KUMBIRAI SAN'ANZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, MANGOTA JJ
HARARE, 3 June 2015 & 11 October 2016

Criminal Appeal

T Nyawo, for the appellant
I Muchini, for the respondent

CHATUKUTA J: The appellant was convicted, after contest, of contravening s 65 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]. He was sentenced to 12 years imprisonment of which four years were suspended on condition of future good behaviour.

Dissatisfied with both the conviction and sentence, the appellant filed this appeal. The appellant's grounds with respect to conviction are that:

1. The evidence led by the State was manifestly unreliable and no court would have convicted the appellant on the strength of such evidence.
2. The court should therefore not have found the complainant's evidence to be satisfactory more particularly because:
    a) there was an inordinate delay in reporting the rape to the Police;
    b) the complainant did not voluntarily disclose the rape. She was induced through threats of a beating;
    c) the medical report was not conclusive that penetration had been effected yet the court concluded that there was legal penetration;
    d) the court made a finding that complainant's evidence had been corroborated yet there was no such corroboration; and
    e) the appellant's defence was not disputed by the State.

The main ground of appeal against sentence is that the sentence induced a sense of shock as the court did not give due weight to the following mitigating factors, that the appellant:

1. was a youthful offender;
2. he had pleaded guilty in the charge; and
3. was of limited financial means.

The appeal is not opposed. The respondent filed a notice in terms of s 35 of the High Court Act [*Chapter 7:06*] not supporting the conviction. The respondent conceded that the complaint of rape was not admissible.

The facts on which the appellant was convicted were that: The complainant was aged 5 years at the time and appellant was 20 years old. The complainant and the appellant resided at the same house, in Marondera. They are related. On an unknown date, the complainant arrived from school. The appellant invited her into his bedroom. He proceeded to remove the complainant's pants and had sexual intercourse with her once. The complainant disclosed the rape at the end of March 2014 to one Conchester Ndlovu, a maid employed at the house. Conchester reported to the complainant's aunt on 2 May 2014 leading to the arrest of the appellant.

It is trite that it is the duty of the State to prove its case beyond any reasonable doubt. As rightly submitted by the appellant and conceded by the State, the evidence adduced by the State was not sufficient to discharge the onus. It is further trite that the appeal court will reluctantly interfere with the finding of the lower court. It will only do so where the record of proceedings does not justify the lower court's finding. (See *S* v *Isolano* 1985 (1) ZLR 62 (S), *S* v *Ngara* 1987 (1) ZLR 91 (S), *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) & *Godfrey Nzira* v *The State* SC 23/06))

The main ground of appeal is that the complaint of rape was inadmissible. In order for the trial court to find a complaint of rape to be admissible, the State must have established that the complaint was made:

1. voluntarily and not as a result of a question or questions of a leading and inducing or intimidating character;

2. without undue delay but at the earliest opportunity under all circumstances as would be reasonably expected; and

3. to the first person to whom the complainant could reasonably be expected to make.

(See *S* v *Nyirenda* 2003 (2) ZLR 70 (H), *R* v *Petros* 1967 RLR 35 and *S* v *Zaranyika* 1997 (1) ZLR 539 (H))

In *Zaranyika* (*supra)* at 557C-D, GILLESPIE J state as follows:

> "Both the promptitude and spontaneous or whereby nature of the complaint are important elements in rendering such a complaint admissible. Where any threat or any inducement by question of a leading or suggestive nature precedes and procures the making of the complaint, its voluntary nature is destroyed and the evidence of the complaint becomes inadmissible".

Conchester's evidence is relevant in determining whether or not the above requirements relating to the admissibility of a complainant were met. According to her evidence, the complainant first reported the rape to her. Her evidence was that in February 2014, she received information from one Tino, whom they lived with, that Tino and the complainant had been discussing about playing house when they were on a commuter omnibus from school. This prompted her to inquire from the complainant the nature of the discussion leading to the report of the alleged rape. The following is her evidence under cross examination.

"A. Tino, with whom we live came and told me what complainant had been saying on the commuter omnibus from school. They were discussing playing house.
Q. So after you heard this from Tino you became inquisitive and wanted to hear from the complainant about the allegation
A. Yes, I was with grandmother
Q. So it is true complainant did not volunteer the information to you but you were inquisitive
A. Yes
Q. In what attitude (*sic*) did you told this inquiry with the complainant
A. I was holding a switch as I asked her, to scare her. She said she had been taught about it by one Jose who(m) she once stayed with in South Africa
Q. So the switch was meant to threaten complainant that you would assault her if she did not disclose to you
A. No
Q. So why were you holding the switch
A. I wanted her to tell me where she got what she had discussed in the commuter omnibus.
Q. Is it that why you had poor relation with your aunt
A. It is not only reason. On 1 March we had a misunderstanding with my uncle and aunt resulting in the calling my aunt from Mbare that is Nyarai San'anza".

What is apparent from the above is that the complaint was not made voluntarily. It was made under threat of assault. Not only was Conchester holding a switch at the time that she was interviewing the complainant. The complainant's grandmother was present and did not intervene in any manner to allay the complainant's fears of the threatened assault at the hands of Conchester.

The *court a quo* was mindful of the implications of Conchester's conduct. At p 9 of the judgment, the trial magistrate observed as follows:

> "She said one Tino, with whom they stayed had come telling them what complainant had been saying on the bus from school. Complainant and Tino had allegedly been discussing playing house on the bus. This is what made her curious to want to quiz complainant further about this. This too, was something the witness had failed to state in her evidence in chief. Complainant had not volunteered the information to them but they had been probing her. She had been holding a switch for complainant while asking her about the alleged abuses. Clearly this kind of pressure on complainant was not conducive to her voluntarily disclosing the true identity of her abuser. Complainant told them that she had been taught about this by one Jose when she was in South Africa, where she once lived. Though she denied having intended to use the switch to threaten the complainant into talking, it was clear that the kind of effect it was likely to have on the complainant."

It is apparent from the above that the court concluded that the inquiry by Conchester was of a leading nature and the complaint was not made voluntarily. Having concluded that the first requirement had not been met, it was not safe for the trial magistrate to have found the complaint to be admissible. This was more so because the complainant had initially implicated one Jose who resided in South Africa and not the appellant. Despite the above, the trial magistrate concluded that the evidence on the complaint was admissible on the basis that the complainant had been traumatised by the rape. She therefore had not been able to voluntarily disclose the rape. However, there was no evidence adduced to support the view that the complainant was traumatised to that extent.

There was no evidence placed before the trial court to establish the second requirement whether or not the complaint was made at the earliest opportunity. The complainant could not recall when she was allegedly raped by the appellant. The only evidence was that the complainant told Conchester about the rape sometime in either February or March 2014. What is of concern, however, is that Conchester did not disclose the report until sometime in May 2014 when she reported to the complainant's aunt, one Chipo. There was no satisfactory explanation given for the delay. In fact between the time of the first report by the complainant and the time Conchester reported to Chipo, Conchester, the complainant and the appellant went together to the complainant's rural home. Conchester conceded under cross examination that there were elderly people at the village whom she could have told but she still did not do so.

Conchester was employed by one Patience San'anza. It is San'anza who told them to go to the village. She did not report to Patience but opted to report to Chipo. There is no explanation either why she did not report to Patience. In fact there is no explanation as to why she opted to report to Chipo as opposed to Patience.

There was no evidence adduced that Conchester was the first person to whom the complainant could reasonably be expected to have made the complaint to. However, the evidence of the complainant and Conchester materially differed as to whom the complainant made the first report. The complainant testified that she reported to her mother

Whilst it is trite that a court can convict on the strength of a single witness and that the cautionary rule is no longer warranted in sexual cases, the trial court can only do so where the complainant is a credible witness having regard to all the circumstances of the case and there are no material discrepancies in the state case. (See *S* v *Banana* 2000 (1) ZLR 607 (S).)

The court's finding that the complainant's evidence was credible cannot be supported by the record of proceedings. The complainant failed, with the use of anatomically correct dolls, to identify the male organ that she alleged the appellant used to prick her on her vagina. In fact the trial magistrate found that the complainant was more prone to playing with the dolls instead of demonstrating what transpired when she was allegedly raped by the appellant.

The trial court discounted the appellant's contention that this was an indication that she had not been raped by the appellant and that she might not have seen the "prick" that the appellant used on her vagina. It was the view of the court that it is not every time that a rape victim is able to see the penis when she is being raped. The court however overlooked Conchester's evidence that the complainant had identified Jose and the appellant as persons who had played house with her (assuming that playing house meant having sexual intercourse which assumption may be wrong). The state did not inquire from the complainant on this aspect, on whether or not she had implicated one Jose before naming the appellant. There was no inquiry on what Tino meant when he/she told the Conchester that he/she had been discussing about playing house. It is not clear what playing house meant and what it is that both Jose and the appellant did to the complainant when they were playing house.

Despite the complaint having been made in the presence of the complainant's grandmother, the state opted to lead evidence from a maid who was 16 years old at the date of hearing of the matter. The grandmother's evidence was important given Conchester's evidence that the grandmother had told Conchester not to report to anyone what the complainant had disclosed.

Further, Conchester testified that she was the first person to whom the complainant made a report about the rape. At the time, the complainant's mother was staying in Mutare. This is in contrast to the complainant's evidence that she first complained to her mother in the presence of Conchester. The state did not seek clarification as to whom the complainant first

reported to. Clarity could have been provided by the mother or even the grandmother. None of the two were called to testify. In fact, the first report was made to Tino, who was also not called as a witness.

I am inclined to agree with the parties that it is not safe to convict the appellant on the strength of the adduced evidence. As observed by MPATA J in *L* v *S* 2003 (1) All SA 16 (SCA) at p21-22 para 20;

> "In my view there is simply not enough evidence to prove the appellants guilty beyond a reasonable doubt. He is therefore entitled to the benefit of doubt. The result will of course be a grave injustice if the appellant in fact raped the complainant. But that does not justify the commission of an even not serious injustice of convicting a person without his guilty having been established beyond reasonable doubt."

I cannot agree more with the above observations. The conviction cannot therefore stand.

It is accordingly ordered that:

1. The appeal is upheld.
2. The conviction be and is hereby quashed.

MANGOTA J agrees…….

Nyawo Ruzive Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, for the respondent