HB 325/17
HCAR 1727/17
CRB BYO R 112/16

THE STATE

Versus

KEVIN MOONSAMMY

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 26 OCTOBER 2017

Review Judgment

BERE J: On 24 February 2016, the accused appeared at Bulawayo Regional Court facing one count of rape in violation of section 65 (1) (a) (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. After the trial the accused was convicted of the offence charged and sentenced to 16 years imprisonment of which 3 years imprisonment were suspended on future good conduct leaving him with an effective sentence of 13 years imprisonment.

I got seized with this matter by way of an automatic criminal review process and I am concerned with the propriety of the conviction as I will demonstrate later in this judgment.

Briefly the facts of this matter are that on 26 December 2015, the accused who is a grandfather to the complainant was alleged to have raped the complainant in the evening and in his room and in the absence of the mother.

Immediately after the alleged rape the woman (who I shall refer as 'custodian woman') in whose custody the complainant/victim had been left got suspicious after noting the victim's strange way of walking. On examining the victim the custodian woman discovered fresh sperms sticking on the victim's pant and vagina.

The custodian woman then questioned the victim who disclosed that the accused had raped her. The custodian woman immediately made a report to the victim's mother upon her return. The victim's mother, after confronting the accused who pleaded innocence did nothing

until the 12 of January 2016 when on bathing the complainant she discovered that there was a foul smelling discharge coming out of the vagina of the victim.

It was then that the victim's mother asked the 3 year old victim who had abused her and the victim pointed at the accused as the person responsible. The accused was then arrested and when the accused appeared in court for trial he denied the charge and his defence outline was given as follows:

> "I do not suffer from the disease suffered by the complainant. I have never suffered from such a disease for many years. I did not do that and there are so many women who I can choose if I want to do such a thing. I did not do it."[1]

The evidence of the state which I will analyse in detail later consisted of that of the custodian woman, the victim's mother and the victim herself.

The accused relied on his sole evidence.

After looking at the evidence that was presented in court the trial magistrate analysed the evidence as follows:

> "From the evidence on record it is clear that the accused did something to the complainant as shows on the medical report. After "the custodian" discovered some sperms on the complainant's pant the complainant told her that the accused inserted his pippy (penis) into her cooky (vagina). This is the same story she told her mother.
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> The alleged rape was committed on 26 December 2015 and the complainant's mother was informed of it on the same day. She did not take action until she discovered some puss on 7 January 2016. In the complainant's (I believe this was meant to be in the "Court's" view) view this dispels any argument that the allegations were concerted (again, I suspect this was meant to say "concerted"). If the allegations had been concerted the report should have been made on the same day, i.e. 26 December 2015. She did not report because she did not believe the accused could sexually abuse the complainant.

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[1] Record page 2

> The complainant herself stood her ground that the accused sexually abused her under cross-examination. She was only aged 3 years then and the court found no reason why she would lie against the accused. The court found her to be a credible witness.
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> The court is satisfied that the state has proved its case beyond a reasonable doubt.
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> Accordingly the accused is found GUILTY AS CHARGED" (*sic)*[2]

I think it would be quite instructive in this judgment if I start by re-stating the legal approach that has been adopted by our courts for years when dealing with matters of a sexual nature and generally what the accused person is supposed to do in order to earn his acquittal.

Ever since the position taken by the Supreme Court in the celebrated case of *S* v *Banana*[3], our courts have done away with the cautionary rule in sexual matters. Despite the abandonment of this rule, the trier of fact still needs to exercise considerable care in assessing the evidence. The court is still expected to exercise extreme caution when looking at the evidence and part of the justification of this cautious approach stems from what WATERMEYER CJ observed; "that charges of the kind are generally difficult to disprove and that various considerations may lead to their being falsely laid."[4]

The *Banana* case also authoritatively laid down the requirements of a complainant in sexual cases as follows:

> "1. It must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature. See *R* v *Petros* 1967 RLR 35 (G) at 39G-H.

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[2] Record page 3

[3] 2000 (1) ZLR 607 (S)

[4] *R* v *W* 1949 (3) SA 772 at 780

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 it. See *R* v *C* 1955 (4) SA 40 (N) at 40G-H; *S* v *Makanyanga* 1996 (2) ZLR 231 (H) at 242G-243C."[5]

On the conviction of the accused it is the time honoured approach by our courts that in criminal matters the accused has no onus to prove his innocence. The duty to prove its case beyond a reasonable doubt is thrust upon the state.

As I understand it, all the accused person is called upon to do to earn his acquittal is to cast reasonable doubt on the state case. The position of our law is lucidly put by GILLESPIE J in *S* v *Makanyanga* as follows:

> "Whilst it is axiomatic that a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complainant, 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 wherever it appears reasonably possible that it might be true. This 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 whose insincere but convincing blandishments must prevail over the stammering protestations of truth by the diffident, frightened or confused victim of false incrimination."[6]

Having laid down the legal position as I perceive it, I must now proceed to analyse the judgment of the court *a quo* juxtaposed with the evidence as recorded.

It is really a tragedy that there was no serious analysis of the evidence that swayed the court to convict the accused in this case. What one sees in the attempted analysis which is

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[5] *S* v *Banana (supra)* at p 616

[6] 1996 (2) ZLR 231 (H) at p 235E-G

evidently scant is one sentence which reads "the court found her (complainant) to be a credible witness". I do not believe this characterization of the complainant's testimony is supported by the record of proceedings itself.

In my respectful view, it would seem that this statement about the credibility of the complainant was slotted in the judgment to try and justify the conviction of the accused. I say so because of the following reasons.

In the first place, I observe that the alleged revelation of the assault on the complainant was not a voluntary disclosure by the young victim. She only opened up after being asked by the custodian woman as to who had done that to her. In her own words the witness put it in the following words:

> "I then took her to her mother's room … I then sat down with the complainant and asked who had done that to her and she said it was the accused. She said he put his pippy inside her cooky."[7]

I accept that when dealing with young children one needs not adopt an armchair approach and treat them in the same manner as adults. Quite often they only respond to and disclose such abuse upon enquiry. So in this regard I will give the child the benefit of doubt.

But the challenges with this victim's evidence does not end with the manner she disclosed the assault on her by the grandfather. It goes beyond that.

The record of proceedings shows that when the complainant testified in court on 24 February 2016 the public prosecutor had to cut short the extraction of her evidence in chief because the intermediary had indicated that the victim had "lost concentration and is busy with

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[7] Record page 4

something else".[8] Because of this the public prosecutor was forced to apply for the postponement of this case to 26 February 2016.

On 26 February 2016, the public prosecutor advised the court that the matter could not proceed as scheduled because the victim was not willing to talk. The result was that the matter had to be further postponed to 29 February 2016. Come the 29th of February 2016, the complainant was still unwilling to communicate forcing yet another postponement of the matter to 2 March 2016.

For unexplained reasons, the resumption of the matter took place not on 2 March 2016, but on 10 March 2016. The record of proceedings captures the brief hearing as follows:

"Question by public prosecutor

Q Can you pick a doll?

A She does not want (Intermediary)

Q Who pinned you?

A … (Intermediary) – she is covering her face

Q Where is your uncle? … No answer

By prosecutor

We apply that proceedings stop so that the witness is referred for counseling.

By court

Remand refused as the witness has to undergo counseling"[9]

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[8] Record page 9

[9] Record p 10

So, the fact is that in the middle of the trial the public prosecutor applied to the magistrate and was granted permission to take the victim for counseling. To me the granting of such an application has the effect of seriously compromising the proceedings.

It does seem to me and with all due respect, that subjecting a witness, particularly a 3 year old victim as in this case to counseling in the middle of a trial has the potential of compromising the evidence of such a complainant or victim. This is particularly made worse like in this case where the matter had previously been postponed on three occasions because of the unwillingness by the victim to testify for whatever reasons. My very strong view is that the evidence of such a witness after undergoing counseling which in all probabilities would have made reference to the court proceedings (outside court) is likely to adulterate the little victim's testimony in court. The victim's new evidence after undergoing counseling is likely to lose its purity. It seem, to me that the best time to counsel a witness is during investigations and not when they are in the middle of a trial, otherwise the court will end up with contaminated testimony.

It is interesting to note that after the so called counseling of the victim the trial eventually kicked off on 23 August 2017 almost 18 months after the last postponement.

Even on the last day the complainant testified in court there were flashes of her testimony characterized by otherwise inadmissible questions from the public prosecutor which the trial magistrate surprisingly allowed the prosecutor to ask. For example the complainant was asked as follows:

"Q What did grandpa use to injure your cooky?

A … He used a pippy"[10]

[10] Record p 10

Given the circus that characterized the testimony of the complainant, can it be seriously said that the complainant was a credible witness? In my well considered view, the answer must be in the negative. It cannot possibly be said, by any stretch of imagination that the young victim was credible in her testimony.

So much about the complainant/victim's testimony, but what about the accused's testimony? The record of proceedings shows that the accused stuck to his story throughout the proceedings. The cross-examination to which he was subjected by the public prosecutor did virtually nothing to change his position. The accused stated that where he did not ask questions he was shocked by the kind of allegations levelled against him at the behest of either the custodian parent or the victim's mother. To me this is reasonably possible. The trial magistrate could not have simply ignored this for no cogent reason.

One noticeable undesirable feature of the judgment of the court *a quo* is that it completely ignored the accused person's defence outline or evidence in court. There was no comment made about it. There was nothing said about the credibility or otherwise of the accused person. It was as if the magistrate was saying to himself "If this accused did not do it, why would this little victim point a finger at him?" In my view, this is false reasoning. Such a perception on the trier of fact is tainted with unforgivable prejudice or bias. A man in a rape case cannot be said to be guilty merely because he cannot come up with an explanation as to why he has been pointed at as the culprit. The reason why such allegations could be raised against an accused could be anything beyond the accused's imagination.

There are other issues in this case which provides a pointer to the accused's innocence in this matter. The accused's defence outline which I suspect must have been consistent with his warned and cautioned statement was a direct challenge to the state case or an invitation to the state to subject him to any medical examination which could have proved either his innocence or guilt beyond doubt. It would have been easy for the investigating officer to have obtained samples of the accused's semen and the semen on the victim's undergarments as observed by either the victim's mother or the custodian woman and send these for forensic examination. This

was not done and I really do not know what else the accused person should have done in this case to demonstrate his innocence.

This reminds me of the remarks made by my brother Judge MUSAKWA in a speech he gave at the opening of the 2016 legal year for Masvingo High Court Circuit. The learned Judge remarked as follows:

> "It is commendable that very few criminal cases go unresolved by law enforcement agents. This goes to show that our law enforcement agents are up to the task in the investigation of crime. The only blemish is the absence of up-to-date forensic technology. In a number of murder and rape cases there is absence of forensic analysis of evidence gathered from the scenes of crime. … DNA analysis which enhances the quality of evidence before the courts is seldom resorted to, even if it can be outsourced. This may sometimes compromise the adequacy of evidence placed before the courts. This may result in guilty suspects getting off the hook or innocent people being convicted"….[11] (my emphasis)

I wish to add and say that given the sprouting of DNA centres in this country including but not limited to institution of Higher Learning like NUST there is absolutely no reason why the investigating officers should not enthuse themselves in this advanced and more civilized way of carrying out investigations particularly in murder and rape cases. It cannot continue to be business as usual.

There are other features of this case which did not sit down well with me. The custodian woman's evidence was quite central to the prosecution of the accused because it was her intervention which triggered the investigations that followed. Is it not ironic that we see very little if at all about the analysis of this witness' evidence in the judgment of the court *a quo*? Nothing completely is said about this witness' credibility in the judgment that condemned the accused to gaol for 16 years imprisonment.

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[11] Speech given during opening of 2016 Masvingo High Court Circuit Legal Year

I will attempt to briefly analyse her evidence in the light of the trial magistrate's decision to religiously accept her evidence. If the evidence of this witness is taken in its proper context, it is clear that she reported a very serious case of sexual assault of the victim to the victim's mother. The witness said when she realised the victim was walking in an unusual manner she took the victim to her mother's bedroom and examined her. The witness said her examination revealed to her that the victim had been sexually assaulted as evidenced by the sperms that she saw on the victim's pant. The witness' conviction of rape was further strengthened by the foul and disturbing smell from the victim's vagina. When this witness testified in court she said she made a report to the victim's mother and the mother confirmed that, indeed she was given this report.

Upon being furnished with such a serious report, how did the victim's mother react? Her evidence in court suggests that other than merely asking the accused who denied she did nothing about such serious allegations. The witness neither took the victim to hospital nor reported the matter to the police at that early stage – a reaction which in my view would be inconsistent with normal practice or reaction after receiving such a serious report.

I am more inclined to believe that if indeed such a serious report as described by the custodian woman had been made to the victim's mother, the mother would have done much more than merely questioning the suspect. It is tempting, in my view to speculate and conclude that the so called report may possibly have been a fiction, after all. This view might lend credence to the view expressed by the accused when he was being cross-examined when his last answer was that he believed the custodian woman was setting him up.[12]

I wish to deal with yet another unpleasant feature of this case. The position is now settled that an unrepresented accused person must be given basic assistance by the court as he battles to come to terms with the usually not too friendly court room environment as he prosecutes his

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[12] Record page 14 (last answer)

case. It will be noted in this case that after the first witness had given evidence against him, the accused asked basically five questions.

After the victim's mother testified, there was not a single question asked in cross-examination, neither does the record of proceedings contain any notes to show that the unrepresented's rights to ask questions to the witness were explained. Students of law spend virtually the whole year studying among other subjects "Criminal Procedure" as a separate subject towards the acquisition of a law degree and I think it is stretching the whole idea of criminal prosecution too far for anyone to expect an unrepresented accused person to have mastered the technique of cross-examination in a split of seconds when the presiding magistrate would have explained the purposes of cross-examination to him. It is imperative in criminal proceedings, even in civil proceedings for that matter for the presiding magistrate to ensure that an unrepresented accused is given reasonable assistance to enable him to prosecute his case. The record of proceedings suggests that instead of trying to guide the accused person in the conduct of his defence, the magistrate chose to behave like a spectator enjoying the accused being shepherded to the slaughter by the public prosecutor.

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. I can only echo the wise words of GILLESPIE J when he counseled as follows:

> "Proof beyond a reasonable doubt demands more than that the complainant should be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true."[13]

In conclusion and exercising my powers on review I quash the conviction and set aside the sentence. The accused is found not guilty and acquitted.

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[13] *S* v *Makanyanga (supra)* at p 235F

Makonese J ……..I agree