

NEAL CEGRIM LEACH

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & MAKONESE JJ
BULAWAYO 19 OCTOBER 2015 & 29 MARCH 2018

Criminal Appeal

T.A. Cherry with T. Masiye-Moyo for appellant
K. Ndlovu for the respondent

BERE J: After hearing argument in this matter, both the conviction and sentence were set aside. The court indicated that its written reasons would follow. Here they are.

The appellant in this case was convicted by a Regional Magistrate sitting at Bulawayo on 21st February, 2014 of three counts of contravening section 66 (1) (a) (i) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. After conviction the appellant was sentenced to serve a cumulative sentence of 25 years five years of which were conditionally suspended leaving an effective sentence of twenty (20) years imprisonment.

Aggrieved by both the conviction and sentence the appellant lodged this appeal to this court against both.

As against conviction the grounds of appeal were framed as follows:

- “1. The learned magistrate in the court *a quo* erred in fact and consequently in law when he held that the complaint by the complainant was made without undue delay at the earliest opportunity which under all circumstances would reasonably be expected, to be made to the first person to whom the complainant would be expected to make it given that the complainant had had all the opportunity to make the complainant to her mother who was close to her and in any event to her boyfriend way earlier than at the time the complainant was made.

2. The learned magistrate in the court *a quo* misadvised himself and therefore misdirected himself when he held that the question before him was “whether or not the accused committed the alleged offence” when in fact the question is whether or not the State has proved its case beyond reasonable doubt.
3. The learned magistrate in the court *a quo* misdirected himself in that he failed to note the significance of the unsatisfactory evidence of the complainant under cross-examination ...
4. The learned magistrate in the court *a quo* erred in law in that he failed to analyse the evidence count by count and instead wrongly treated all the counts as one.
5. The learned magistrate in the court *a quo* misdirected himself in that, he failed to understand, analyse and properly evaluate the medical evidence that the placed before him.
6. The learned magistrate in the court *a quo* misdirected himself in basing his conviction on the finding that the appellant “must have done something to her” which misdirection resulted in the learned magistrate losing sight of where the onus lay.
7. The learned magistrate completely abdicated his duty to properly analyse the evidence of the complainant for credibility and instead chose to make a bold assertion that he found her to be credible.
8. The learned magistrate in the court *a quo* erred in law by completely ignoring the evidence of Laura Pinkney who testified that she would always come home for lunch on Mondays and would only leave at 3.00pm for afternoon activities.
9. The learned magistrate failed to make a proper or any assessment of evidence of the appellant and his witness on its merits choosing instead to rely on possibilities for his findings in a criminal case.”

As against sentence the grounds of appeal were basically that by failing to treat all counts as one for purposes of sentence, the learned magistrate ended up with a sentence that was so excessive as to induce a sense of shock.

Upon being served with the appellant’s notice of appeal and the elaborate heads of argument the respondent declined to support both the conviction and sentence.

In arriving at this position the respondent’s counsel was swayed by the inconsistencies in the complainant’s evidence which negatively coloured her credibility. Counsel was of the firm view that in all the probabilities of this case, the complainant dismally failed to pass the credibility test which incidentally the lower court had triumphantly concluded had been established and used it as the main basis of the appellant’s conviction.

The background

The complainant, a 16 year old girl and a student at Girl's College, Bulawayo had been given accommodation as a border together with four other girls from the same college at the appellant's residence.

The complainant then alleged that on two occasions stretching from February to March 2013 the appellant had indecently assaulted her by inserting his fingers inside her vagina and that on one occasion the appellant was alleged to have forced the complainant to suck the appellant's erect penis.

The appellant strenuously denied the allegations in the lower court. However, despite this and after a protracted trial the appellant was convicted and sentenced as already highlighted.

The legal position on sexual matters

The position of our law was authoritatively laid down in the much celebrated case of *S v Banana*¹ as follows:

“The requirements for admissibility of a complainant are:

1. It must have been made voluntarily and not as a result of question as a leading and inducing or intimidating nature. See *R v Petros* 1967 RLR 35 (G) at 39G-H.
2. It must have been made without undue delay and at the earliest opportunity, in all the circumstances, to the first person to whom the complainant could reasonably be expected to make. See *R v C* 1955 (4) SA 40 (N)_ at 40G; *S v Makanyanga* 1996 (2) ZLR 231 at 242G – 243C”

¹ 2000 (1) ZLR 607 (S) @p 616B-C

A simple perusal of the judgment of the court *a quo* clearly shows that the learned magistrate was fully alive to the correct applicable legal position in sexual matters. However, the shortcomings of his judgment were exposed when he failed to apply the legal position to the evidence which was accepted by the court, or that evidence which was not in dispute.

Three cardinal errors which were made by the court *a quo* can be summarised as follows:

The first error that screams loudest was the magistrate's stout effort to try and determine the outcome of this case by relying on evidence based on a balance of probabilities as opposed to being guided by proof beyond a reasonable doubt. It is trite that in criminal proceedings, and in order for the court to find against an accused person, the proof required is proof beyond a reasonable doubt. There is no room in a criminal matter for the court to be guided by evidence weighed on the balance of probabilities.

The second error made by the trial court was its apparent failure to appreciate that the complainant's conduct looked at in its totality did not satisfy the requirements outlined in the *Banana* case (*supra*).

Thirdly, the court *a quo* failed to appreciate that the inconsistencies in the complainant's evidence heavily militated against a finding of credibility in her favour. It is quite telling that despite all these highlighted issues having been presented to the court *a quo* during cross-examination of the complainant and during court addresses by the appellant's counsel the court chose to disregard same on an uninformed basis.

Proof beyond a reasonable doubt

It is a time honoured principle of our law that in order for the court to convict an accused person the state must have proved its case beyond a reasonable doubt. All an accused person is expected to do is to merely cast doubt on the state case. GILLESPIE J in the case of *S v Makanyanga* eloquently puts the position as follows:

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“Whilst it is axiomatic that a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, still, the fact that such credence is given to testimony for the state does not mean that conviction must necessarily ensue. This follows irresistibly from the truth that the mere failure of an accused person to win the faith of the bench does not disqualify him from an acquittal. Proof beyond a reasonable doubt demands more than that the complainant should be believed and the accused disbelieved. It demands that a defence succeeds whenever it appears reasonably possible that it might be true. The insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence. If it were not so then the administration of criminal justice would be the hostage of the plausible rogue who’s insincere but convincing blandishments must prevail over the stammering protestations of truth by the diffident, frightened or confused victim of false incrimination.”²

In *R v Henry*, the learned Judge made a very critical observation when he remarked as follows:

“Human experience has shown that in the courts girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons ... and sometimes for no reason at all”.³

In the instant case, one notes in the court *a quo*’s judgment a blind determination to religiously accept the whole story told by the complainant without critically analyzing it. The apparent shortcomings of the judgment are clearly demonstrated by the magistrate’s total failure or neglect to analyse the evidence of the appellant. The appellant maintained throughout the proceedings that the allegations against him did not take place and that he had no idea about the complainant’s motive in bringing the charges against him.

If the court *a quo* had commended on the evidence of the appellant and analysed same in the same manner that it attempted to do with the complainant’s testimony, the court would probably have agreed with the consistent position maintained by the appellant. In these cases, it is not sufficient to blindly whitewash the complainant’s testimony and using same to condemn an

² 1996 (2) ZLR 231 (H) at p 235E-G

³ (1968) 53 Cr App R 150

accused because that is not what the law dictates. The analysis and critic of evidence must be done in respect of both the complainant's evidence and that of an accused to remove any traces of bias. The judgment of the court a quo failed to achieve this and it therefore comes nowhere nearer to establishing the accused's guilt beyond a reasonable doubt.

The inconsistencies in the complainant's evidence

It is quite telling that the evidence on record suggests that the complainant was reluctant to bring the allegations of abuse to her boyfriend Kevin Lombard, her closest friend Daniello and even to her parents. The closest she came to was with particular reference to the threat of kidnapping by the appellant. If it is true that the appellant had sexually abused her, not once, not twice but thrice, why would she not have reported such serious violations to any of these individuals? The complainant's case gets complicated if one considers the existence of other girls with whom she stayed, her teachers at Girls' College, the domestic helpers, her friend's parents, to whom she could have reported. As observed by appellant's defence counsel the complainant's accessibility to social media and her failure to use same further complicates her situation.

To further compound her case, when she eventually decides to take the issues out of her breast, she spoke about kidnapping and not sexual abuse. It is not safe to trust such complainants. They can easily lead one astray like what happened in this case.

All these observations could not possibly have supported the credibility of the complainant's story. It remained far from convincing.

The delayed report

If there is anything that put the final nail in the complainant's case it was her unexplained delay in reporting the sexual abuse.

As correctly observed by the appellant's defence counsel, here the court *a quo* was dealing with a mature and intelligent complainant who had already started dating her boyfriend Kevin, at whose place she was putting up on a number of occasions.

The delay in reporting which goes against the court's position in the *Banana* case remained unexplained in the judgment. The evidence suggests that having been abused on three separate occasions with his assailant using the same *modus operandi*, the complainant took close to three months to report the abuses. Even when the reports were eventually made, the complainant was not forthright – she started reporting about some threat of kidnapping by the appellant before the sexual assault came out. The judgment of the court *a quo* does not adequately explain either the delay in reporting or the reluctance by the complainant to report such a serious assault at the numerous opportunities that presented themselves to her.

This judgment will not find space to exhaustively deal with the conduct of the complainant which militates against the finding of credibility on her part which would justify a finding of the appellant's guilt beyond a reasonable doubt.

In conclusion of this judgment, let me recall the observation I made in a recent review case on sexual assault where I remarked as follows:

“When everything has been said about this case, one cannot help but come to the conclusion that the conviction in this case was arrived at more out of sympathy of the victim than borne out of the evidence led. Clearly the magistrate fell into error.”⁴

This was a poor conviction and the concession made by the state against supporting that conviction was well made.

Having taken this stance it is not necessary for this court to consider the appeal against sentence because that sentence is standing on nothing.

⁴ The State vs Kevin Moonsammy HB-325/17 at p 11

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In the result, the appeal succeeds. The conviction is quashed and the sentence is set aside. The appellant is found not guilty and acquitted.

Makonese J I agree

Messrs Hwalima Moyo & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners