MUNYARADZI KEREKE
versus
FRANCIS MARAMWIDZE N.O.

HIGH COURT OF ZIMBABWE
HUNGWE AND WAMAMBO JJ
HARARE, 10 April 2018 & 29 May 2019

Criminal Appeal

T Mpofu with him A Mutandiro, for the appellant
C Warara, for the respondent

HUNGWE J: The appellant was convicted of rape[1] by the Regional Magistrate, Harare, and sentenced to 14 years imprisonment of which four years were suspended for five years on the usual conditions, on 11 July 2016. The appellant was aggrieved by both his conviction and the sentence. He now appeals against both the conviction and sentence. Although the notice and grounds of appeal were filed timeously this court was of the view that the grounds of appeal were so general and ambiguous that, in the courts' view, they did not comply with the clarity and specificity requirement in the rules of court.[2] Additionally, the heads of argument filed in support of the grounds of appeal did not address the grounds of appeal. The appellant withdrew the appeal and made a fresh application for condonation for the late of filing of notice and grounds of appeal. In that application appellant abandoned the earlier grounds of appeal and raised new grounds of appeal which were congruent with the already filed heads of argument.

The new grounds of appeal recite the following:

1. The Court *a quo* seriously misdirected itself, such misdirection amounting to an error of law in convicting the appellant on the basis of a story whose *actus reus* is incapable of performance or is alternatively implausible in the circumstances

[1] As defined in s 65 of the Criminal Law (Codification and Reform) Act, *[Chapter 9:23]*
[2] Rule 22(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, S.I. 504/79.

alleged and consequently not susceptible to proof beyond any reasonable doubt as is required by law, more in particular in that;

(a) the allegation that there was penetration of an eleven year old virgin, by adult appellant whilst seated on a couch and with the victim's panties brought down to knee level is most inconceivable;

(b) the penetration of an eleven year old virgin, by adult appellant, in a house full of people without her screaming is most improbable on the circumstance as to be unbelievable;

(c) the reaction of the complainant to the act of sexual violence found to have been perpetrated against her does not comport with reality and with a manner which can objectively be expected under such circumstances.

2. The court *a quo* seriously misdirected itself such misdirection amounting to an error in law in convicting the appellant notwithstanding the many material inconsistencies in the prosecution evidence such inconsistences arising out of:-

(i) inconsistencies between the statement given by the complainant to the police;

(ii) inconsistencies between the statement and the evidence given *viva voce*; and;

(iii) inconsistencies between the general evidence given and the scene report.

3. The court *a quo* misdirected itself in failing to consider the effect of the substantially similar failed charge of indecent assault on the assessment it had to make of the complainant, her testimony; the conditions under which she made the report and her general credibility; all these factors considered.

4. The court *a quo* erred in law in concentrating and getting itself fixated on what it improperly found to have been appellant's suspicious conduct without considering whether there was against the appellant an objectively plausible case the existence of which would be the basis for the evaluation of his conduct.

5. The court *a quo* erred in disbelieving appellant's *alibi* in the absence of any evidence from the State undermining such defence and so erred in failing to

consider and evaluate the quality of the evidence given by the appellant in support of the *alibi*.

6. Having found the sentence contended for by the State to have been draconian, the court *a quo* erred in effectively imposing a manifestly excessive sentence which was just as draconian as had been urged for by the prosecution.

On the basis of the above grounds of appeal the appellant prayed for the setting aside of the conviction and the quashing of the sentence imposed. Alternatively; he prayed that should the conviction be upheld, then the sentence be reduced to 5 years with 2 years suspended on the usual conditions.

The appellant was convicted after a protracted trial in which evidence was led from several witnesses. As background to the conviction, it is appropriate that the evidence led at trial be restated and analyzed in light of the findings of fact and conclusions of law arrived at by the trial court. It is also important to state the factual background behind the institution of the private prosecution by the complainant's guardian.

When the allegations of rape were made at the Police station against the appellant, the officers who were handling the matter would be transferred, the docket would be referred to such other offices as would give the impression that the appellant could not be prosecuted. The long and short of the events surrounding the matter is that ultimately the office of the Prosecutor-General declined prosecution in the matter. It also did not issue the certificate indicating this, as it was obliged to do in terms of the law.[3] When the complainant's guardian applied for a certificate to confirm this position, that certificate was not issued as a matter of course. The complainant's guardian had to seek the intervention of the courts to get the office of the Prosecutor-General to issue the appropriate certificate authorizing a private prosecution of the appellant. This explains why, even before this Court, the State has folded its arms when, in normal circumstances, it ought to have vigorously demonstrated, through the office of the Prosecutor-General, commitment to the duty to protect, uphold, respect and defend the rights of a child to equal protection of the law. Zimbabwe has ratified most, if not all, regional and international treaties and conventions on human rights. These international conventions which bind the State, spell out obligations of State

[3] Section 16(1) of the Criminal Procedure and Evidence Act, *[Chapter 9;23]*

parties.[4] The Constitution of Zimbabwe gives effect to these and other rights either in its provisions or through the legislative framework made thereunder.[5] One of the important rights enshrined in the Constitution is that of equality before the law. Complainant had to resort to private prosecution to enforce her rights leading to the present proceedings without State assistance.

The events leading to the allegations were narrated in court by several key witnesses among them the following:-

1. Tinashe Taruvinga ("Tinashe"), the complainant in respect of the indecent assault charge. Although appellant was acquitted on her allegations of indecent assault, he argues that the court's treatment of her evidence ought to have applied in respect of the rape count.
2. Nicole Tariro Taruvinga ("Nicole"), the complainant in the rape charge. The conviction was based on her evidence.
3. Sally Ndanatseyi Maramwidze (Sally"), the aunt to the two children. She received the initial report on the allegations from Nicole.
4. Francis Maramwidze, ("Maramwidze") the complainant's maternal grandfather and legal guardian of the two children. He took the initiative to make a police report and took up private prosecution when the Prosecutor-General declined it.
5. Edwin Tafadzwa Chanakira, the medical doctor who examined the complainant following upon the allegations;
6. Gresham Muradzikwa, (Muradzikwa") the Director of Security at the RBZ;
7. Mirirai Chiremba, ("Chiremba") the Director of Financial Intelligence Unit at the RBZ;
8. Monica Kativhu, the investigating officer who was based at ZRP Borrowdale.

The defence, for which the appellant was the main witness, led evidence from the following other witnesses:

[4] International Covenant On Civil and Political Rights, 1966; International Covenant on Economic and Social Rights, 1966; the African Charter on Human and Peoples Rights, 1981; Convention on the Rights of the Child, 1990; the African Children's Charter, 1990.
[5] Sections 56, 68, and 69 of the Constitution; see generally the Criminal Procedure and Evidence Act (supra).

1. Patience Muswapadare Taruvinga ("Patience"), the aunt of the two complainants and the wife of the appellant. It was at her residence that the events subject of the trial took place;
2. Alpheus Njodzi Chinhamo or Chief Mukangamwi, to confirm a political plot;
3. Cletos Kereke, a brother to the appellant, to confirm the *alibi*;
4. Taurai Bwanaisa, a security guard, to confirm the *alibi*;
5. Norest Ndoro another security guard, to confirm the *alibi*;
6. Anna Muswapadare, a step-mother of the complainant's father to deny the rape.

The court called Chiratidzo Lorraine Jeyacheya ("Dr Jeyacheya") a medical director at Parirenyatwa Hospital, to clarify the authenticity of the hospital duty roster.

The regional magistrate analyzed the evidence of the sixteen witnesses. He first isolated the facts which were not in dispute, and then identified the issues for determination. I will summarize the facts which were not in dispute at the trial.

Factual Findings of the Trial Court

Patience Muswapadare was at the time customarily married to the appellant. She testified on his behalf. She is the paternal aunt of the two complainants, Tinashe and Nicole. These two are the daughters to Patience Muswapadare's brother. Between 20 and 27 August 2010, Nichole was at Patience's house at 11 Tovey Road, Vainona. Tinashe joined her there from 20 August 2010 till the 27th August 2010. There is a period during which the two girls were excluded from school over school fees which were in arrears. On the night of 31 October 2010, Francis Maramwidze ("Maramwidze") made a telephone call to Patience in which he summoned her to his residence. She indicated that as she had no transport. She could only come over the following day.

On the following day, Patience went to the Maramwidze's residence. At this point she was informed of the allegations by the minor children against her husband, the appellant. It is not in dispute that between 20 and 21 August 2010 Anna Muswapadare, Calvin Muswapadare and one Munyaradzi were present at 11 Tovey Road, Vainona. During that time it is agreed that Nicole shared bed and board with Anna Muswapadare. On 22 August 2010 Nicole was aged 11 years.

The court *a quo* summarized the evidence of the two complainants in the following manner. In August 2010 Tinashe and Nicole Taruvinga visited 11 Tovey Road, Vainona, to see their

paternal aunt, Patience. On 20 August 2018 Tinashe left Nicole home when she went away for a prayer meeting. She returned on 23 August 2010. Upon her return Nicole gave her a report in which she claimed the appellant had raped her on a Saturday. Nicole pleaded with her not to tell anyone as she feared that appellant would harm her. It was only after Nicole had made another report to Sally in Avondale that at a family meeting was called in October 2010. In that meeting, Sally had confirmed that in fact Nicole had made a report of rape against appellant to her a few days before.

On her part, Nicole told the court that on Saturday around 03h00 she had been woken up by her aunt, Patience, who asked her to take care of the baby. She was preparing food for the appellant. She saw the appellant in the lounge and greeted him. She proceeded to the bedroom where she laid the baby on the bed. She sat on the couch. Appellant followed her into the bedroom. He said something that she did not understand. He proceeded to fondle her breasts and vagina. He then reached for her pants whilst at the same time producing a pistol. He then told her to comply with whatever he was saying. He pulled down her pants to knee-level and thereafter inserted his male organ into hers. Only when he heard footsteps did he stop. She managed to break free and rushed into her bedroom. Although her paternal grandmother was asleep in her bedroom, she did not report to her. Instead, she wept quietly. She did not want anyone to know about this incident. The next morning, Sunday, she woke up and attended church and came back home. On Monday her older sister Tinashe came back from the prayer meeting. She confided in her about the Saturday night's event in which appellant had raped her. She however pleaded with her not to tell anyone.

It was later, on 30 October 2010, when she had visited her aunt, Sally in Avondale, Harare that she reported to an adult member of family. She asked Sally to advise her mother of the event. Instead, Sally asked her if she could inform other members of the family in Harare. Her mother was in London. Complainant agreed and Sally communicated this information to her sister-in-law Philippa Maramwidze ("Philippa"). The information was passed to the patriarch, Maramwidze. He later on made a telephone call to Patience. On that same night the matter was reported at Highlands Police Station, Harare. Complainant was medically examined immediately that night.

Sally told the court that the two, Tinashe and Nicole, came to her place in Avondale on 30 October 2010. During the night Nicole narrated to her how the appellant had, in August 2010, sexually molested her at 11 Tovey Road, Vainona. Nicole asked her to inform her mother about it.

She, in turn, asked complainant if she could share the report with other family members. When complainant agreed, she told her husband and the following day the parties went to Greendale where the girls' maternal grandfather stayed. She gave this report to Philippa, her sister-in-law. The report was passed on to the patriarch, Maramwidze, her father-in-law. When the matter was discussed, she told the court how emotional everyone became. The matter was eventually reported to Police at Highlands.

When Nicole repeated her story to Philippa in Sally's presence, complainant told Philippa not to tell her sister-in-law or their grandparents or anyone else as she feared that appellant would use a gun on them. At this point Philippa asked Tinashe if she had suffered the same fate at appellant's hands. Only then did Tinashe relate to other members of the family, the inappropriate sexual advances to her which had taken place in March 2012. Tinashe told them that appellant had fondled her breast and buttocks and had kissed her against her will. According to Sally, complainant had not described to her the details of the rape until the following day in Greendale because, as she was narrating her story, her husband had walked into the room. She asked him to excuse them. She went out briefly with the husband and when she came back she found complainant crying. She consoled her. Given the complainant's emotional state, she was unable to probe her for further details. By the time the report was made to Mr and Mrs Maramwidze, the rape details were however, clear.

Maramwidze, the maternal grandfather of the two girls, is also the legal guardian. He confirmed that he had received a report concerning the rape allegations by Nicolle against appellant on 31 October 2010. He had called Patience that same night but Patience could not come as she had no transport. That same night, he made a report to Police at Highlands against the appellant.

The court *a quo* took note of the fact that in his evidence Maramwidze indicated that he did not know the appellant prior to this matter. He therefore denied that he had sent the two girls to ask for school fees from the appellant; or that he personally asked for money from appellant following upon the report to Police. It was his evidence that appellant had, on several occasions, visited his residence in order to discuss this matter but he had, on each occasion, refused to discuss the matter with him. Patience had also brought her mother who wanted to negotiate with Maramwidze on behalf of the appellant. Anna Muswapadare also wanted to talk to the two complainants to them but Maramwidze denied her access to the children. The witness gave

evidence of how, as a family, they tried to get the appellant prosecuted from 2010 to 2015 without success. Only after a court order did the private prosecution take-off in 2016.

Edwin Chanakira, the medical doctor who examined the complainant testified that he had reported for duty on 31 October towards midnight. His shift ran from midnight to 08h00. He had, upon examination noticed a healed hymeneal tear. This indicated that complainant had been sexually penetrated. He disputed the contention that he was not on duty on 1 November 2010.

Gresham Muradzikwa, a director of Security at the Reserve Bank of Zimbabwe ("the RBZ"), testified to events at the Bank. Appellant was his superior when they were both at RBZ. In 2005 appellant was issued with a CZ pistol for his personal protection. This firearm belonged to the Bank. When an officer is issued with a fire-arm that officer makes an entry in a fire-arms register for accounting purposes. This would have been done in respect of the pistol issued to appellant. Sometime in 2010 the witness was called by his Divisional Head, Mirirai Chiremba. Upon attending at his superior's officers, he was asked if it was possible for him to accept back the CZ pistol previously issued to appellant and also to backdate the receipt of the pistol beyond a certain date. He refused. He explained that such an anomaly would clearly be picked up by an audit inspection. That would create serious problems for him. Chiremba had the pistol with him. He refused to accept it. When he left, Chiremba was still holding the pistol in his hands.

Mirirai Chiremba, the Director of Financial Services Unit at RBZ worked under the supervision of the appellant during appellant's time at the institution. Appellant was the advisor of the then RBZ Governor. His evidence was that in the morning of 22 August 2010 he had woken up to find a missed call from his superior, the appellant. As would be expected, he returned the call. The appellant asked that they meet outside Bon Marche, Chisipite. They duly met around 06h45 that morning. In that meeting, the appellant, produced a pistol and its magazine as well as the cleaning kit. He handed these items to him with instruction that they be returned to the Security Department. When the witness asked why he was in a hurry to return them, appellant informed him that there were people who were alleging that he had used the same to commit a crime. He also asked if an earlier date of return could be entered in the fire-arms registry. The witness asked the appellant if he had robbed or murdered someone. Appellant told him that he had not done anything of that sort but that it was a minor dispute. The appellant looked worried. He took the

pistol and its accessories. This meeting occurred on a Sunday morning. He then took the items to his office at the RBZ the following day.

On the next day appellant came into his office with a memorandum on the rationalization of firearms at RBZ. He asked the witness to sign but the witness refused. The reason why he refused to sign was that the memo bore a back-dated date and required him to acknowledge receipt of the memo using that back-dated date stamp. The appellant was furious. He threatened him with unspecified consequences if he did not sign and backdate the date stamp. Out of fear of these threats, the witness told the court *a quo* that he had signed the memorandum. Appellant took his signed copy and left. At that time, the witness told the court that appellant wielded a lot of power at the Bank before he resigned.

As soon as appellant left, he called Muradzikwa, head of security in charge of the fire-arms registry. He explained to him what appellant wanted done in respect of the fire-arm and its accessories which appellant had returned. He specifically told Muradzikwa that appellant wanted the date of return backdated. Muradzikwa flatly refused. He went out leaving him with the pistol which he kept in his safe until this day. When it was put to him that his evidence was a fabrication meant to fix the appellant in order to conceal some alleged fraudulent activities in which he and Governor Gideon Gono were involved, he dismissed the suggestion out of hand.

Monica Kativhu, the investigating officer, explained that she had not compiled the scene report. She had received the docket with that report inside from Police at Highlands. She had recorded statements from the complainant. According to her, initially Nicole had not mentioned anything about the gun until after she had given the statement to her, guardian Maramwidze, for him to peruse. He had pointed out that the reference to the gun had been left out. When she asked Nicole about a gun, Nicole confirmed that she had indeed omitted to make reference to the gun. Another statement in which there was reference to the gun was then compiled.

The evidence led by the appellant was that he was away in the USA for the whole month of March 2010. He came back on 4 June 2016. He denied that he had molested either Tinashe or Nicole. He disputed the evidence of fondling of breast and buttocks given by Tinashe and that of rape given by Nicole. Instead he raised the defence of an *alibi* in both counts. He told the court that on 20 August as well as 21 August 2010 he had left 11 Tovey Road, Vainona at 20h00 pm proceeding to his other residence at 75 Wallis Road, Mandara. He arrived at this address at 21h00.

His guards, Norest Ndoro and Taurai Bwanaisa recorded in their log book his time of arrival as they were duty bound to do. His other wife and children were away at the farm for the week ending 22 August 2010. His brother Cletos Kereke had visited him from around 20 August 2010 until around 22h00 on 22 August 2010. From the time Cletos arrived they were in each other's company till he left. On the night of 20th and 21st August 2010, he had retired to bed at 21h00 and got up the following at 10h00.

He disputed visiting the Maramwidze residence on any occasion besides the only occasion when, on 1 November 2010, he went there to pick up his wife Patience Muswapadare. On that occasion these allegations were raised. He denied that he has dispatched his mother-in- law, Anna Muswapadare to plead with the Maramwidze's for an out of court settlement of the issues raised by the two girls. Similarly, he disputed the truthfulness of the evidence given by the two RBZ officials regarding the circumstances surrounding the return of the CZ pistol to his workplace. He denied forcing Chiremba to sign or demanding that the return date entry in the fire-arms registry be backdated. He maintained that he had returned the pistol on 14 June 2010 as acknowledged by Chiremba. He denied the encounter with Chiremba at Chisipite Shopping centre or that he had handed over the pistol to Chiremba in that encounter. Although he acknowledged that he had originated the memorandum in respect of the firearms, exhibit 6B, he denied that he had forced Chiremba to sign it. He denied that he had called Chiremba and that as a result that phone call they had met around 06h45 on 22 August 2010. He claimed that at that time he was sound asleep at his Mandara residence.

He told the court that these allegations are an attempt to extort money by the Maramwidzes. They had, before these allegations were raised, sent the two girls to ask him to pay for their school fees which were in arrears in the amount of $8000-00. He had refused to give them. For that refusal they were out to fix him.

He also drew the court's attention to the fact that he had made political enemies who were behind the framing of the allegations because he had exposed their fraudulent activities. These enemies ranged from his immediate boss, Gideon Gono, the head of the Central Intelligence Organisation, one Happyton Bonyongwe and an officer in that organization, one Jimias Madzingira. The three want to silence him for exposing their fraudulent activities at RBZ.

The other political enemies, former Vice President Joyce Mujuru, former Minister Webster Shamu and David Butau, were bent on tarnishing his political career through these allegations.

The trial court took note of the fact that the appellant had developed a new defence. It was this. The former Member of Parliament, David Butau, was romantically involved with Chipo Maramwidze, the mother of the two complainants. Through Chipo Maramwidze, the complainants and their grandparents had concocted these allegations in order to fix him politically. David Butau allegedly confessed to the plot. To confirm this plot and Butau's subsequent confession appellant read to court a text message sent by Butau.

Patience testified that between 20 and 27 August 2010 Tinashe and Nicole were at 11 Tovey Road, Borrowdale, her residence. She however, disputed the claim that in March 2010 Tinashe and Nicole had visited her. Therefore, any claims of sexual harassment by Tinashe against her husband could not be true. Regarding the events of the period from 21 August 2010 to 23 August 2010 she told the court that she had come home around 20h00 on 21 August 2010. She had left some thirty minutes later and did not come back that night. Therefore, she could not have woken up in the early hours of 22 August 2010 to cook for the appellant. Put differently, her evidence was that Nicole lied to court in this regard. She indicated that the two girls had previously asked her to approach her husband with a request that he pays their school fees as well as arrange for their travel to the United Kingdom to visit their mother. Should he fail to do this, they warned, they would fix him. She believed then that this was said in jest but later realized that this was the genesis of her husband's woes.

She confirmed the phone call from Maramwidze on 31 October 2010. She only managed to go there on the next day. There she learnt of these allegations for the first time. When appellant came to pick her up, she noticed that Maramwidze did not respond to her husband's greeting. The reason she and her mother paid a subsequent visit to the Maramwidzes was to get the full details of the issues involved on her father's instruction. She disputed the claim that Nicole was raped during the early hours of 22 August 2010.

Alphious Njodzi Chinhamo, the current Chief Mukangamwi, told the court that in 2013 they had approached the Vice President Mujuru with a request that appellant be allowed to stand as a candidate for Bikita West Constituency. When they got to the Vice President's Office they

met up with Francis Maramwidze. They were later advised by the Vice President that appellant was facing rape allegations and therefore not suitable to contest on their party ticket.

Cletos Kereke's evidence was that he visited appellant at his hospital in Mount Pleasant on 20 August 2010. From the hospital they had gone to 11 Tovey Road, Borrowdale. Since Patience had not yet arrived home, they did not spend time there. They proceeded to 75 Wallis Road, Mandara where they slept. To his knowledge appellant did not get out of the house the whole night. The next day they had both gone to the hospital in Mount Pleasant and spent the whole day there. They had then gone to Borrowdale before proceeding to Mandara where they both spent the night. Accordingly it is improbable, on his evidence, for appellant to have raped complainant around 03h00 on 22 August 2010.

The evidence of the two guards was led to establish as fact that both appellant and his brother would arrive at 75 Wallis Road, Mandara, at 21h00 and only left the following morning at 10h00. They said Police had taken their Occurrence Book during investigations. This book would have confirmed their evidence.

The assessment of evidence in a rape trial has received both local and regional attention over a long time. The long-held view that appeared to regard evidence by women in a rape trial with exaggerated circumspection is slowly fading away. Our courts have readily accepted the justification advanced in that regard. This is however not to say that a court would willy-nilly accept any rape allegation without subjecting it to the usual assessment on credibility. The Constitution commends our courts, in the development of the law, to have regard to other sources of law including foreign law. The starting point is the offence-creating provision which is the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Whilst the Act does not define rape, what constitutes rape therefore must derived from the wording of s 65 as that section set out the essential elements of the crime of rape. That definition can be broken down as consisting of the following; a male person; (b) who with intent, (c) has sexual intercourse; (d) with a female person; (e) knowing that she has not consented to it, or (e) realising that there is a real risk or possibility that she may not have consented to it.

International and Regional framework and approach

The South African "Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defines rape as consisting in

> "Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B") without the consent of B, is guilty of the offence of rape."

The Constitutional Court of South Africa in *Masiya* v *Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae*)[6] extended the common law to cover anal penetration of females. The intimate and personal nature of this Act makes this a particularly reprehensible form of assault involving not only the application of force to the body of the victim but, by ignoring the unwillingness to engage in sexual penetration, also a serious invasion of privacy and autonomy[7]. The effects of a sexual assault are considerable. Studies have shown that rape victims frequently suffer from a "rape trauma syndrome," a condition involving the deep disruption of the victim's life patterns and thought-processes, not just in terms of the physical effect of rape (physical pain, inability to sleep, prolonged distress) but also in terms of the effects on emotional, spiritual well-being (new found fears, mistrust of surroundings and other people, embracement, and so on.[8]

Studies in various jurisdictions also reveal common myths and fallacies. The myths about rape and sexual assault perpetuate the idea that "real rape" only happens when a rapist is a stranger who raped the victim on a vacant lot, the rape is perpetrated through the use of force or a weapon, and the victim suffers serious physical injuries in addition to the penetration, resisted the attack strenuously and promptly complained to the authorities. The reality is that victims more often than not are assaulted by people they know,[9] are raped in their own home or the home of a relative of

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[6] 2007 (5) SA 30 (CC).
[7] CMV Clarkson, Understanding Criminal Law (2001) 208.
[8] See J Tempkin, Rape and the Legal Process 2nd Ed (2002); D Hanson, What is rape Trauma Syndrome? (1992); Rape Trauma Syndrome: A Psychological Assessment for Court Purposes (199).
[9] Callie Marie Rennison; Bureau of Justice Statistics, Criminal Victimization 2000, CHANGES 1999-2000 with TRENDS 1993-2000, 8 (JUNE 2001) available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cvoo.pdf; Patricia Tjaden & Nancy Theonnes, NAT'L INST OF JUSTICE SPECIAL REPORT, EXTENT, NATURE AND CONSEQUENCES OF RAPE VICTIMISATION; Findings From the National Violence Against Women Survey, 21-22 (2006) available at http://www.ncjrs.gov/pdf.files 1/210346.pdf.

friend[10], are not likely to face force or an armed offender, [11]are not seriously physically injured other than the rape itself[12], and do not report to authorities. Research demonstrates that most rapes are committed by someone the victim knows. The 2010 National Intimate Partner and Sexual Violence Survey (NISVS) which was conducted by the Centre for Diseases Control, USA, and published in November 2011, found that the majority of both female and male victims knew their perpetrators[13].

In addition many victims cannot or do not resists a rape or other sexual assault. There are several reasons. Many victims fear serious injury or death. In addition the trauma that is associated with rape and sexual assault may prevent a victim from actively resisting an attacker. Events that are traumatic and overwhelming cause some victims to "freeze with fright" and become immobilized[14]. Decades of research has documented that only about 15 to 20 percent of victims report the crime to police.[15]

There are many reasons for not reporting or delaying a report. Victims are faced with the decision to contact the police in the immediate aftermath of a rape, when they may be traumatised and are trying to make sense of what has happened. In the aftermath of the rape victims experience a wide range of physical, psychological, and emotional symptoms both immediately and in the long term[16]. These symptoms may include fear, anxiety, anger, depression, phobias, panic, disorder, and obsessive compulsive disorder. A rape victim may experience all, some or none of these reactions[17]**.** As a consequence, victims may behave in a manner that appears counter intuitive,

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[10] Lawrence A Greenfield, Bureau of Justice Statistics, Sex Offences and Offenders: An Analysis of Date on Rape and Sexual Assault 3 (Feb 1997) available at http://www.bjs.usdoj.gov/content/pub/pdf/500.PDF.
[11] Rennison, supra note 4.
[12] Tjaden & Theonnes, supra note 4.
[13] MC Black et al, CENTRE for DISEASE CONTROL, THE NATIONAL INTIMATE PARTNER and SEXUAL VIOLENCE SURVEY 21 (2011), available at http://www.cdc.gov/violenceprevention/pdf/nivs-executive-summary-a-pdf.
[14] Grace Galliano, et al. Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates, 8 Journal of Interpersonal Violence 109-10 (1993).
[15] Tjaden & Theonnes, supra note 4 @ p33-34
[16] Shirley Kohsin Wang, et al, World Health Organization/Sexual Violence Research Initiative, Research Summary, Rape: How Women, the Community and the Health Sector Respond 2 (2007).
[17] Patricia L. Fanflik, Nat'l District Attorney Association, Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive? 5 (2007) (citing Patricia Frazier, The Role of Attributions and Perceived Control in Recovery from Rape, 5 Journal of Personal & Interpersonal Loss 203, 204 (2000)).

but is in fact merely a normal expression of the victims' unique strategy of coping with the overwhelming stress of the assault.

Mr *Mpofu*, for the appellant, urged this court to find that in assessing the complainant Nicole as a reliable and credible witness, the court *a quo* erred in light of the objective reality of her story. He argued that the court erred in convicting the appellant "on the basis of a story whose *actus reus* is incapable of performance or implausible on the circumstance alleged." He in essence invited this court to find that penetration of an eleven year old virgin by an adult person whilst seated on a couch was not possible, nor was it conceivable that she could be penetrated without screaming.

In the second ground of appeal, the appellant argued that the court erred and misdirected itself in law by convicting the appellant notwithstanding the many material inconsistencies in the prosecution evidence. These inconsistencies he said, resided in the different versions given by complainant, first to police then the statements she gave in court and between the general evidence given and the scene report.

In the third ground, the appellant decries the failure to consider the effect of the substantially similar but failed charge of indecent assault on the assessment it had to make of the complainant. Put in another way, the appellant avers that the court *a quo* ought to have assessed the credibility of Nicole in the same way that it had assessed that on Tinashe.

The fourth ground of appeal attacked the manner in which the court *a quo* dealt with the appellant's conduct which it found to be suspicious without considering whether there were other possible reasons why he behaved in the manner he did.

Finally, appellant submitted that the court *a quo* erred in disbelieving his *alibi* when there was no evidence tendered by the State to rebut it.

It seems to me that where an appellant recites the grounds of appeal cited above, the court must ultimately be satisfied that having regard to all the facts and circumstances, either there is or there is no proof beyond a reasonable doubt that accused is guilty. Whilst it is certainly true that the evidence of children should not be approached on the basis of assumptions that all children make false allegations, have poor memories and are highly suggestible, it is equally true that a court ought not convict unless it is safe to do so, that is, unless there is proof beyond reasonable doubt. The circumstances of and the issues as raised in a particular case, might inevitably require

that a court considers the age of the child witness and her mental ability and development. Each case must be considered on its own merits. This might involve a finding on whether the evidence of the child witness concerned is such that it can, for purposes of a conviction, safely be relied upon.

In my view the issues raised in the first ground, i.e. that it is inconceivable that an eleven year old virgin could be penetrated by an adult and fail to scream thereby alerting the other occupants of the house, were fairly and adequately explored and dealt with by the learned trial magistrate. In *S* v *Nyirenda* [18] this court observed that it does not follow that every rape situation should be characterized by the screaming of the victim; tearing of the victim's garments; immediate report to a relative or someone close to the victim; crying after the rape; preservation of the evidence of rape etc. Each case has to be considered on its own merits.[19]

The language in which the first ground of appeal is couched reminds one of the wise words by the eloquent Justice L'Heureux Dube` in her acknowledgement of criminal justice system failures in relation to crimes of sexual assault and the fact that legal decision-making about sexual law has too often been shaped by sexist biases and myths. She said:

> "Complainants should be able to rely on a system free of myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The [Criminal] Code was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. It is part of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law."[20]

I find that appellant's grounds of appeal reveals an embeddedness of the male viewpoint of sex in the law of sexual assault which pervades our society. The problem is that the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant. I am unable to accept that male lawyers should import their

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[18] 2003 (2) ZLR 64 (H).
[19] Compare: Commonwealth v Berkowitz 641 F 2d 1161 (1994). This case was discussed in Lynn Hecht Schafran, *Criminal Law: What is Forcible Compulsion?* THE JUDGES' JOURNAL. Winter 1995, at 43
[20] R v Ewanchuk 1999 1 S.C.R 330

chauvinistic views about sexual assaults on women in such serious issues as an appeal against a conviction of rape. This in my view, is what *Mr Mpofu* has done. Even assuming in his favor that he was articulating his client's viewpoint, his duty, as an officer of the court, is to ameliorate that language to avoid a clearly the misogynistic opinion that coloured the grounds of appeal. What a court of law must consider is whether the threshold of the standard of proof required in a criminal case has been breached. I am of the view that it has. I reach that decision on the following basis.

Complainant explained that due to her immaturity at the time, she felt that she was responsible for what had happened to her. All she wanted was for her mother to know. The learned magistrate was satisfied that by the nature of the graphic details which she gave, the complainant told the truth. He contrasted her evidence with that of the complainant in the indecent assault charge which lacked detail. It was on that basis that he had found that there was no proof beyond a reasonable doubt in respect of the first count. This is different from stating that that complainant had not told the truth. The evidence on that count did not reach the required threshold of proof beyond a reasonable doubt. Therefore, I do not find that there was any misdirection in the manner which the credibility of the complainant on the rape count, was assessed as opposed to that of the complainant on the indecent assault charge.

The court *a quo* also considered the whether or not the evidence given by complainant in the rape count could have been a result of suggestibility. He was unable to find that she could have been influenced to give that quality of evidence regard being had to the fact that she had no prior sexual experience. The court also paid due regard to the evidence by Dr Chanakira who testified that there was indeed evidence of penetration.

The appellant's counsel dwelt on the circumstances in this testimony given by complainant in court as compared to her earlier statements to police and to the many people she narrated her ordeal. The court *a quo* held that although there are variations in regard to certain minute detail, it did not find any material inconsistences with regard to how the offence was committed. It gave the example of her initial statement to her sister in which she did not say she was raped. The court reasoned that her explanation in court that she was confused and embarrassed by the whole experience should account for her indecision on whether to report or not or if she were to tell, what detail to tell who and how. In my assessment where a child is subjected to sexual abuse a trial court

ought not to nitpick and bear such scrutiny on immaterial detail with a view to cast doubt on the credibility of a witness evidence. The proper approach always is to assess the merits as well as the demerits of a witness evidence and decide whether as a whole the truth has been told. In this assessment of credibility it must not be lost to a trier of fact that the witness does rarely make a report of abuse with a view to meticulously record it for the purpose of future use in a court of law. Usually a witness realizes that she may be required to recall all the minute details when she is called upon to give a statement to police. Even then, that statement may be taken in vernacular and translated by another officer who may or may not have the opportunity to clarify certain of the testimony at the time. The witness is only required to do so in court when she has had to repeat her statement to many people. In this situation a court is entitled to require that credibility be tested against the realm of what the probabilities of the case maybe. Each case will have to be assessed on its own merits.

The court *a quo* considered the question of the authenticity of the medical examination report by Dr Chanakira. It correctly concluded that the doctor's findings provide irrefutable corroboration of sexual penetration. Complainant's evidence in this respect is therefore corroborated.

Mr *Mpofu* urged this court to conclude that penetration of an eleven year old virgin was a virtual impossibility given the fact that this was said to have happened when she sat in a couch. His argument implies that because appellant is an adult he could not possibly effect penetration on an eleven year old in that situation. Impossibility as a defence is only available in situations where an accused has a positive duty to act. The argument of impossibility of the *actus reus*, in my view, is not sustainable as it is not premised on any evidence of the physiology of either the complainant's or appellant's anatomy. It makes an assumption of what in reality constitutes some of the myths of rape to be fact. Such an argument cannot possibly avail the appellant. As I pointed out, it is based on a wrong premises. I reject it accordingly.

Mr *Mpofu* urged the court to disregard the evidence of the circumstances surrounding the return by the appellant of his pistol. This issue was extensively debated in the court *a quo* and dismissed in the judgment by that court. The court, correctly in our view, rejected the evidence tendered by the appellant and accepted that given by the State witness Mirirai Chiremba.

Critically, this evidence was obtained by the prosecution and not by the police. The evidence of the documents certifying the return of the pistol, according to Chiremba, were falsified by the appellant to reflect a date in June 2010 when in fact the appellant gave Chiremba the pistol on 22 August 2010. Coincidentally, it was the morning after the rape. Chiremba's evidence was that appellant asked him to backdate the date of return since some people were alleging that he had committed an offence. When asked by Chiremba if he had killed or robbed someone the appellant retorted that he had not but he looked worried.

The court preferred this version of events rather than the one proffered by the appellant. In his version he had returned the pistol, not by handing it to Chiremba at Chisipite Shopping Centre on a weekend, but by completing a form during the week at the RBZ. The evidence by Chiremba was the work of his enemies bent on ruining him politically. The court rejected this claim. It is easy to understand, in the context of the facts of this case, why the court, fairly in our view rejected this version. The appellant's claim was only corroborated by a document which he had completed and coerced Chiremba to co-sign. Chiremba's evidence was corroborated by Muradzikwa, the security officer at RBZ, who refused to take back the pistol on the condition that he falsifies the firearms register.

That evidence on its own, is innocuous. However if it is taken in its proper context which is that the return of the pistol the day following the rape confirms the complainant's testimony that the appellant produced a fire-arm with which he threatened her. When she says that she was raped the night before the return of this fire arm, this episode in a way, corroborates her otherwise singular evidence of what happened in the bedroom involving her and the appellant. Circumstantial evidence is sometimes stronger than direct evidence. The return of the fire-arm the morning after the incident from which the allegations of rape arose and his conversation with his subordinate at the time, in my view, betrays a behaviour of someone who anticipated the events which later unfolded. When asked if he had robbed or killed someone, the appellant explained that he had not done that but that there was a "minor dispute."

The court *a quo* considered the defence witnesses' evidence. It concluded, after a careful and detailed analysis, that no weight can be attached to this evidence as these witnesses were apparently coached on what to say by the appellant. The court pointed out the anomaly surrounding the fact that the witnesses' statements were in affidavit form, were commissioned by one lawyer

and were given on the same date. He ruled that these witnesses were lying and they were lying at the behest of the appellant who faced serious charges. Where a court rejects the evidence of an alibi testimony, it follows that the court would have by implication found that the defence of alibi had been disproved. Therefore, in my view, the court correctly adverted to the appellant's defence and rejected it as false. It found that the appellant had been untruthful on not just the issue of the *alibi* defence but the pistol and his presence at Tovey Road, Borrowdale, on 22 August 2010.

The relevant page of the occurrence book was certified by the police. The two witnesses disowned it. The court also determined that their evidence was a direct effort by the appellant to adduce favourable evidence by influencing them on what to tell the court.

In our view the court *a quo* properly assessed the evidence and correctly found that the State had found the guilt of the appellant proven beyond a reasonable doubt.

Consequently, the appeal against conviction stands to be dismissed.

As for the appeal against sentence, the appellant submitted that the sentence imposed against the appellant was manifestly excessive. A sentence is excessive if it is considerably lengthier than the usual sentences imposed by the courts for a similar offence. As indicated at the outset of this judgment, appellant was sentenced to 14 years imprisonment of which 4 years was suspended on the usual conditions. In his reasons for sentence, the learned magistrate emphasized the aggravating features in the matter before him and took into account the relevant mitigatory features of the case. He correctly found that the age of the complainant weighed heavily against any favourable consideration which the court might have decided to credit him with. She was 11 years only. Besides, he was her uncle and society naturally expected him to protect her rather than abuse her. He abused the trust that the complainant reposed in him both as an adult and a relative through consanguinity. The sentencing court took into account the usual aggravating features and correctly weighed them against the mitigatory features in the case. It cannot, in my view said he erred in settling on the sentence that he eventually passed. We were not referred to any case which could indicate the harshness complained of in this case.

The Criminal Law Code permits for the imposition of life imprisonment in deserving cases. In an appeal against sentence, the test is whether the sentencing court, in the exercise of its sentencing discretion, erred or misdirected itself by taking into account irrelevant issues or failing

to pay due regard to those issues it was obliged to consider. Such matters may take the form of exceeding the sentencing jurisdiction, omitting a statutorily provided step and so on. I did not hear counsel for the appellant argue that any of the above errors had been committed in the present matter. The argument relied on the harshness of the sentence imposed. I pose to observe that I do not find anything outstandingly unusual in the sentence imposed in this case. It is within the range imposed in similar cases. As such there is no basis for this court to interfere with the sentence. In light of this finding, the appeal against sentence is therefore dismissed.

Consequently, the appeal is dismissed in its entirety.

WAMAMBO J authorizes me to state that he agrees with this judgment.

Mutandiro, Chitanga & Chitima, appellants' legal practitioners
Warara & Associates, respondent's' legal practitioners