

THE PROSECUTOR GENERAL OF ZIMBABWE
versus
SAMSON SHUMBAYARERWA
and
THE MAGISTRATE, HARARE (TSIKWAN.O)

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 9 & 23 October 2014

Criminal Appeal

T Madzingira, for the appellant
T Mapfuwa, for the respondent

HUNGWE J: The first respondent was charged with one count of rape as defined in s 65 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. He pleaded not guilty. After a trial he was found not guilty and acquitted. The Prosecutor-General was aggrieved by this decision. He filed an application for leave to appeal. That application was duly granted. Following upon the decision to appeal, the Prosecutor-General filed his notice of appeal in terms of r 7 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979.

The point taken on appeal is that the magistrate acquitted the accused on a view of the facts which could not reasonably be entertained.

The magistrate in his judgment correctly found that all the requirements regarding rape had been met. The complainant had immediately reported to her mother who was nearby of how she had been raped as soon as she escaped from the ordeal. The mother had immediately proceeded to her room which was adjacent to the accused person's own room. The two rooms are separated by a wall. The mother had observed that the complainant was still bleeding from the sexual assault at the time. The accused did not immediately open for the complainant's mother until he realised there was an agitated crowd gathering outside. The evidence given in court by the complainant closely followed the state outline. This evidence was that the accused had called the complainant into his room on the pretext that he wanted her to assist him fix a used bulb. Upon entry into the room, the accused gave her his mobile

phone which had a torch for the purpose. As soon as she accepted the mobile phone, he grabbed her, gagged her mouth and fell her on his bed. He lowered her under clothes and loosened his pair of trousers and lowered it. He inserted his erect penis into her vagina. Upon completing his purpose, he released her. She ran out, still holding the mobile phone, to where her mother was and reported.

The accused's defence at his trial was that he had indeed called her to come and assist him by lighting the spot where he wanted to replace a used electric bulb. He realised that he needed a new bulb. He went out to buy one. Upon his return he did not find the complainant in the room where he had left her. He later heard her mother accuse him of rape. He suggested that the complainant may have been raped by someone else as he was not the culprit. He claimed that it could be a case of mistaken identity since this event took place at night.

The magistrate seems to have accepted the claim by the accused that this was a case of mistaken identity. The appellant contends that the trial court acquitted the first respondent "on a view of the facts which could not reasonably be entertained." The thrust of the argument by the appellant is that, on the facts, a reasonable court given the full facts in the case could not possibly come to the conclusion that there was a possibility of mistaken identity. In the case of *Attorney-General v Paweni Trade Corp (Pvt) Ltd* 1990 (1) ZLR 24 (S), Korsah JA (with the concurrence of the remainder of the court) held that

"..., it is only when the inference drawn from the primary facts is so inconsistent with logic and common sense that the Attorney-General can succeed ... if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together, point inexorably to the guilt of an accused beyond peradventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not reasonably be entertained. Put E another way, if, on a view of the facts, the court could not reasonably have inferred the innocence of the accused, then the verdict of acquittal is perverse, and the Attorney-General is entitled to attack it."

(see *Attorney-General v Lafleur & Anor* 1988 (1) ZLR 520@522)

The complainant stated that she had at no time been left alone inside the accused's room. She was not cross-examined on this point by the defence. The closest the defence came in disputing the claim that the accused never left complainant alone appears at p 21 of the record where the question was asked:

Q: When the accused went to buy the bulb what were you doing?

A: He never left me alone.

She had maintained this position in her evidence in chief. It was never suggested that in saying this she was either deliberately misleading the court or that she was genuinely mistaken. The fact that the crime was committed at night alone did not place the identity of the culprit at issue. What constitutes an issue is the presentation of conflicting evidence on the same averment in a trial.

If, on a charge of rape, an accused claims that the complainant may have been mistaken as to whether it was he who had raped her, the veracity of this claim would seem to be undermined by evidence that the accused never left the complainant until after the rape. The question arises whether this fact, that the accused never left the complainant till after the rape, must be proved beyond a reasonable doubt? More importantly, must each individual piece of evidence of rape be proved beyond a reasonable doubt? Is this not what an accused is entitled to in a criminal trial? It is trite that the standard of proof required of a prosecution, in a criminal trial, is proof beyond a reasonable doubt. This means that every requirement of the criminal offence in question must be proved beyond a reasonable doubt. The case against an accused and all the evidence against the accused must be considered in its totality. That is, the courts are not permitted to take a piecemeal approach to the evaluation of evidence. All evidence against an accused person must be proved beyond a reasonable doubt.

What is often not recognised is that it also does not follow from the ultimate onus of proof (that the prosecution must prove its case beyond a reasonable doubt) that all evidence must be proved beyond a reasonable doubt. One possible source of this error may lie in the adoption in our law of “the cardinal rules of logic” pronounced by the former Appellate Division (now the Supreme Court of Appeal) in the case of *S v Blom* (1939 AD 188). These cardinal rules of logic were set out as a guide to how courts ought to draw inferences in the context of circumstantial evidence.

Conventionally, evidence is thought of as falling into two discrete and mutually exclusive categories: direct evidence and circumstantial evidence. On the one hand, direct evidence, such as the testimony of an eyewitness, requires that no inferences are supposedly necessary from this sort of evidence. Direct evidence is conventionally thought of as evidence which, if true, is direct evidence of the fact in issue. Circumstantial evidence on the other hand is considered to be evidence which, if true, is not direct evidence of the fact in issue. Instead, it is evidence of a fact from which an inference must be drawn to the fact in issue. Thus where a question of fact before the court is, for example, whether the accused shot and

thereby killed the victim, direct evidence may take the form of a witness testifying to the fact that she/he saw the accused shoot the victim. In the alternative, circumstantial evidence would be evidence such as that of a witness who testifies that she/he saw the accused who was armed with a gun go into the room where the victim was shot dead, that she/he heard a bang, and saw the accused exit the room shortly thereafter. This sort of evidence is circumstantial in that it requires that inferences must be drawn from the evidence (of what the witness saw) to the fact in question – did the accused shoot and kill the victim?

A first point worth observing is that circumstantial evidence is often considered to be weaker evidence and a so-called circumstantial case is one which is considered to be more easily refuted – at least relative to the case in which the prosecution will produce direct evidence. However, it is not the case that circumstantial evidence is necessarily weaker than direct evidence. The classic example is that of the persuasive value of fingerprint evidence (which is circumstantial evidence) for the purpose of identification, compared with that of an eyewitness.

Beyond that, as is the case in respect of many attempted distinctions in law, the distinction between circumstantial and direct evidence is not sacrosanct and breaks down on analysis. It breaks down at least in the sense that it is incorrect to imagine that direct evidence or indeed any evidence is free from requiring the court to draw inferences (Zeffertt and Paizes, *The South African Law of Evidence*, p 99). This is best illustrated by the following example (drawn from Wigmore on Evidence): The accused (X) is charged with the murder of the victim (Y) by shooting. X denies that she/he shot Y. The prosecution calls a witness, who testifies that she/he saw X arguing with Y, that she/he saw X produce a firearm, and point it at Y, heard a loud bang, and saw Y fall to the ground. The defence explains that it has only one question for the witness: whether the witness saw the bullet strike Y.

The point of the illustration is only to draw one's attention to the fact that even given what appears to be a straightforward case of direct evidence, one must nevertheless draw inferences. The point ultimately is that all evidence requires a court in considering its verdict to draw inferences from the evidence. Zeffertt and Paizes explain that: "All evidence requires the trier of fact to engage in inferential reasoning." (*The South African Law of Evidence*, p 99). Some evidence requires fewer inferences, this would be traditionally so-called direct evidence whereas other evidence, traditionally circumstantial evidence, will require more

inferences. Nevertheless the point must be observed that the court is never free of drawing

inferences and therefore the rules that govern the drawing of inferences govern the court in its ultimate evaluation of all evidence.

In *casu*, I am satisfied that the evidence led in the court *a quo* leaves no room for doubting the complainant's identification of the first respondent. I do not agree that the fact that the rape occurred at night in a room part of a house situated in a farm compound gave room for mistake as to the identity of the complainant's assailant. In any event the possibility that she could have been raped by someone else was never put to her during cross-examination by first respondent's counsel. In my respectful view, the reason is that the answer to such a question would have been pretty obvious. Her detailed narration of the event did not leave room for anyone else beside the first respondent to have committed the act in issue. The time between the first respondent calling the complainant, her responding positively to the call for help and her being handed a cell-phone, did not, in my view permit of anyone suddenly coming in to ravish the complainant without the first respondent realising it. When she ran to make a report to her mother soon after the act, she still had the first respondent's cell-phone in her hand.

Thus we are left with the ultimate problem: how is a court to evaluate the evidence? The "cardinal rules of logic" in Blom represent the law on the drawing of inferences in criminal trials. They state that (to paraphrase):

1. The inference sought to be drawn must be consistent with the proved facts.
2. The proved facts must exclude all other inferences except the one sought to be drawn.

The second rule seems to be little more than a restatement of the standard of proof in a criminal trial. The inference must be the only reasonable inference – presumably, otherwise it may not be drawn. The problem in criminal cases, is that in its ultimate assessment of guilt, all evidence relies upon inferences, and so all evidence requires the application of the rules of Blom. Each inference must be the only reasonable inference.

Since the evidence of the witness is the only evidence against the first respondent, the prosecution's case depends on it. If this intermediate fact represents "an indispensable [link] in a chain of reasoning toward an inference of guilt" (from the Australian case of *Sheperd v The Queen* (1990) 170 CLR 573 at 579) the strength of the prosecution's case is, of course,

only as strong as the link in the chain. If this piece of evidence falls below the standard of proof beyond a reasonable doubt, a reasonable doubt must exist in respect of the accused's

guilt, and she/he is entitled to an acquittal. Just as a chain is only as strong as its weakest link, so must all the links (evidence) be proved beyond a reasonable doubt. Thus, in the example given, the only piece of evidence, the testimony of the witness, should be subjected to the ultimate standard of proof: is it true beyond a reasonable doubt?

Yet, case law is clear that in the drawing of the inferences they must take account of the totality of the evidence, and must not consider evidence on a piecemeal basis. (*S v De Villiers* 1944 AD 493; *S v Reddy* 1996 (2) SACR 1 (A); *R v Mtembu* 1950 (1) SA 670 (A)). There is a substantial difference between raising some doubts, even reasonable doubts in respect of some of the evidence against an accused, and raising reasonable doubt in respect of the case against the accused.

From the reasoning of the court *a quo*, it is clear where the court fell into error. Firstly, it considered the evidence of the case against the accused on a piece-meal basis. Secondly, it did not give a critique of the evidence before it; be it against the accused or in his favour. Thirdly, the court *a quo* chose the easy way out of a trial instead of dealing with the trial of the issues squarely placed before it and decide the case on the basis of logical reasoning by relying on a supposed identity issue which was non-existent. As an example, the court held as fact that the accused left the room to go and purchase a bulb leaving complainant alone in his room. The evidence does not support this view of the facts. If, as the accused stated, he left to go and buy a bulb why was it necessary to call the complainant for her assistance? It defies all logic for the court to magnify some obscure point of detail which was raised only during closing submissions and rely on it as sufficient to cast some doubt on the clear evidence given by the complainant. As already stated, there is a substantial difference between raising some doubts, even reasonable doubts in respect of some of the evidence against an accused, and raising reasonable doubt in respect of the case against the accused. The court *a quo* failed to take account of the totality of the evidence. It fell into error by considering fanciful possibilities in isolation of the totality of the evidence placed before it. In the end it relied more on speculative evidence, in which anything could possibly have happened like an intruder coming in and raping the complainant without saying a word and disappearing into the dark, rather than what the "links" in the evidence indicate. There is no gap in the chain of

evidence given by the complainant which could, by any stretch of imagination, permitted the court to entertain reasonable doubt that someone other than the first respondent may have had the opportunity to commit the crime against the complainant.

In the result therefore I conclude that the court *a quo* misdirected itself and failed to properly analyse the evidence before it or did so in a grossly unreasonable manner and consequently came to the wrong conclusion in acquitting the first respondent. The court could not have reasonably inferred the innocence of the first respondent given the tightly knit evidence against him. The acquittal is therefore perverse. It cannot stand.

Consequently the verdict of “not guilty” is quashed and in its place I return the verdict of “guilty”.

Matizanadzo & Warhurst, first respondent’s legal practitioners
National Prosecuting Authority, appellant’s legal practitioners