that means is that a complaint in a sexual offence is no different from any other where the State is required to prove its case beyond reasonable doubt. No additional burden must be placed on a complainant in a sexual offence. It is therefore permissible for a court to convict an accused based on the testimony of a single witness, as long as that witness is credible, competent and his/her evidence is clear and satisfactory in every material respect. See also 269 of the CPEA. What that means is that corroboration of a single witness's testimony, where it is available is just an icing on the prosecution's case. See the dicta in *Ruzive* (supra), and in *Omega Mushamba v The State* HH562/23. A court can disregard the evidence of the sexual complaint but proceeds to convict an accused on the strength of the uncorroborated but credible evidence of the complainant in court.

[27] What is noteworthy is that *Banana* followed cases like *S v Jackson* 1998(1) SACR 470 (SCA). In arguments which stemmed from *Jackson* in South Africa some cases argued that the cautionary rule had only been reformulated, but others such as *S v M* 2000(1) SACR 484 (W) 501, were unequivocal that *Jackson* had completely abolished the rule. That debate was finally extinguished when the South African Parliament stepped in to enact legislation that put it beyond doubt that the cautionary rule was a dead practice. It promulgated the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The Act was intended to deal with a problem called secondary victimization and traumatization of victims of sexual crime which is apparent from insistence on treating the evidence of such complainants with caution and requiring corroboration. In section 58 and 59 the statute provides as follows:

> 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.

[28] In *Alex Dube* (*supra)*, this court equally cited with approval the argument by authors *Zeffert* and *Paizes*, that the drawing of adverse inferences against a victim of sexual abuse for failing to complain is an act of relying on sexual mythology that the new legislation in South Africa was intended to:

> "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."

[29] Namibia, also enacted a statute which has the same effect as that of South Africa. It abolished the cautionary rule. The courts are proscribed from drawing adverse inferences from a complainant's failure or delay to report sexual abuse to anyone. 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)

Application of the law to the facts

[30] In the instant case, the appellant argues that the complaint was not made timeously and that the first person to whom it was allegedly made (the complainant's friend) did not testify in court. If we understood it correctly therefore, the argument was that the two days

it took before the complainant reported the abuse to her mother constituted an undue delay which compromised the admissibility of her complaint. The appellant said it was so because there were not only people in authority at the school where this happened but that there were other learners who included the complainant's own brother to whom she was reasonably expected to have made the report.

[31] The above arguments were in our view, clearly flawed. To begin with, even if it were to be accepted that the requirements stated in *Banana* must be met as a rule, the second of the rules is that the complaint 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. (underlining is for emphasis.) The phrase reasonable period is not defined but is dependent on the circumstances of each case. In this case, the complainant, in her evidence, repeatedly stated that she sought audience with the matron of the school soon after her rape ordeal. Her efforts were rebuffed not once but twice. On both occasions, the matron waved away her request for audience on the pretext that she was busy with other things. It followed that an attempt to make the complaint was made immediately after the rape. Had the matron availed herself the complaint would have been made even earlier than the two days it took. Even then, the complainant reported the issue to her friend on the morning following the afternoon when she was raped. We did not hear any argument that she did not do so other than that the friend was not called to testify. The complainant did not have immediate access to her mother. She requested her friend to bring a phone to school so that she could communicate with her. The friend obliged and brought the phone upon which the complainant sent a text to the mother. Her numerous and persistent attempts were all indicative of a complainant who remained desirous to make a report despite the earlier setbacks. That the matron did not readily avail herself to allow the complainant to make the report cannot be held against the young girl. In any event, the two days within which she finally made the report to her mother cannot be said to be unreasonable in the circumstances considering her mother was not readily available and the other person whom she could confide in was hostile. We find it preposterous therefore to allege that the complaint was not made timeously.

[32] The argument that the complainant ought to have reported to other people at the school other than the matron does not make sense. The court aquo dealt with that contention and concluded that the girl could only report to a person(s) whom she felt comfortable with. That is the expectation. Rape or any other sexual abuse is not easy to deal with. Victims of such abuse do not always feel free to talk about it except with people that they really trust. The complainant said she trusted the school matron who unfortunately failed her. That she must have approached anyone who could have listened to her story is being insensitive. She had no obligation to do so.

The credibility of the complainant's evidence

[32] In the case of *Nickolas Van Hoogstraten v Tapiwa Nelomwe* SC 4/20, MATHONSI JA restated the rule against an appellate court interfering with a trial court's findings of fact. His LORDSHIP at p. 7 of the cyclostyled judgment remarked that:

> "It has long been regarded as settled in this jurisdiction that this Court will not interfere with factual findings including findings on the credibility of witnesses, made by a trial court unless the decision is irrational. This Court has, in a number of cases, followed the general rule on whether to interfere or not which was expressed in *Hama v National Railway of Zimbabwe* 1996 (1) ZLR 664 (S0 at 670 C-D, where the court pronounced:
>
> "The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion."

[33] At the hearing and in his heads of argument, the appellant alleged that the court aquo erred in accepting the evidence of the complainant as credible because it was full of inconsistencies. He said for instance, she had told her mother that she had been raped in **her** classroom yet in court she had said the rape had occurred in the **appellant's** classroom. Further, he said in her description of the rape, she had said the appellant made her to lie on a desk yet to her mother she had said the appellant pushed her on to a table.

[34] Clearly, the appellant was just splitting hairs. Our reading of the record of proceedings revealed that there was nothing inconsistent about the complainant's narration of events. She told her mother how the appellant had taken her satchel and dared her to follow him and collect it. She said she was raped in a classroom. Whatever the mother understood

about that episode cannot be held to show that the complainant's testimony was fabricated. Further being made to lie on a desk and being pushed on to a table to us mean the same thing. Rape is a traumatising occurrence. No one takes it with nonchalance. Usually, the scene is very fluid and is punctuated by struggles. To then say where a complainant said a desk on one occasion is not the same as a table on another is expecting her to behave like a machine. When one hears an oral explanation, and they are asked to retell the same story later, the use of different words and missing some finer detail is inevitable. What matters is whether or not that story remains materially the same. We therefore did not find anything inconsistent about the complainant's story in that regard. The court aquo was correct to find her evidence credible.

[35] A further argument regarding the credibility of the complainant's evidence was that she fabricated the rape because she was pregnant and wanted someone to pin the pregnancy on. But that again, demonstrates that the appellant was clutching at straws. The complainant was not pregnant. Her testimony which appears at p. 27 of the consolidated record of proceedings was that:

> "When we got to… St Patrick's, … I was examined. A pregnancy test was done on me and it came out positive. HIV came out negative. I stayed for 2 weeks at home and went back to school. When I got to school, accused's younger sister Oprient started laughing at me. She said what did you benefit from reporting my brother. I tried to report to the senior teacher but she said I am tired of your reports. After some days, I started to have pain. My mother phoned the school for a pass. I was given the pass and came back home. She took me to the hospital and **another pregnancy test was carried out and it came out negative.** I then went back to school until the end of the term."

[36] As already stated, the complainant was NOT pregnant. The first pregnancy test must have produced an erroneous result. It is illogical then to suggest that she wanted to pin the pregnancy on the appellant when she was not pregnant. The first pregnancy test was done in early May 2023. The trial occurred in October 2023, that is some six months later. No one alleged at that stage that the complainant was pregnant. She must have been visibly so were she pregnant. It vindicated her assertion that she was not. In any case, the appellant denied any relationship with her. He denied any kind of acquaintance or interaction with the complainant. The appellant was therefore suggesting that the complainant was so foolish that she wanted to pin a pregnancy on someone she had not even shaken hands with. We found no basis to interfere with the court *a quo's* conclusion that the issue of the false pregnancy result did not colour the complainant's evidence. It exhaustively dealt with

the complainant's credibility and found it satisfactory. Having lived through the atmosphere of the trial, it was better placed than this Court to make those conclusions.

The evidence of the school matron

[37] The court *a quo* after a thorough analysis of the school matron's evidence, rejected it as a concocted story. In its judgment, at p. 12 of the record of proceedings it stated that the complainant had no reason to fabricate evidence against the school matron that she had refused to listen to her story. It detailed that:

> "Why would the complainant tell the court that the matron refused to give her an era when she needed her the most? Why would the complainant lie against her? In her testimony the complainant advised the court that she wanted to advise the matron as she trusted her. In the court's view she had no incentive to lie against the matron. In fact, the matron is the one who had all the reasons to lie. She may have felt that the complainant had a trivial issue when she told her she had something urgent to discuss with her. After being told by the complainant's mother that the complainant had been raped at school she then sought to protect herself. For anyone to even imagine that the matron having ignored the complainant to that extent would come to court and admit that she deliberately omitted to attend to the complainant will be unreasonable. She had to protect herself as well as the school's reputation."

[38] The trial court went on to criticize the matron's assertion that she had been with the complainant both at lunch and at supper on the fateful day. It observed that if that were true, the fastidiousness with which she had approached the complainant's issues smacked of a cover up. She had no reason to pay special attention to the complainant on that day to the exclusion of so many other girls in the school. She had not given any reason why she had been particularly interested in the complainant more than the others. The only reason she could have singled her out would have been if she had listened to her report. That would have been special. The court further said the matron had clearly performed her responsibilities negligently and had failed in her duties. She was expected to protect the girls at the school, yet she had deliberately rebuffed the young girl on a couple of occasions when she wanted help. She therefore had a motive to fabricate her evidence.

[39] Counsel then argued that because the evidence of the matron was at variance with that of the other two state witnesses, it destroyed the evidence of the prosecution. He based his argument on the rule that a conviction cannot ensue where the evidence of state witnesses is contradictory. But our understanding of that rule is that it was intended for witnesses

who truthfully testify in court. It cannot apply where a witness is found to have deliberately chosen to mislead the court for his or her own ulterior motives. In this case, what was important was for the court aquo to ask itself whether in the absence of the tainted evidence of the school matron, there was sufficient evidence to prove the allegations against the appellant. The court aquo did so and was satisfied that the evidence proved the offence beyond reasonable doubt. Where the evidence of prosecution, without the tainted witness's evidence still proves the crime charged, the court is nonetheless, entitled to convict the accused person.

[40] The reasons given by the trial court in rejecting the evidence of the school matron were more than cogent to us. The quality of the matron's testimony was pathetic. She acted suspiciously. The complainant's evidence that she approached her on two occasions could not have been a lie given her consistency in alleging it from start to finish. The school authorities themselves appeared to have been rattled by the matron's dismissive approach in dealing with the student's problem. There is evidence which was not refuted that they attempted to sweep this case under the carpet by suggesting that it be resolved without police involvement. There is also evidence that they accommodated the appellant's mother who suggested bribing the complainant's mother not to make a report. There is also evidence that the senior teacher viewed the complainant as a child who had created problems at the school. She refused to take the complainant's reports of subsequent abuse. In a nutshell, the school had tried to cover up the abuse. With that the court aquo cannot be faulted for rejecting the concocted evidence of the matron which was clearly intended to hide the school's malfeasance. In the end and correctly so once again, it found the evidence of the complainant and her mother to have been clear and satisfactory to ground the appellant's conviction.

The appellant's alibi

[41] McNally JA in the case of *State v Musakwa* 1995(1) ZLR 1 (S) at p 3 D-E remarked that:

> "What no-one seems to have realized is that the defence raised was that of an alibi. The Appellant was saying that he had only just arrived when he was accused. So, he was not there when the confidence trick was set in motion. The Appellant said so right from the beginning. So why did the police not check whether he was being truthful…Why did they

> not check how long it takes to walk from there to the spot where the offence was committed… The court should have been alive to the importance of these matters…"

[42] In *State v Mandaza and 2 others* HH116/24 this court defined the defence of alibi as follows:

> "Put simply, an alibi is when a person accused of a crime seeks to rebut the accusations by demonstrating that he could not have committed the crime charged because he could not possibly have been present at the crime scene by reason of having been elsewhere at the relevant time."

[43] So, put in other words the defence that an appellant was not present when the offence was allegedly committed must be raised at the earliest possible opportunity to allow the police to investigate it. It also means it is not expected that the police and prosecution could have investigated an alibi raised for the first time at trial. Further, the law is that if the police and prosecution failed to investigate the defence of alibi made timeously, that defence is unassailable. The accused person does not need to prove his or her absence on a preponderance of evidence. The presence of the accused at the crime scene and his committing it, must be proved beyond reasonable doubt by the State. See the cases of *Mhlangu v S* [2014] ZAKZPHC 27; *Dennis Dube v S* HB 78/11 and *S v Chimusoro & 2 Ors* HH 699-15).

[44] In the instant case, the court *aquo* found that the appellant maintained his evidence that he was not at school at the time the offence was alleged to have occurred. What is unclear is whether or not the appellant raised an alibi which must have been investigated. Much as an accused person is not expected to prove his alibi, it remains incumbent on him to lay a proper foundation for that alibi. In *casu*, the appellant accepts that he was at the school that day, but alleges that he left before lunch. He does not state where he went yet for an alibi to stick, an accused must tell the police where he was so that they can investigate the veracity of such claim. The police cannot investigate an accused's presence 'in the whole world.' It must be confined to a particular place mentioned by the accused himself. The court aquo said it was not convinced that the appellant had left school before lunch like he alleged. The appellant was in boarding school. There is no evidence that the school gave him authority to leave the school. That the complainant even in the circumstances she was in was required to get a pass to leave school shows that it was a requirement. Without saying where he was, and with all the evidence staked against his claim of not having been

at school, there was no alibi to talk about. There was nothing for the police to investigate in that regard. So, the contention that his alibi was not investigated is baseless.

Proof beyond reasonable doubt

[45] The courts have a duty to protect the vulnerable, especially children from being sexually exploited. In a case of rape, a court must assess whether or not the guilt of an accused has been proven beyond reasonable doubt. It looks at the evidence presented against an accused in its totality and not in instalments. An accused's guilt in a rape case is not entirely dependent on whether or not the complainant reported the abuse to someone else but on whether the complainant's and other evidence if avialble, given in court, is clear and satisfactory. If it is the court must convict. In our law, the State must prove the guilt of an accused person beyond reasonable doubt. Proof beyond reasonable doubt does not translate to proof beyond a shadow of doubt. It does not mean proof to an absolute degree of certainty but simply means that there should be such proof as leaves no reasonable doubt in the mind of an ordinary man capable of sound judgment and of appreciating human motivations. The state does not have to close every avenue of escape and fanciful or remote possibilities. See the case of *S* v *Isolano* 1985 (1) ZLR 62 (S). Whether the appellant raped the complainant twice or once is a question of how one views the transaction described by the complainant. Strictly speaking and having regard to the rules against splitting of charges, the complainant was raped once. It was the reason why the state preferred a single count of rape. But in a layman's view, it can be argued that she was raped twice. She understood it so. The complainant inserted his penis into her vagina, she screamed, and he withdrew. To her that concluded the first count. When she stopped screaming following his threats, he inserted it again and only withdrew after hearing voices of passers-by. That was the second count. There was therefore no contradiction of any sorts regarding the number of times the complainant was raped.

[46] As a result of the fulfillment of these requirements and the entirety of the discussion above, we entertained no doubt that the trial court did not err when it concluded that from the evidence adduced by the State the appellant raped the complainant after threatening her with an okapi knife. Its decision was well supported by the evidence. There was, therefore,

no basis upon which we could interfere with the conviction. In the result, there was no merit whatsoever in the appeal against conviction and we dismissed it.

The appeal against sentence

[47] As regards sentence, the law is also that it is largely the discretion of the trial court. An appellate court can only interfere with a sentence if an error is established on the manner in which a sentence was arrived at. The fact of the matter is that this is a serious case. The rape, like the trial court noted was aggravated by the fact that the complainant was a child and that the appellant used a dangerous weapon to threaten her. Once that happened, the court aquo was bound to impose the minimum mandatory sentence prescribed by law. There wasn't any argument about this, either in counsel for the appellant's heads or at the hearing. We accordingly dismissed the appeal against sentence without much ado.

MUTEVEDZI J ……

CHIVAYO J……..Agrees

Mvhiringi and Associates, Appellant's legal practitioners
National Prosecuting Authotity, Respondent's legal practitioners