

ALFRED MAMSA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
HUNGWE & BERE JJ  
HARARE, 16 January 2014  
Date of Judgement 16 January 2014

### **CRIMINAL APPEAL**

BERE J: The appellant is a registered and practising medical doctor. On 16 April 2012 the appellant was arraigned before the regional court sitting at Harare charged with the offence of raping his 21 year old patient. He was found guilty of the offence charged and sentenced to 15 years imprisonment of which 4 years were suspended for 5 years on the usual conditions of good behaviour.

Aggrieved by both the conviction and the sentence he lodged an appeal to this court for redress.

At the nerve of the appeal is the averment that the learned magistrate erred in making a finding that the complainant was a credible witness when her own record of proceedings pointed to the contrary.

The State Counsel has made a concession of the filed appeal in terms of s 35 of the High Court Act [*Cap 7:06*].

There is no doubt in my mind that the concession was well made.

This is one case where the learned magistrate fell into the usual common error of properly identifying and defining the applicable legal principles but fails to apply such principles of law to the facts presented at trial.

Having properly made the numerous specific findings pointing against the credibility of the complainant it was not possible for the trial court to turn around and conclude that the complainant's story supported a conviction of rape.

The conviction was clearly against the weight of evidence and I have no doubt that on reflection the learned magistrate would be surprised by the conviction and would not be able to support it.

There was no need for the presiding magistrate to speculate on the possible effect of the injection administered on the complainant when the prosecution itself had failed to lead evidence contrary to the assertion made by the appellant that such injection was necessary to enable the appellant to examine the complainant.

The court made inferences of guilty when the evidence led left room for several other reasonable inferences that could have been made in favour of the accused person.

There was no cogent reason advanced as to why the complainant did not grab the first opportunity presented to her to report the rape case before she swiftly moved to embark on action that clearly destroyed any evidence of the alleged rape.

In all the probabilities of this case, the appellant ought not to have been convicted and for these reasons the conviction against the appellant cannot stand. It is accordingly set aside and substituted by a verdict of not guilty.

The appellant is accordingly found not guilty and acquitted.

BERE J -----

HUNGWE J concurs -----