JABULANI DUBE

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI AND CHIVAYO JJ
BULAWAY, 24 October 2024 and 17 March 2025

Criminal appeal

T. Muganyi for appellant
K. Gundani for respondent

MUTEVEDZI J: ` Much as a sizeable number of Zimbabweans may view virginity as an old-fashioned virtue, the truth remains that in many parts of the same community it is still regarded very highly. Marriages have been known to collapse after a would-be husband who had waited for the special honeymoon night with unmitigated anticipation suddenly found that the terrain which he thought was private was a well-trodden path. Medical doctors are expected to know that the intrusion into a young girl's privates with the use of hard instruments could potentially cause embarrassment to such a girl in her future life. The doctor in this appeal wanted us to believe that he did not know and did not care about the sacredness and purity of maidenhood when he said he had poked deep into a thirteen- year -old girl's vagina using a metal instrument. It could only have been intended to mask the allegations of rape against him.

Background

[1] The appellant was, at the time he was arrested, a medical doctor operating a surgery at Binga Centre whilst the complainant was a juvenile aged thirteen (13) years. She was doing form two (2) at Siabuwa High School. The appellant and the complainant were doctor and patient.

[2] Some time at the beginning of 2024, the complainant developed a medical problem. She suffered from what appeared to be seizures. She travelled from her parents' homestead in an area called Sibauwa to Binga Centre where her mother's sister stayed. When she arrived, the aunt decided to take her to the appellant's surgery for a medical examination to determine what was causing the seizures. It was around 0900 hours on 7 February 2024. She was attended to by the appellant who advised both her and the aunt that they were supposed to return to the surgery around 2000 hours that same day. The excuse was that the appellant wanted to diagnose her at that time because it was the time that she was usually taken by the seizures. An arrangement was made that the appellant would sent a car to pick them up. True to his promise, around 2030 hours the appellant called the complainant's aunt and advised that he had dispatched a car to pick them. The complainant and her aunt attended at the surgery in the comfort of their chauffer driven vehicle. But upon arrival, the appellant ordered the complainant's aunt to remain seated in the corridor whilst he proceeded into the examination room with the complainant. When they were alone inside the consultation room, the appellant directed the complainant to remove her pants and to lie on the bed for examination. The complainant complied but alleged that instead of medically examining her, the appellant unzipped his trousers and inserted his penis into her vagina. When she attempted to resist, the appellant forcibly pressed her down. She felt excruciating pain and screamed. In panic, the appellant picked some cloth with which he covered his privates. At the same time, the complainant said she noticed him closing the zippers of his shorts. She got the opportunity to bolt out of the consultation room and ran past her aunt and out of the surgery premises. She later confided in her aunt about the rape. A report was made to the police leading to the arrest of the appellant. He was later arraigned before the court of a regional magistrate at Hwange on allegations of contravening s 64(2) as read with s 65 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] ("the CODE) that is rape.

[3] The appellant denied the allegations. In his defense outline, he stated that the complainant was his patient. He said after he had examined the complainant without any positive diagnosis coming out, he suggested to the complainant's aunt that the complainant be brought to the surgery around the times when her convulsions usually occurred so that he could ascertain

whether the complainant's condition was medical or spiritual. With the full agreement of the complainant's aunt, he arranged transport to pick her and the complainant to come to the surgery around 2030hrs on the day the alleged rape occurred. The appellant said the complainant's aunt chose to remain in the corridor when the complainant and him proceeded into the consultation room. He stated that as soon as they got into the consultation room, the complainant passed out and started convulsing in a violent manner. She appeared as if she had been possessed by some demon. When he attempted to contain her, she suddenly stood up and bolted out of the examination room. She ran past her aunt to an unknown destination. He concluded by stating that the allegations were a result of the suggestive manner in which the complainant was questioned about the incident by her aunt, Janet Muleya.

Proceedings of the court *a quo*

[4] The State tendered into evidence the medical report which spoke to the medical examination carried on the complainant. It also produced the complainant's birth certificate before leading viva voce evidence from two witnesses namely the complainant and her aunt, Janet Muleya. Below we summarise the important aspects of the witnesses' evidence in order to contextualise the issues in this appeal.

The complainant

[5] We paraphrased the complainant's evidence in the opening paragraphs of this judgment. In detail, she said she resided at Siabuwa, Binga with her parents. She had left Siabuwa village on 2 February 2024 for Binga Centre because she was not well. On 3 February 2024, she went to the surgery with her aunt where she was attended to by the appellant. The appellant advised her to return for review on 6 February 2024. When she went back on that day the appellant was not available. That forced her to return to the surgery on 7 February 2024. She saw the appellant. During the session, the appellant asked her about her monthly menstrual experiences. She advised the appellant that she bled very little but with severe menstrual pains. On hearing that, the appellant instructed the complainant to remove her pants. She did and he examined her private parts before advising her to go home and to return to the surgery at 1100hrs.

[6] At the appointed time, the complainant returned to the appellant's surgery. In the examination room, the appellant once again, instructed the complainant to remove her pants. He locked the door. For the second time, he examined the complainant's privates and advised her to again return to the surgery at 1800hrs with her aunt. Upon their return at 1800hrs, the appellant enquired from the complainant's aunt the time during which the complainant's convulsions occurred. She said it was usually between 1900hrs to 2100hrs although sometimes they afflicted her around 0400hrs. The appellant then dismissed them and promised to call them later.

[7] The complainant said later on the same day at 2025hrs, the appellant called her aunt and asked where exactly they resided because he wanted to send a car to pick them to attend at the surgery. After the aunt gave the directions, the vehicle arrived and took them to the surgery. The place was locked and the appellant unlocked the entrance for them. They got in but again, the appellant asked the complainant's aunt to remain at the verandah. He instructed the complainant to follow him into the consultation room. He immediately locked the door behind him. He again asked the complainant to remove her pants and to lie on the bed. She complied. He unlocked the door and went out for about five minutes. He came back and locked the door again. The supposed examination commenced. The complainant said she heard the sound of the appellant's trousers' zippers opening. Moments later, she felt pain on her privates and she attempted to rise. The appellant violently pushed her back with his hands. She felt something inside her private parts. The pain persisted and was intense. She cried out and rose. At that point, the appellant pulled a cloth and covered himself on his front to hide his private part. The complainant said she again heard the sound of the zippers of the appellant's pair of trousers. The appellant unlocked the door. The complainant's aunt was already at the door but the appellant told her to wait outside. The complainant picked her pants and ran past the two who were standing by the door into the darkness. Later, she went home but found that her aunt was not there. She proceeded to sleep. Her aunt later arrived in the company of a security guard from the surgery. The man however did not stay long.

[8] When he had left, the complainant said her aunt enquired, about what had earlier occurred at surgery. The complainant broke down and started crying. It was then that the aunt asked whether the appellant had slept with her and she said he had. She examined the complainant's private parts and discovered that there was semen. She too broke down and cried.

[9] When she was further probed by the prosecutor, the complainant stated that when she ran into the darkness she had proceeded to a nearby flea market. Whilst there, she had felt some wetness on her vagina. She checked and noticed sperm on her.

[10] Under cross examination, the complainant remained consistent with her testimony. She was adamant that the appellant was standing when she felt a "thing" inside her vagina and the appellant pushed her with both hands on the chest when she had tried to rise. When asked how before the alleged rape, the appellant had examined her privates, she said he had only looked and did nothing else. She denied that the she was possessed by a demon when she bolted out of the surgery.

Janet Muleya (Janet)

[11] She is a maternal aunt to the complainant. Her evidence dovetailed into that of the complainant in a lot of material respects. She confirmed the various visits to the surgery. Crucially, she narrated that on 7 February 2024 she left the complainant at the surgery because there was a long queue and she wanted to go to work. At around 1600hrs the same day, the complainant had arrived at her workplace and advised that the appellant wanted to see her. They both proceeded to the surgery where on arrival the appellant enquired on the times the complainant usually convulsed. She told him. The appellant instructed that the complainant had to be brought to the surgery around those times. Later that day, at about 2025hrs, the appellant called her and sent a car to bring them to his surgery. When they arrived, she remained in the corridor whilst the appellant and the complainant proceeded to the consultation room. After a time of about forty-five minutes to an hour, Janet said she heard the complainant screaming. She rushed to the consultation room. She met the appellant as he opened the door. She enquired why the complainant was screaming but the appellant directed her to remain

seated on the bench. As they spoke, the complainant bolted out of the consultation room holding her underwear which included her pants and another garment colloquially called a skin-tight. She ran into the darkness. Together with the appellant, they looked for the complainant in vain. She finally went back home in the company of a security officer at the surgery. They found the complainant already home. She enquired from the complainant what had occurred but she broke down and started crying. The security officer left. She then asked the complainant whether the appellant had slept with her. She said he had. She said she examined the complainant and found that she was soiled with semen.

[12] Under cross examination, Janet was asked to fully explain how the complainant conducted herself during the moments of seizure. She narrated that when she went into the seizures, the complainant would be quite and motionless. It would take about an hour for her to get back to her senses. She said whilst in that state, the complainant would not respond to any engagement. She added that the seizures usually occurred during school days and were infrequent as they would attack the complainant about once a week. She said the door to the consultation room was locked at the time that the complainant screamed because when she attended there she found the appellant unlocking it. She denied the allegation that the complainant was not in her right senses when she bolted out of the surgery. She was also adamant and maintained her story that when she examined the complainant, she saw semen and blood on her body. She confirmed that she had asked the complainant whether the appellant has slept with her. She was equally adamant that the appellant had told her to sit on the bench and not to enter the examination room when the complainant screamed.

[13] As already mentioned, the appellant denied the allegations. He incorporated his defense outline into his evidence in chief. In addition, the appellant told the court aquo that contrary to the evidence of the state witnesses, it was the complainant's aunt who had refused to enter the consultation room and chose to remain outside whilst he went into the consultation room with the complainant that evening. He stated that his objective was to observe the behaviour of the complainant when she went into the seizures which troubled her. He had previously done a test which is called an ECG. It had been inconclusive. That prompted him to make further inquiries

to ascertain the cause of the problem. The other possible causes which he thought of, so he alleged, were pregnancy and sexually transmitted infections. It was for those reasons that he instructed the complainant to remove her pants and lie on the bed. He said he used an instrument called a specular to conduct the examination. It was in his satchel which he unzipped to draw it out. He explained how he had conducted the examination of the complainant. He said she was lying on the examination bed, which was about ten centimeters above his navel on his left whilst the complainant's feet were on his right. With gloved hands, he had lubricated the specular and gently inserted it into the complainant's vagina.

[14] The appellant further stated that at that point, the complainant began to make shrieking sounds and violent movements of the whole body. The specular was still inside her vagina. He said he had to quickly remove it. He added that because the complainant was swinging from side to side, the appellant had to stretch his hand to calm her down but he failed. He rushed to call the complainant's aunt who was already approaching the door. He said at that stage, the complainant opened the door and bolted out of the room passing both him and her aunt. She ran into the darkness. He denied that the complainant had semen in her vagina. Instead, he said what she had on her privates was the gel he had used for the examination. He further explained that the fresh tears which reflected on the complainant's vagina as per the medical report were a result of many possibilities, such as;

i. self-examination conducted by the complainant,
ii. examination conducted by the aunt;
iii. the use of the specular; or
iv. anything could have happened during the one hour forty-five minutes that the complainant was at the flea market.

[15] Under cross examination, the appellant confirmed that in his detailed defense outline he had not mentioned the use of the specular and the gel. He admitted that the complainant could not have seen him inserting the specular because she was in a lying position but that he had advised her that he was going to examine her and it was going to cause some discomfort. He denied that the complainant bled at the time of examination. He also stated that there was

nothing unprocedural or unethical about examining a minor in the absence of her guardian or nurse.

Findings of the court *a quo*

[16] In his judgment, the trial magistrate was convinced that the State had managed to prove the case of rape beyond reasonable doubt. He made several findings and conclusions before reaching that decision.

[17] The court first dealt with the issue of the admissibility of the sexual complaint because the appellant had in his defence challenged it on the basis that it had been made after a suggestive inquiry carried out by the complainant's aunt. The trial magistrate found that the complaint remained admissible despite the appellant's protestations. He reasoned that: -

> "One may ask if the complaint made by the complainant is admissible. It is not in dispute that the complainant admitted that upon being asked what had happened she could not reveal what had transpired. She continued crying until her aunt asked her if the accused had sexual intercourse with her and she then said, yes. In the court's view the complaint is admissible. It is important to note that the aunt had taken the complainant to the accused's surgery at night and all of a sudden, she bolted out of the surgery after having screamed. The aunt was anxious to know what could have transpired in the surgery as the complainant was just crying and not revealing what had happened. The circumstances could not permit her to continue asking her or to wait for the complainant to stabilize."

[18] He held further that:

> "It is important to note that rape by its very nature is traumatizing in that moment where one is in trauma, they cannot reason. In this case, the complainant could have been shaken to the extent that she could not speak. Obviously, the aunt asked that question so that she can get to know what transpired in the surgery. This was important because the complainant had screamed in the surgery and all of a sudden bolted out of the surgery and ran away to the market. In the court's view the complainant's complaint is admissible."

[19] The court *a quo* went further and dealt with the appellant's defence that he had used a specular to conduct the examination on the girl and dismissed it. It said the argument was clearly an after-thought because it was only raised in the defense case. It further held that even under cross examination of the complainant, the appellant had not put to her questions regarding the use of that instrument. Further, the court *a quo* said it could not comprehend

why the appellant had inserted the specular into the complainant's vagina because clearly there were other means of obtaining the information whether she was pregnant or had been afflicted with a sexually transmitted infection. In the end, the court *a quo* held that it was satisfied that the state had managed to prove its case beyond a reasonable doubt.

Proceedings before this court

[20] Dissatisfied with the decision of the court *a quo*, the appellant approached this Court. He appealed against both his conviction and sentence. Clearly without giving any thought to it, counsel for the respondent blindly supported the appeal. The five grounds which the appellant raised against conviction and the two against sentence were couched in the following terms: -

"GROUNDS OF APPEAL

1. The court *a quo* erred and grossly misdirected itself at law and in fact by making a finding that the state had proved its case against the Appellant when it had presented evidence that falls short of evidence required in proving sexual offences.
2. The court *a quo* grossly misdirected itself at law by making a finding that the sexual complainant was admissible when in fact the complainant and evidence adduced fell short of the admissibility requirements. The report was not made voluntarily but as a result of leading questions and pressure.
3. The court *a quo* erred and grossly misdirected itself as a trier of fact by making findings that are medically conclusive when no evidence or expert evidence was led to substantiate same.
4. The court *a quo* grossly misdirected itself by rejecting in toto the evidence led by the Appellant in his defense when such evidence remained extant and was never controverted.
5. The court *a quo* grossly misdirected itself by making a finding that the complainant was raped when in fact no direct evidence was adduced and in fact the evidence was circumstantial and marred with possible inferences that were clear in the evidence before court.

Ad sentence

6. The court *a quo* grossly misdirected itself by making a finding that the offence was committed in aggravating circumstances and thereby imposing the minimum sentence of 15 years.
7. The court a quo misdirected itself by paying up lip service to the mitigatory factors advanced by the Appellant.

RELIEF SOUGHT

WHEREFORE; the appellant prays for the following relief:

(a) THAT the appeal prevails.
(b) THAT the decision of the court *a quo* be and is hereby set aside and substituted as follows:
    1. "accused person is hereby acquitted and consequently"
    2. "the accused person is released."

[21] We heard the appeal. At the end of the hearing, we dismissed both the appeal against conviction and against sentence. Our reasons for the dismissal were unscripted. We set to prepare this judgment after counsel for the appellant requested fuller reasons for our decision. These therefore are they.

Issues for determination

[22] We noted that grounds 1 and 5, were essentially one. They both complained that the State had failed to adduce evidence which met the required threshold of proof beyond reasonable doubt. Put differently, they allege that it had had not been proven beyond reasonable doubt, that the appellant had raped the complainant. Ground 2, attacked the admissibility of the sexual complaint whilst ground 3, alleged that the court *a quo* made findings on medical or expert evidence which had not been led in court. In other words, the argument was that the court *a quo* used extraneous evidence to convict the appellant. Ground 4 complained about the rejection of the appellant's defence by the trial court.

[23] Needless to state, in ground 6, the appellant was aggrieved by the court *a quo's* finding that the crime had been committed in aggravating circumstances. He alleged it was not. In ground 7, the argument was that the factors which mitigated the appellant's moral blameworthiness were not properly assessed. In the end, we summarised the issues which arose for our determination as whether or not:

a. the state's evidence proved the crime of rape.
b. the sexual complaint was admissible.
c. the court *a quo* used extraneous evidence to convict the appellant
d. the court *a quo* erred in rejecting the appellant's defence.
e. the court *a quo* wrongly found that the rape had been committed in aggravating circumstances.

[24] Our view was that the above issues could easily be further compressed and resolved. The question whether or not the evidence proved rape was the simplest. We held so because

it was entirely dependent on which story, between that of the complainant and of the appellant, the court *a quo* should have believed. The two versions were mutually exclusive. But, before that, the question of the so-called admissibility of the sexual complaint required interrogation.

The law on admissibility of sexual complaints

[25] Recently, this court, in the case of *Alex Dube v The State* HH188/24, made far reaching pronouncements on the question of the admissibility of sexual complaints when it said at pp. 13-14 of the cyclostyled decision: -

> "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*[1] 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 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. 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." (The bolding is my emphasis)

[26] We repeat it here once more that it is futile for an accused person to cling on to the so-called admissibility of a rape complaint in the face of clear evidence that a rape was committed. The issue of whether or not a rape was revealed through questions of a leading or intimidating

[1] 2000(1) SACR 484 (W) 501

nature can only be relevant in instances where the guilt of an accused is entirely dependent on the making of such a complaint. What matters is not the complaint but whether or not there is evidence to prove beyond reasonable doubt that the complainant was raped by the person she points to as the rapist. The sexual complaint only corroborates the complainant's story. It does not prove the rape. It is evidence which only demonstrates that a complainant did not fabricate the allegations of rape.

[27] What happened in this case demonstrated the fallacy that the rape report must not have been elicited through questions of a leading or intimidating nature. The circumstances must be separated from situations where a rape occurred and the complainant kept quiet about it for some time only to cry the rape after being intimidated or being asked leading questions about it.

[28] The complainant's aunt was aware of what had transpired earlier in the evening when the alleged rape occurred. The trial magistrate correctly pointed out that aspect in his judgment. He said at the surgery, the complainant had not only inexplicably bolted out of the consultation room but had done so with her underwear in her hands in full view of both the appellant and the aunt. When she finally got home, the aunt was anxious to know what the problem was. The complainant was beside herself with sorrow. She was crying relentlessly. She could not say anything. The trial magistrate went further and said it cannot be gainsaid that where one is raped, the possibility of traumatization is very high. He said he could not rule out that possibility with the complainant in this case. He added that it was possible that she could not at that time comprehend what had happened to her. She had screamed from the belly of the consultation room before running out. It had only been her and the appellant in that room. If anybody had done anything wrong to the complainant, it could only have been the appellant. It was clear that something amiss had happened to her. In cases like that, a parent/guardian is not expected to keep quiet. They are allowed to probe the child and find out what could have possibly gone wrong. Parents and guardians are not legally trained about the much-touted requirements for the admissibility of rape complaints. They do not even know about them. All they care about is the peace and happiness of their loved ones.

[29] In the end, how the rape report came about does not in my view matter. What does is the quality of the evidence led at trial to establish the guilt of an accused person. In that regard, we reiterate the position that the complications which are at times ascribed to the requirements for admissibility of rape and other sexual offences complaints are self-created by litigants who wish to twist such requirements to suit their nefarious interpretations. The long and short of it is that the case of *Banana v The State* 2000(1) ZLR 607 (SC) ended the application of the cautionary rule in sexual matters. Once that is admitted, a complaint in a sexual offence must be equated to and be seen from the perspective of any other where the State is required to prove its case beyond reasonable doubt. There is no rational basis for imposing an extra layer of scrutiny on a complaint in a sexual offence. It must follow that a court may convict an accused on the basis of the sole testimony of the complainant. The only requirement for that to happen is that the complainant's evidence must be credible, competent, clear and satisfactory in material respects. That position is firmly supported by s269 of the Criminal Procedure and Evidence Act which allows a court to convict an accused on the testimony of a single witness. Where the state adduces evidence, which supports the complainant's, it does so not because the law requires it but simply to solidify its case. A court may, therefore, disregard the evidence of the sexual complaint but at the end of the trial convict an accused because there is adequate and credible evidence given by the complainant in court although lacking corroboration.

[30] In this case, the complainant reported a case of rape against the appellant to the police. The question that needed to be answered was, if we took away the disclosure by the complainant to her aunt about the rape, was there enough evidence to ground the appellant's conviction on a charge of rape. Surely there was. The appellant's conviction was not grounded on the report to the aunt but on what transpired at the surgery. It was based on what the complainant said was done to her, what she said she felt and saw on her body in the aftermath of the alleged rape. Unfortunately, for the appellant, the aunt in this instance did not only give evidence about the complaint. As will be shown later, she was also a witness to the happenings at the surgery which tended to support the allegations of rape.

[31] In conclusion, our view is that the discussion above demonstrated that it was immaterial whether or not the rape complaint was admissible.

Whether or not the appellant raped the complainant and the rejection of appellant's defence

[32] From the findings of the court *a quo*, there were issues that we found common cause. They were that: -

(a) The appellant went into the examination room alone with the complainant,

(b) Whilst in the room, the complainant never lost consciousness of what was going on around her. That she had the presence of mind to rise from the examination bed, remember to pick her underwear and that she had no time to waste by putting it on supports that conclusion,

(c) Something invasive (whether a penis or a specular) was inserted into the complainant's vagina without her consent,

(d) After the incident, the complainant found on her body a jelly like substance (whether it was surgical gel or semen),

(e) In the examination room at some time during the purported procedure, the appellant opened and closed a zipper (whether it was of his satchel or his trousers/shorts),

(f) The complainant stormed out of the examination room holding her underwear in her hands.

[33] As already said, the point of departure in the examination of the question whether the complainant was raped must be the stories as told by the two protagonists. We read the record of proceedings relating to the trial. The complainant's story was told with amazing clarity and consistency from beginning to end. It was so detailed that it could only be outrageous to allege some form of collusion or fabrication on her part. Better still all the things that she said were supported not only by her aunt but also by the appellant himself.

[34] For instance, the complainant said something was inserted into her vagina without her consent. The appellant accepted that he inserted a specular into the complainant's privates. That fact was further corroborated by the aunt who said when she examined the complainant, she saw

blood mixed with semen on her. The medical report supported that further where it indicated that there were tears on the complainant's hymen.

[35] In addition, the complainant said that she saw semen on her privates after the incident. The appellant again corroborated that but argued that it wasn't semen but surgical gel. The aunt also saw the semen on the complainant. When it was put to her that it was not semen she was emphatic that she was a mature woman with sexual experience and could identify semen with ease when she saw it.

[36] The appellant also confirmed that the complainant was right that a zipper had been opened and closed at some stage when they were in the examination room although he attributed it to a satchel .

[37] Given the above narration, and the confirmation of the appellant's story, no one could have questioned the credibility of the complainant's evidence. Not by any stretch of imagination. No one could find any reproach on the findings of the trial court that it believed the complainant's story.

[38] What, however, complicated the above issues were two smalls, but very significant details. Those were the appellant's story and his conduct. We noted that the appellant was represented by counsel from the beginning to the end of his trial. That counsel must have been aware of the requirements of section 188 of the CPEA. That section provides as follows: -

> **"189 Statement made or withholding of relevant fact by accused may be used as evidence against him**
>
> (1)Any statement referred to in paragraph (*b*) of section *one hundred and eighty-eight* may—
>
> (*a*) be taken into account in deciding whether the accused is guilty of the offence charged or any other offence of which he may be found guilty on that charge; and
>
> (*b*) except in so far as it amounts to an admission of any allegation made by the State, not be taken into account for the purpose of deciding whether the accused should be found not guilty in terms of subsection (3) of section *one hundred and ninety-eight*.
>
> (2) If an accused, when so requested in terms of paragraph (*b*) of section *one hundred and eighty-eight*, has failed to mention any fact relevant to his defence, being a fact which in the circumstances existing at the time, he could reasonably have been expected to have mentioned, the court, in determining whether there is any evidence that the accused

> committed or whether the accused is guilty of the offence charged or any other offence of which he may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused"

[39] Noticeably, there was no doubt at all that the conduct of the examination on the complainant by the appellant was a crucial aspect of the entire trial. The appellant was well aware that his conviction or acquittal was solely dependent on his explanation of what had transpired in the room where he was alone with the complainant at the time she cried rape. He was at all times cognizant of the need to disclose that he had inserted an instrument into the complainant's vagina and applied gel to lubricate her privates for that purpose. We presume because we did not hear any protest to it, that the appellant was favoured with the witnesses' statements and other documents which the state intended to use in proving its case well before the trial commenced. In those, he must have noted the allegations that he had inserted his penis into the complainant's vagina and that both the complainant and Janet were alleging that they had discovered semen on the complainant's body when she got home. Yet he never raised a finger to correct that. He remained silent about the specular and the gel. He did not mention the specular and the gel in his defence outline. They were not only central to his defence but were in reality his entire defence. It was not possible therefore that he could have inadvertently overlooked such critical detail. Even worse is the fact that during trial when the complainant and Janet testified, they repeatedly alluded to those facts but the appellant at no time ever suggested to them the use of the specular and the gel. The court *a quo* was alive to these omissions and referred to them in its judgment. They were fatal to the appellant's defence and there could have been little surprised, if any, that it was rejected.

[40] The only conclusion that we drew from the above indiscretions, by the appellant just like the trial court did, was that his reference to the instrument and the gel were just an afterthought to counter the damning allegations against him. He did not only try that, but further added a satchel to the equipment that he had. The satchel was brought in to diffuse the bomb about him opening and closing the zippers of his shorts. It was a desperate attempt to close the stable when the horse had already bolted. The result was that the court *a quo* was entitled to hold as it did, that the appellant's defence was not only false but palpably so. That falsity, as mandated by s 188 (2) corroborated the complainant's allegations that it was a penis that had been inserted into her vagina.

[41] More damning is that the suspicious actions by the appellant when taken cumulatively, further supported the conclusion that he raped the complainant. For instance, he argued that when the complainant screamed and acted like she had been possessed by a demon, he had opened the door to call in her guardian whom he met at the door. But contrary to that, Janet said when she heard the scream, she rushed to the door in a bid to enter the examination room. At the door, the appellant barred her from entering and directed her to remain seated on the bench outside. That evidence exposed the appellant's lies once more. It also put paid to his claim that it was Janet who had elected not to enter the examination room when both her and the complainant were categoric that the appellant had barred Janet from accompanying the complainant into the room.

[42] Further, the appellant chose to examine a complainant he had all the opportunity to observe in day light, at night and alone in his surgery. During trial, we noted that the appellant skirted the question on whether it was not a requirement that when examining patients there was supposed to be a nurse in the consulting room. When the prosecutor insisted, he said it was preferable that there be someone. He then said the complainant's caregiver had opted to sit on the bench but in contrast she said she was asked to sit there. When we looked at it though, she was an aunt who appeared highly concerned with her niece's health. It was difficult to imagine that she just chose to sit outside on her own volition.

[43] We equally noted that the complainant chose to conduct pregnancy and presence of sexually transmitted infections tests by the use of overly invasive methods without the consent of the patient or her guardian. The complainant said she was never asked for her consent to the insertion of the so-called specular into her vagina. The view or consent of her guardian who was outside the room was equally not sought. The trial court acknowledged the limitations of its knowledge in medicine but said it was common sense and did not even need medical skill to know that pregnancy could be tested by other means such as pregnancy test kits which are sold over the counters in pharmacies. In addition, it said that the presence of sexually transmitted infections was not something that was easily detectable by a naked eye. As stated earlier in this judgment, it made little sense for an experienced doctor to break a young girl's virginity with the reckless abandon that the appellant showed. It was so particularly for treatment of an ailment that was not life

threatening. We, therefore, entirely agreed with the trial magistrate's views and did not need to add anything to them. They were indisputable. We are not saying those omissions by the appellant constituted criminal actions but that added to the evidence narrated by the complainant, they tended to corroborate her testimony that the appellant raped her.

[44] From the above, there could be no doubt that the appellant raped the young girl and that the court aquo was right to conclude that his guilt had been proven beyond reasonable doubt. It was also right to reject his defence which was clearly a lie. We could not find any misdirection in the trial court's findings. For those reason, we could not interfere with its decision.

The extraneous evidence

[45] Counsel for the appellant argued that the trial magistrate concluded that there was semen on the complainant's body when in reality no scientific test had been done to prove whether or not it was semen. But in truth, there was nowhere in the trial court's judgment that it said it was placing reliance on the fact that the substance found on complainant's body was semen, to convict him. The timidity with which counsel argued the point in his heads of argument and at the hearing demonstrated his lack of conviction that it could be a ground that the court had to seriously consider in this appeal. The question simply did not arise. Above, we dealt with how the appellant divested himself from dealing with the defence that the substance was a gel which he had applied to the complainant. We need not labour this judgment with a repetition of the same arguments. The long and short of it was that the presence of that substance on the complainant's body was simply supportive of her testimony and not the major basis on which the conviction was premised. We concluded so because the presence of semen does not prove rape. Similarly, its absence does not prove that there was no rape. Ejaculation is not an essential element of the crime. Penetration even to the slightest degree is. The medical evidence showed that there was penetration because the complainant had fresh hymenal tears on her vagina. The trial court rejected the appellant's version of how the tears had been caused. It accepted the complainant's version. And justifiably so. Once more there was no merit in this ground of appeal. We dismissed it for those reasons.

The appeal against sentence

whether or not the court *a quo* erred in finding that the crime was aggravated

[46] This crime was committed in February of 2024 well after the enactment of the amendment to s 65 (2) of the CODE and the coming into operation of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023 (The sentencing guidelines). The sentencing of the appellant was therefore supposed to be in accordance with that law.

[47] Section 65(4) of the CODE obligates a court convicting an offender of rape to assess whether or not the offence was committed in aggravating circumstances before it sentences him/her. The presence or otherwise of aggravating circumstances will in turn guide the court's sentencing options. If a court finds the presence of one or more of the factors listed under subsection (2) of s 65, it is required by law, to make the conclusion that the crime was committed in aggravating circumstances. Once it finds so, it has no discretion but to impose on the offender the minimum mandatory 15 years imprisonment. The factors which constitute aggravation as listed in the provision are:

a. The age of the person raped
b. The degree of force or violence used in the rape
c. The extent of physical and psychological injury inflicted upon the person raped
d. The number of persons who took part in the rape
e. The age of the person who committed the rape
f. Whether or not any weapon was used in the commission of the rape
g. Whether the person committing the rape was related to the person raped in any of the degrees mention in subsection (2) of s 75
h. Whether the person committing the rape was the parent of guardian of, or in a position of authority over the person raped
i. Whether the person committing the rape was infected with a sexually transmitted disease at the time of the rape"

[48] From the above list it is significant that the age of the person raped is critical and is an aggravating factor. In this case, the complainant was only 13 years old at the time of the rape. The trial magistrate correctly found it aggravating. It was not the only aggravating factor though. There

were more. For instance, the court aquo ought to have considered the physical and psychological injuries caused to the complainant. We talked about issues such as the loss of virginity and the injuries to the complainant's privates earlier on. We equally noted that the appellant as the complainant's doctor was in the circumstances, a person in authority over her. Yet there is no need for a multiplicity of the factors. A single one suffices.

[49] When that happens, no amount of mitigation may move the court from imposing the minimum mandatory sentence required by law. It is actually futile for a sentencing court to start considering the mitigation if the purpose will be to impose a sentence lower than the minimum mandatory because the law does not permit that. In the end, with the presence of more than one aggravating factor as shown, the appellant ought to have counted himself lucky to have gotten away with the barest minimum. The appeal against sentence was completely hopeless.

[50] Given the above, we had no choice but to dismiss both the appeals against conviction and sentence.

[51] We wish to end this judgment by pointing out that whilst counsel for the appellant saw it fit to get instructions from his client to request our reasons for the dismissal of his appeal, he neglected his duty to advise the appellant to surrender himself to the authorities to serve his sentence. He is in clear contempt of the courts from which he seeks redress because at the last count, the return from the Zimbabwe Prisons and Correctional Services showed that the appellant was a fugitive from justice unless if that return was not correct.

MUTEVEDZI J………………………

CHIVAYO J …………………………Agrees

Tanaka Law Chambers, Appellant's legal practitioners
National Prosecuting Authority, Respondent's legal practitioners