ELIZABETH MUKOMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 22 May 2014

Concession in terms of Section 35 of the High Court Act, [Cap7:06]

CK Mutevhe, for the appellant
S Fero, for the respondent

HUNGWE J: The appellant was convicted of assault as defined in s 89 (1) of the Criminal Law (Codification & Reform) Act, [*Cap 9:23*] and sentenced to pay a fine of US$80-00 or in default of payment undergo 20 days imprisonment. She appeals against both conviction and sentence.

The State filed a notice in terms of s 35 of the High Court Act, [*Cap 7:06*] indicating that the Prosecutor-General did not support the conviction.

The case against the appellant rested on the evidence of a single witness. The facts upon which the conviction was based were found to be as follows. Complainant was employed by the appellant as a shop-keeper. On 21 December 2012 the appellant confronted the complainant over an apparent shortfall of daily cash takings from sales. It is said that the appellant was dissatisfied by the explanation tendered by the complainant since she denied all responsibility for it. Appellant asked her husband to get out the room where this interrogation took place before perpetrating an assault on the complainant. The appellant is said to have used a sjambok to perpetrate an assault all over complainant's body. Complainant only made a report to police on 30 December 2012, some nine days later.

The appellant disputed the claim that she had assaulted the complainant pointing out that there were police details at this business centre to whom she could have reported the assault the same night or the following day. She explained that the reason why these allegations were concocted against her are that this was a pre-emptive move by a suspect over

allegations of embezzlement. She told the court that the complainant was assaulted by her paramour's wife before the date of the medical examination therefore whatever injuries were found on her were a result of that assault. She called a witness who confirmed this assault which occurred prior to the report to police.

The trial court found that the complainant was a credible witness and convicted the appellant whose defence was rejected out of hand as unreliable. It is true that the law permits a court to convict an accused on the evidence of a single witness. These courts have repeatedly sounded warnings against accepting the word of the complainant against that of the accused simply because the law permits it. In *S* v *Banana* 2000 (3) SA 885 the former Chief Justice of this country put the matter in the following words;

> "It is, of course, permissible in terms of s 269 of the Criminal Procedure and Evidence Act [*Cap 9:07*] for a court to convict a person on the single evidence of a competent and credible witness. The test formulated by DE VILLIERS JP in *R v Mokoena* 1932 OPD 79 at 80 was that the evidence of such a single witness must be found to be 'clear and satisfactory in every material respect.'
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> In The South African Law of Evidence 4th ed at 573 the celebrated authors, Hoffmann and Zeffertt, rightly point out that *Mokoena*'s case concerned the situation of a single witness claiming to have identified the accused by the light of a pocket torch as he ran past in the dark. Accordingly, they contend that the remarks of DE VILLIERS JP should be related to the context in which they were made.
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> Certainly, in purporting to lay down a general rule the dictum of the learned Judge President has been criticised as unhelpful and tending to obscure the ultimate purpose of the court's inquiry, which is whether the guilt of the accused has been proved beyond a reasonable doubt. See *R* v *Abdoorham* 1954 (3) SA 163 (N) at 165; *R* v *Mokoena* 1956 (3) SA 81 (A) at 85 - 6. In *S* v *Sauls and Others* 1981 (3) SA 172 (A) at 180E - G, DIEMONT JA said:
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> > 'There is no rule of thumb or formula to apply when it comes to a consideration of the credibility of the single witness. . . . The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. . . . It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'
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> In Zimbabwe much the same approach has been adopted. In *S* v *Nyati* 1977 (2) ZLR 315 (A) at 318E - G, LEWIS JP warned that the test in *R* v *Mokoena* (supra) is not to be regarded as an inflexible rule of thumb. There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence a common-sense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole

> witness has spoken the truth it must convict, notwithstanding that he was in some respects unsatisfactory. See also *S* v *Nathoo Supermarket* (Pvt) Ltd 1987 (2) ZLR 136 (SC) at 138 D - F.
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> Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution." (per GUBBAY CJ at p 894 E- 895 D).

The reliability of the complainant in the present case ought to have been tested against the probabilities which quite clearly exist in the matter. For example, it is not clear why she did not report to her workmates who were present at the shop on the night of the assault. Vongai was said to have seen the complainant soon after the assault as did Rumbidzayi and Stanley Gwenhure. These possible witnesses could have testified on the crucial aspect of the demeanour of the complainant soon after the event. The trial court could have called their evidence if the State did not wish to rely on it. The husband to the appellant, Amos Mukomba could have shed some light as to what exactly took place inside the room, if at all these two were at any time left alone. Even more critical is the failure by the State to require the oral evidence of the examining doctor who could have shed light on the question whether the injuries he observed on her were consistent with the earlier or later assault. Section 232 of the Criminal Procedure and Evidence Act, [*Cap 9:07*] could have been relied upon by the trial court to call these necessary witnesses for the purposes of clarifying the evidence led by either side. This was not done. It could have helped to strengthen the reliability of either the State or the defence cases.

The appellant, for her part, called complainant's co-worker who testified that the complainant was indeed assaulted on 29 December 2012. The effect of this evidence was to cast serious doubt on the all-critical issue of whether it is the appellant or someone else who inflicted the injuries seen at medical examination. Further, the complainant had a good motive to concoct this allegation against the appellant once she was assaulted by someone else. She needed to forestall the allegations of theft against her. It was critical, in my view, for the State to discount this possibility by calling evidence to discount this possibility. It needs not be emphasised that there is no onus on the accused to prove her innocence. As long as she was able to put forward an explanation which was reasonably possibly true, she was entitled to an acquittal. It seems to me that this was the case in the present matter.

In light of the above I find that the concession by the State was well made. In the result the appeal succeeds. The conviction is therefore set aside and the sentence is quashed. The judgment of the court *a quo* is substituted with the following:

"The accused is found not guilty and acquitted."

BERE J agrees _____

Mugadza Chinzamba& Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners