TONGAI HUNGWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & KWENDA JJ
HARARE, 12 March 2019 & 17 March 2021

CRIMINAL APPEAL

K. Chisekereni, for the appellant
E. Mavuto, for the respondent

KWENDA J: The appellant appeared before the Regional Magistrate for the Eastern Region facing two charges. Firstly, he was charged with Rape as defined in s 65 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] in that on the 10th April 2017 he had unlawful sexual intercourse with a female adult without her consent. Secondly, he was charged with Criminal Abuse of Duty as Public Officer as defined in s 174 (1) of the same Criminal Law Code in that on the same day he gave to the victim two documents namely, a birth certificate and national identity document which he had earlier impounded from the victim for the purpose of showing her favour contrary to his duties as a public officer.

The facts leading to the conviction are that sometime in February 2017 the complainant went to the office of the Registrar of Births at Makombe building, Harare, after being referred from the Registrar's Passport Office for her birth certificate to be verified before submitting her application for a passport. At the offices of the Registrar of Births, the complainant was referred to room 77 where the appellant attended to the verification process. The appellant decided that it was necessary to interview the complainant's mother. He impounded the complainant's birth certificate and National Identity card and told her to bring her mother as part of the verification process. The complainant went away and returned on the 10th April 2017 at around 9am alone. She said she wanted to collect the National ID and Birth certificate because she needed the National Identity Card to register her pregnancy. She was attended to by the appellant who kept her waiting.

At 1500 hours he told her to follow him to a certain room where he asked her to sit on a chair. He then locked the door and placed the complainant's National Identity card and birth certificate on the table before telling her that he wanted to have sexual intercourse with her before releasing the documents to her. She refused to have sexual intercourse with him. The appellant pushed her to the ground and raped her.

The appellant pleaded not guilty and the matter proceeded to trail. The appellant's defence was that the complainant attended at his office for confirmation of her birth certificate. After examining the birth certificate, he noticed that it had been issued beyond the mandatory period of forty-two days specified in s 11 of the Births and Deaths Act [*Chapter 5:02*]. The informant had therefore contravened s 27 (1) of the Births and Deaths Act [*Chapter 5:02*]. The complainant failed to explain the delay whereupon he directed her to bring her mother who had procured the birth certificate on her behalf. The complainant was behaving as if she had something to hide. Initially, she said she did not know her mother's cell number. Later, she gave the appellant a cell number which he dialed and spoke to a woman who, although claiming to be the complainant's mother, did not know the complainant's place of birth. The appellant decided and did impound the complainant's documents and told her he was keeping them until she brought her mother. He warned the complainant that she could be prosecuted in the event that she had supplied him with false information and advised her of the penalties. He also told her that since the registration of her birth had been delayed by 4 years, she was liable to a late registration fee of $50. The complainant was visibly annoyed. She accused the appellant of deliberately making it difficult for her to acquire a passport and wanting to cause her arrest. The appellant was not moved and maintained that she had to comply with his directive and the law. The complainant left but she was visibly bitter. The bitterness must have motivated her to make the false report.

The basis for charging the appellant with abuse of office is difficult to comprehend. It will, however not be necessary to delve into the second charge in detail because the appellant was acquitted of the crime of abuse of duty and convicted only of Rape. He was sentence, on the rape charge, to imprisonment for 16 years of which 4 years were suspended for 5 years on condition of good behavior.

The appellant appealed against both the conviction and sentence on the 3rd July 2017. The Notice of Appeal was amended on 27 July 2017 by the deletion of grounds 2 and 3 and substitution with new grounds.

The grounds of appeal against conviction as amended are:

1. "The learned court *a quo* erred and misdirected itself in making a finding of fact that there was no reason or motive for false incrimination when the evidence suggested otherwise. The complainant was clearly hurt and frustrated by the fact that she was unable to apply for a passport because she did not have a legitimate birth certificate and that she failed to locate her mother who was supposed to come and explain the anomalies on the birth certificate and she viewed the appellant as the cause of her woes.
2. The court *a quo* erred and misdirected itself in finding the complainant credible when she, not only contradicted herself, but also appeared unsure of a number of material aspects. When asked by the prosecutor to explain what transpired she said she did not recall and while claiming to be too unwell to scream, she had the energy and power to wrestle with the appellant.
3. The court *a quo* fell into error when it found corroboration where there was none but only contradictions. While the complainant categorically told the court that she took away her documents soon after the alleged rape, the investigating officer who was called by the court testified that it was her who found the documents in appellant's file, both the originals and photocopies.
4. The court a *quo* erred and misdirected itself in relying on the medical report which was of no probative value regarding being had to the fact that the complainant was married and sexually active. While the court *a quo* attached some weight to the 'fresh tear 'indicated on the medical report, the complainant never suggested that she felt pain, let alone sustain any injury or cut. The medical report could not therefore corroborate what was not before the court.
5. Generally, the court erred in convicting the appellant on the basis of glaring inadequacies in the state case and the totality of the evidence before it."

There is only one ground of appeal against sentence, which is that the trial court imposed a sentence which is so severe that it induces a sense of shock.

The state filed a concession in terms of s 35 of the High Court Act [*Chapter 7:06*] submitting that the trial court erred and misdirected itself in convicting the appellant without sufficient evidence. According to the State, the evidence adduced by it at the trial had failed to rebut the appellant's defence. The appellant had been consistent in his defence throughout the trial

that the complainant had made a malicious complaint of rape after being hurt by the appellant's insistence that she had to bring her mother for interview and verification of the birth certificate. The appellant's defence that the complainant viewed him as the author of her problems was probable. In addition to that, the trial court misdirected itself when it believed the complainant's testimony that the appellant returned the originals of the documents to the complainant soon after the rape so that she could register her pregnancy. That was not the case. In fact, the complainant had been untruthful when she claimed that the appellant returned the documents to her because the investigating officer located all her certificates, that is the originals and copies in the file at the appellant's office. The complainant's false testimony had the effect of putting her credibility in doubt. The correct position is that the investigating officer's testimony confirmed the appellant's defence while discrediting the complainant. The state further submitted that the complainant's version about how the rape took place was not at all convincing. She gave conflicting versions about the position in which she was when the rape took place. The complainant had also been untruthful when she said she narrated to her sister about how she had been raped. The sister was called as a State witness and denied that, saying the complainant had not given a detailed account of what transpired. The trial court ought therefore to have given the appellant the benefit of the doubt and acquitted him.

I find the concession by the State to be proper. My reasons are stated below:

At p 4 of its judgment the court made the following finding

"……. After the act, the accused person stopped…. She put on her pant and took her documents, which had been placed on the table. That is the birth certificate and ID and left the room. The witness was clear that she did not like or enjoy what had just taken place.

The witness however did not specify whether she took her original documents but did tell the court that she took the documents. The court saw no reason to doubt her assertion especially since this was not challenged during cross-examination."

In my view that is where the trial court misdirected itself. Having correctly identified that the case before it could only be resolved through establishing who between the appellant and the complainant was telling the truth about what transpired when they met at the appellant's office, the trial court correctly invoked s 232 of the Criminal Procedure and Evidence Act *[Chapter 9:07]* and called the investigating officer to give evidence. Her evidence was that she had gone to the

appellant's office to carry out investigations after receiving conflicting versions from the appellant and the complainant. The complainant claimed to have taken the originals of her birth certificate and National Identity card but had failed to produce them. The appellant was steadfast that she had not taken them and they were at the office. The resolution of the factual dispute was relevant to the credibility of both the complainant and the appellant. Whoever, between them, was proved to be telling the truth on that issue was more likely/deserving to have his/her version to be believed. The investigating officer therefore went to the appellant's office to look for evidence that the complainant had been to the appellant's office at Makombe building. Upon carrying out a search at the appellant's office, she found the documents in the official file. The documents consisted of both the originals and the photocopies. The evidence refuted the complainant's evidence that the originals were in her possession. The witnesses' testimony is significant in five ways. Firstly, it showed that the complainant had been untruthful when she said she took her documents because both sets of the originals and copies were on file. She had, therefore, taken none. Secondly, the trial court's finding that the complainant took her documents was a misdirection at law because it was contrary to the evidence presented to it. Thirdly, the complainant's assertion that the appellant had demanded sexual intercourse or raped her in exchange for the documents had been proved to be false. She had falsely testified that after raping her he opened the door, allowed her to take her documents and leave after detaining her the whole day to achieve that. Fourthly, the evidence went as far as showing that the complainant was not a credible witness. The finding by the trial court as quoted above, was therefore, inconsistent with the evidence of the investigating officer who had been called by the Court to resolve the factual dispute between the State and the appellant. The implication of the erroneous finding by the trial court was that the trial court believed the evidence that the appellant kept the complainant's documents and delayed her for the whole day while demanding a bribe of $70 and only allowed her to leave with her documents after raping her. The demand for the bribe was implied in the evidence of State witness, Patience Machingami, the complainant's sister and a Police officer, who was the first person to receive a report from the complainant. The witness testified that the complainant had told her that the appellant had initially demanded $70 to release the I.D and birth certificate. After making the complainant wait and leaving her unattended for a long time he later returned and locked the door and said he no longer

wanted money since that could cause his arrest but he wanted sexual intercourse with her in exchange for the documents. That was when he raped her.

The trial court ought therefore to have gave the appellant the benefit of the doubt.

See *S* v *Makanyanga* 1996 (2) ZLR 231.

S v *Dzinoreva* HH 780/15

R v *Bloon* 1907 7PD

S v *Difford* 1937 AD 370.

It is imperative to quote from *S* v *Van der Meyden* 1999 (1) SACR 447 (W) at 449H-450B: -

> "…. The proper test is that the accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. The conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

The trial court erred in that it did not apply the law on complaints in sexual matters as stated in S v *Banana* 2000 (1) ZLR 607. It relied only on the case *S* v *Musumhiri* 2014 (2) ZCR at p 232. The decision of the High Court in *S* v *Musumhiri* did not change the law regarding the admissibility of evidence of complaints in sexual matters. The law remains as stated by GUBBAY J in the headnote of *S* v *Banana* 2000 (1) ZLR 607 at page 609 B-D that: -

> "…… evidence of a complaint in a sexual case is admissible to show the consistency of the evidence of the complainant's evidence and the absence of consent. The requirements for admissibility are that (a) the complaint must have been made voluntarily, not as a result of questions of a leading and inducing or intimidating nature; and (b) must have been made without undue delay, at what is in the circumstances the earliest opportunity, to the first person to whom the complainant could reasonably be expected to have made it"

The exceptional circumstances and postulations in the *Musumhiri* case have been largely misunderstood and erroneously elevated to the status of being the rule. It must be noted that notwithstanding the abandonment of the cautionary rule or two rung approach set in the case of *S* v *Mufudza* 1982(1) ZLR 271 (S), GUBBAY CJ in the *Banana* case made it clear that the evidence in case of sexual matters still need to be approached with caution which must be informed by the circumstances of the matter. See at page 614 D-E

> "I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I would emphasize that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully."

The complainant in this matter had the opportunity to report to any of the several officials who work at Makombe building having been at the building from 9am to 3pm. It is a notorious fact that the Registrar's office is always a hive of activity. She also had the opportunity to report at the Harare Central Police Station before boarding a taxi home. The trial court did not address its mind to the issues raised by the delayed report.

The misdirections by the trial court resulted in a wrong conviction.

As a result, I order as follows:

1. The appeal succeeds.
2. The verdict of guilty is quashed and substituted with the verdict of not guilty and acquitted.

CHATUKUTA J agrees

Hogwe, Dzimirai & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners