HB 61-18
HCA 178-15
XREF BYO REG 360/15
XREF HC (C0ND) 104/17
XREF HCB 135/15

GREATNESS TAPFUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND MOYO JJ
BULAWAYO 5 MARCH 2018 AND 8 MARCH 2018

Criminal Appeal

B Masamvu for the appellant
Ms N Ngwenya for the respondent

MATHONSI J: The appellant owns his own church which goes by the catchy name of Kingdom Rulers International Church which he founded in the Cowdray Park suburb of Bulawayo. Prior to that he had worked with a friend of his called Ronald before they parted ways and Ronald also founded his own church known as Transfiguration Zone in the same suburb which the appellant says is a rival church competing with him, not only in the selection of funny church names, but also in attracting congregants. The applicant's church does not have a church building at which to worship but they fellowship at some bushy area in the suburb where they have a stand with some of their activities taking place at his rented house No 6639 Cowdray Park Bulawayo.

The appellant was arraigned before a Regional Magistrate at Bulawayo charged with two counts of rape as defined in section 65 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. Although he pleaded not guilty, he was convicted on both counts following a protracted trial and was, on 22 September 2015, sentenced to 15 years imprisonment on each count. Of the total of 30 years imprisonment 5 years was suspended for 5 years on condition of future good behaviour leaving him with an effective 25 years imprisonment. Aggrieved by that turn of events, the appellant appealed to this court against both conviction and sentence.

On conviction his grounds of appeal are that the court should have found that the complainant was not a credible witness as the evidence of state witnesses was full of contradictions, their evidence was erroneously understood and the court should not have dismissed the evidence of defence witnesses. All in all the appellant's position is that the state failed to prove its case beyond a reasonable. Regarding sentence, the appellant attacked it on the ground that it is too severe and out of proportion as to induce a sense of shock.

The prosecution sought to prove at the trial that the 16 year old complainant, who was a member of the appellant's church, was invited by the appellant to his house in October 2014 in his capacity as her pastor. At his house, No 6639 Cowdray Park Bulawayo, the appellant told the complainant that there were evil spirits at his residence which were going to kill her father while the complainant herself would be turned into a Satanist. This was after the complainant had turned down the pastor's amorous advances. He stated that the solution to all her problems lay in her falling in love with him and submitting to having sexual intercourse with him. Using such threats the appellant is said to have raped the complaint three times without protection during October 2014 in count one.

In count two the appellant is said to have used the same threats to cow the complainant into submission several times during the month of November 2014. It was only after the complainant developed blisters on her private parts and tested positive to HIV Aids that she revealed the sexual abuse to her step mother. Denying the accusations the appellant rubbished them as "trumped up charges" instigated by his friend-cum-rival Ronald who influenced the complainant to falsely accuse him in order to destroy him and his church. This happened after the complainant and her parents abandoned his church and joined Ronald's rival church.

The appellant completely denied having sexual intercourse with the complainant at any one time insisting that he only moved to house number 6639 Cowdray Park Bulawayo, where the rape allegedly took place, on 19 December 2014 well after the period covered by the allegations. The appellant's defence was that his church renders what he called "deliverance sessions," the casting out of demons and cleansing of victims of Satanism which sessions were conducted from his house. It was during such deliverance that a demon manifested itself in the complainant.

The demon said, while being filmed on video which was played in court, that the complainant had been initiated into Satanism. Thereafter the complainant surrendered her "tools of trade" and confessed being a prostitute who was involved with married men and was HIV positive.

The complainant's story, though extremely sad, was a simple one. She was a member of the church where the appellant was a pastor. After passing a comment on her attire in early October 2014 the appellant invited her to his residence where he propositioned her but she turned him down. On another day he approached the complainant's father suggesting to him that she should attend a counseling session at his residence and the father released her. Once at the appellant's residence he preached to her the threats of spiritual damnation and that he foresaw the death of her father at the hands of evil spirits. He persisted with the threats forcing the complaint to cry in desperation pleading with him to save her family. At that stage he stripped her naked pointing out that any resistence would trigger the death of her father. So was any attempt to tell anyone about the rape. He then raped her.

That was the beginning of the complainant's nightmare because after that the appellant used the same trick to sexually molest the complainant several times. At some stage he directed her to visit his house three times a week for purposes of fulfilling his pervated sexual desires on the threat of damnation if she did not comply. That way the appellant reduced her to a sex slave. She later developed skin rash and had to receive medication. When he got wind of that the appellant came to her home and told her father that the medication she was receiving was from Satanists and that a demon was responsible for her illness. The only solution was for him to pray for her and not to take medication. So influential was the appellant that his spell held the entire family in awe. The complainant's father immediately flashed the pills down the toilet content to rely on the appellant's prayers.

The complainant confirmed attending an all-night church prayer session where she was prayed for but could not tell what happened there. She did not appreciate what has happening although she was later told that a demon had manifested itself through her. When her condition got worse she was taken for an HIV test which confirmed she was positive. Later she revealed to her mother how the appellant had raped her. She explained that she could not immediately

report to anyone for fear that death would befall her father as had been threatened by this all too powerful man of God gifted with spiritual power to foresee and foretell the future. She only felt free to disclose the attack when her father did not die even after she stopped going to the appellant's house or his church, and had discovered she was HIV positive. She rebutted the appellant's claim that he had only moved to house number 6639 Cowdray Park on 19 December 2014.

Of the entire uninterrupted testimony of the appellant running into exactly four pages when he was given an opportunity to defend himself against the accusations, only one page (the last one) attempted to answer to the charges. The rest of his evidence in chief was an endless prattle about Satanism and his fallout with this friend Ronald and a prodigy of his called Frank of Nigerian descent, who was deported a long time before the alleged rape. His testimony was completely useless and unhelpful. Although there was no bad blood between him and the complainant, he took the view that it is both Ronald and the complainant's mother who were using her to destroy him.

The appellant then called four more witnesses none of whom could shed any light on the allegations leveled against him. Two of them, Charles and his girlfriend Takudzwa were character witnesses brought to potray the complainant as a person of poor morals who was HIV positive. In fact most of the defence evidence was inadmissible hearsay mixed with potshots at the character of the complainant to make an omlet of unhelpful testimony clearly unable to address the charges of sexual abuse.

The whole case turned on the credibility of the complainant and her mother who came in to corroborate her complaint of sexual abuse. The main issues for consideration in this matter were whether the complainant was so groomed and placed under the spell of her pastor, the appellant, and his overbearing influence on her as to believe the threats of spiritual damnation that were made. If so, could those threats be said to have vitiated consent. The other issue was whether the explanation given by the complainant for her failure to report the abuse until after the HIV test results was plausible.

This arises out of the fact that our law as it stands now is that the evidence of a complaint in a sexual case is admissible to show the consistency of the complainant's evidence even though the cautionary rule is no longer part of our law. In order for it to be admitted the following requirements must be satisfied;

a) the complaint must have been made voluntarily, not as a result of questions of a leading and inducing or intimidating nature; and

b) the complaint must have been made without undue delay at what is in the circumstances the earlier opportunity, to the first person to whom the complainant would reasonably be expected to have made it.

See *S* v *Banana* 2000 (1) ZLR 607 (S) at 616 B-C; *S* v *Makanyanga* 1996 (2) ZLR 231 (H) at 242G, 243C; *S* v *Mukuku* HB 337-16; *R* v *Petros* 1967 RLR 35.

By definition in section 65 of the Penal Code, rape involves sexual intercourse with a female person without her consent. Where the accused person denies even the act of sexual intercourse itself, the burden resting on the state is to prove both the act of sexual intercourse and the lack of consent. Therefore even before the issue of consent or lack of it can be discussed the court must be satisfied that indeed sexual intercourse took place. This is a case in which the medical evidence talks of "multiple breaches on hymen" and " definite penetration in the past" which helps noone at all as it leaves the question of who was responsible for that very open. It is for these reasons that I said the case turned on the credibility of witnesses.

In finding the state witnesses credible the court *a quo* accepted that there were discrepancies in their testimonies but found that they were "normal human beings" bound to make mistakes here and there as they did not keep diaries of the events. It found that the discrepancies were not material. The court *a quo* concluded;

> "Lastly the court does not find any sign of Ronald's hand in the accused's prosecution. I do not find that the two churches of Ronald and accused are rivals to an extent needing the elimination of the other. They are virtually unknown little outfits called Kingdom Rulers Ministry and Transfiguration Zone – quite inventive names. If such can maintain a rivalry that leads to falsely implicating each other then we should fear that bigger religious organisations rivalry might trigger nuclear war soon. I find that the words Ronald is said to have uttered about the character of the accused are nothing more than

> petty gossip. What I find instead is that the accused took advantage of a despirate girl fearing for the life of her father – her mother is already late. She genuinely believed that evil spirits are hounding her family. Accused encouraged this fear of the evil spirits and the belief they were ready to pounce on her family starting with her father. He then raped her several times as the stated alleged and proved."

It occurs to me that the above reasoning cannot be faulted at all. This is a case in which evidence of sexual abuse of a child was all over. The appellant denied any sexual contact with the complainant, a complainant who had been shown to be so sexually active as to have contracted HIV Aids at the age of 16. She gave a heart-rending account of how on the first encounter she was reduced to tears and helplessness immediately before the sexual attack, so much so that she became powerless to the extent that the appellant undressed her like a child. This is what she said:

> "On another day the accused requested me from my father whilst we were at church. He told my father that he wanted me at his residence to undergo a counseling session. My father agreed then I proceeded to his residence. When I got there he took me to the dinning room. We were seated facing each other on chairs. He told me that he foresaw bad things in my family. He said he saw bad spirits which were following my father and that these spirits were after each and every family member and they wanted to kill my father. The accused then asked me what I wanted him to do for me and I told him it was better for him to pray for us since he was privileged to see these bad spirits which we were not able to see. The accused then said he would not pray for my family because I had rejected his love proposal. I then started crying and this was after the accused had told me that it can happen any time for my father to pass on even on that same day upon my arrival at home there was a possibility I would find my father dead in a mysterious way. I kept crying pleading with the accused to do what he knows best and rescue my family. The accused then stood up, moved to where I sat and asked me to stand up. I then stood up at the same time crying and the accused started stripping me of my clothes. I was wearing a dress with animal print and pink panties and a blue brasserie. As I was standing there and crying the accused was stripping me of my clothes as if he was undressing a small child. I kept crying thinking he was going to stop but he pointed out if I ever attempted to raise alarm that on its own would trigger the death of my father ---."

It should be recalled that this is the testimony of a minor child. It is this witness that the appellant said was not credible and that she lied in order to bring him and his church down for the benefit of a rival of his, Ronald. In my view the attack on the complainant's credibility is

fanciful. The complainant submitted to the predatory exploits of a sexual pervert but clearly did not consent. The account given by the complainant as reproduced above fits the description given by MURRAY AJA in *R* v *Swiggelaar* 1950 (1) PH H 61 at 110 where he said:

> "The only conclusion to which the evidence as a whole can lead is that appellant's previous conduct had reduced the complainant to frightened and tearful subjection at a time and at a place where a young woman might (have) nervous fear for her own safety, and that his official position, his overwhelming physical superiority and his known possession of a revolver made her submit to an act of intercourse which she had not only not desired but to which she positively objected. The authorities are clear upon the point that though the consent of a woman may be gathered by her conduct, apart from her words it is fallacious to take the absence of resistance as *per se* proof of consent. Submission by itself is no grant of consent."

It is now accepted in sexual offences that it is fallacious to take the absence of resistance as consent. This is particularly so in cases where the victims are children because in such cases even the appearance of consent must be scrutinized in greater detail. This arises from the unequal nature of the relationship. It is the inequality in the relationship which influences a child's apparent consent, which consent is illusory.

In that regard the remarks of MUSHORE J in *S* v *Gumbura* HH 665-17 at page 27 of the cyclostyled judgment are apposite. She said:

> "In a widely used dissertation paper entitled '*The Grooming Process and The Defence of Consent*', Deon Minnie prescribes that where vulnerable child witnesses have been subjected to a grooming process which bends their will and lowers their resistence; any 'consent' given by the victims is not valid consent. In his summary he explains on page V1 that:
>
> > 'Consent is often raised as a defence where sex offenders are charged with and prosecuted for their crimes, more specifically in relation to victims who are over the age of twelve years and more frequently in relation to victims who are sixteen years and older. This consent, however, ought not to be valid for purposes of any sexual activities between such adults and children. Consent is often given as a consequence of the unique dynamics of the grooming process and imbalance of power and authority. Furthermore, the child's level of understanding and life experience, as shaped by the grooming process, may also have an important impact on ostensible consent given. South African courts, in accordance with international trends, have apparently started acknowledging the impact of the grooming process on consent given by children in sexual abuse cases.'

> In *M* v *S* (657/12), [2013] ZASCA 43, a case which is apposite to the present matter, appellant's contention that the minor child consented to sexual relations was dismissed on the basis that the inequality existent between his relationship and the child victim, and appellant's grooming of the victim, vitiated consent."

I am aware that the appellant's defence was that he never had sexual intercourse with the victim. It was a bare denial. However it is the victim who stated that sexual intercourse did take place under circumstances which may have been construed as consensual. The above discussion therefore goes to show that even in those circumstances, the overbearing influence of the appellant combined with the threats that reduced the victim to tears and in the end to powerless submission, was no consent at all.

In addition to that, it has a long been accepted that religious dogma might have the effect of reducing its devotees to a point where consent is vitiated. As stated by PATEL JA in *S* v *Gumbura* 2014 (2) ZLR 539 (S) at 543 G, 544 A-B:

> "In the court *a quo*, the learned judge elaborated 'the subjective nature of religious dogma' in more cogent terms. To paraphrase and summarise his findings, the complainants were subjected to frequent indoctrination in the notions of total separation and submission to authority. They were not allowed to fratenise with their relatives and were conditioned to believe that matters of church should not be discussed with outsiders. The appellant displayed a pattern of predatory behaviour, characterized by rampant sexual pervesion, manipulating and luring the complainants to accept and endure his deceptively benign patriarchal authority. As eloquently observed by JUSTICE DOUGLAS in *United States* v *Ballard* 322 US 78 (1944) – quoted by both of the courts below – religious doctrines and beliefs cannot be subjected to the rigours of legal proof. I would take this sentiment further to opine, in the circumstances presented by this case, that the quasi-mystical force of religious dogma might overwhelm its conscripts and devotees to point where it operates to vitiate and negate any meaningful consent to sexual abuse and exploitation by their spiritual masters."

The 16 year old victim was very young indeed. She was aware that her father and step mother held that appellant in high regard. They would release her to him at the stroke of a finger. They all believed in all the teachings of the appellant no matter how schewed and bizzare including the warped belief that demons would manifest themselves in a human being and give commands to the living. As the appellant and others were bearing down on their followers including the

victim shouting "Jesus Jesus" as well as "Fire Fire" the targets were robbed of any rational reasoning and any free will. Thus it became easy to whip the victim into line, the line of a sexual pervert coveting a child for sexual satisfaction in the most callous and indeed unimaginable manner.

I have no doubt in my mind that in the mystical world where the complainant and her family lived under the indefinite spell of the appellant where only submission to his demands and instructions could guarantee survival, the complainant could not have been expected to report the sexual abuse timeously. I am therefore satisfied that a plausible explanation was given for the delay. The conviction was therefore proper.

Regarding sentence, Mr *Masamvu* for the appellant submitted rather half-heartedly that the two sentences should have been ordered to run concurrently. I say half-heartedly because even in his heads of argument that argument was restricted to only four lines at the tail end of 13 pages of heads of argument. No submissions as to why that should be done were made. I tend to agree with Ms *Ngwenya* for the respondent that the aggravatory features of the case over-shadowed any mitigation and that the interests of justice dictate that these "false men of God" who use the bible to perpetrate heinous crimes should be conscripted to jail for lengthy periods in order to protect society from their predatory instincts.

In fact there is absolutely nothing that can be said in favour of the appellant regarding sentence. He used the most abrasive if not crude means to prey on his victim. He used threats of Satanism to turn a young girl into a near zombie who would wax into a demon in front of cameras threatening blood and thunder against herself and her family and turned her into a sex slave in the most despicable manner. Those who sexually abuse children the way the appellant did cannot expect any favours from courts of law after ruining the lives of children. I see no reason why the sentencing discretion of the trial court in that regard should be interfered with.

In the result, the appeal against conviction and sentence is hereby dismissed in its entirely.

Moyo J agrees……..

Dube-Tachiona & Tsvangirai, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners