THE STATE
vs
LEONARD BUNDWA

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 11 February 2004

Criminal Review

NDOU J: The accused was charged with and convicted of rape by a Marondera Regional Magistrate. He was sentenced to ten (10) years imprisonment.

The salient facts of the case are that the accused raped his two year old step-daughter. The *viva voce* testimony of two witnesses, namely, Brandina Musekiwa and Maria Mangwanya plus medical evidence of Dr Manangazira, was adduced. Manangazira did not testify but the State produced her affidavit.

The complainant, aged two years, understandingly did not testify during the trial. The main State evidence is that of Maria Mangwanya. The Regional Magistrate made a positive finding on her demeanor. He found her to be a credible witness. There is no basis to fault this finding of fact. She testified that she arrived at the accused's person's homestead to collect her money. When she got into the year, she heard the complainant crying. She initially thought that the child was crying on account of hunger and that the accused was preparing a meal for her. She abandoned her initial intention of collecting her money and decided to walk away. As she walked away the complainants cries grew louder. It was as if the child was about to be killed. The intensity of the cries grew louder. It was as if the child was touched and she felt that it was necessary for her to go back and investigate and she did likewise. When she got to the back of the house she heard the accused say in the Shona language "Nyarara kuti zvirikurwadza here" loosely translated to "shut up is it painful". Maria announced her presence and it suspiciously took long for the accused to respond. She, however, did not inform the accused of her suspicions. The incident took place around 1600 hours on 28 July 2001. Curious to know what was happening and at the same time careful not to antagonize the accused, she asked him where the children where. The accused replied that the younger child (an apparent reference to the complainant) was asleep in the room. The accused gave her $15 and she left. She proceeded to the abode of Brandina Musekiwa, her next-door neighbour and made a report

to her about what transpired at the accused person's residence. The two witnesses decided to go and inform the complainant's grandmother about their suspicions. With the assistance of her grandmother, the complainant was brought to these two witnesses. An examination of her genetalia revealed that her private parts were inflamed. They also asked the complainant to walk towards them and she did no "with her legs spread wide apart". There were scares on her back indicative of assaults. After these startling observations, these witnesses advised her grandmother to make a report to the police. Brandina Musekiwa also testified and mainly confirmed what Maria stated. The Regional Magistrate believed her testimony. There is no basis for doubting this finding. The medical report produced during the trial revealed –

> "…. Sex life – inactive ….
> Labia majora – intact
> Vestibule – reddened
> Hymen – visual inspection done
> Fourchelte – intact
> Perineum – circumferential reddening
> Discharge – nil noted
> Haemrrhage – nil
> Examination – easy
> General Remarks – a 2 year old child with complaints of sexual abuse
> Remarks as to whether penetration effect – effect."

The accused person does not deny being at the scene when witness Maria Mangwanya arrived at his place of abode. He also confirmed that the latter's visit was for the purpose of collecting her money. He does not dispute that the complainant was crying when Mangwanya arrived. He, however, denies that she was crying on account of sexual abuse. E specifically denied raping the complainant. He alleged that the complainant was crying because he was bathing her. E stated that the complainant usually cries when bathing. The learned trial magistrate rightly made a negative finding on the accused person's demeanor. This finding cannot be faulted.

In this case complainant, if I may conveniently call her that, is considered to be incapable of consenting to the sexual act on account of her age. The only issue for determination by the trial court was whether there was a sexual act between the accused and the complainant. The medical evidence clearly established that the complainant was sexual abused. The medical evidence showed that there was interference with the complainant's genetalia. The State witnesses also observed vaginal injuries before the complainant was

observed by the medical doctor. In cases were there has been some form of examination by law witnesses. It is safe for trial courts to her the medical doctor on the possibility of such non-expert examination being the cause of the vaginal injuries. The doctor was not called in this case. I however, note that the examination of these State witnesses did not go beyond mere observation of the complainant's genitalia. Prosecutors should not readily discard the oral testimony of a medical practitioner in cases where his or her examination was preceded by am examination carried out by a layperson. In some cases this may be fatal as it may be doubtful whether the injuries in the genetalia were caused by the use of wrong non-expert procedures in carrying out the examination or occasioned by a sexual act perpetrated by the accused person.

In casu, however, there is no such doubt operating in favour of the accused person. The injuries are consistent with a sexual act. The only remaining issue is the identity of the complainant's assailant. She did not give *viva voce* evidence so she did not identify her assailant. I hold the view that it is not a requirement of our law that every complainant in a rape case must give *viva voce* evidence. Ideally she must testify and in cases where her consent is in issue I think, she must do so. Children of her age are considered incapable of consenting to a sexual intercourse – see section **.....** of Criminal Procedure and Evidence Act [*Chapter 9:07*]. The evidence of her assailant can emanate from other evidence. In this case there was no direct evidence led of a witness who saw the accused person having sexual relations with complainant. The State relied on circumstantial evidence. In the circumstances the trial court must caution itself of the dangers inherent in the cogency of such evidence. In *The South African Law of Evidence,* 4 ed, by KH Hoffmann and DT Zeffertt at pages 589-590 the learned authors remarked –

> "The possibility of error in direct evidence lies in the fact that the witness may be mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involve an additional source of potential error because the court may be mistaken in its reasoning. The inference which it draws may be a *non sequitur,* or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It sometimes happens that the trier of fact is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred." – see also *Ocean Accident & Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A).

The two cardinal rules of logic apply to the facts of this case – *R v Blom* 1939 AD 288 at 202 and 203 and *S v Sesetse* 1981 (3) SA 353 (A):

> "(1) The inference sought to be drawn must be consistent with all the proved facts. If it not, then the inference cannot be drawn.
>
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn., If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

The above second rule has been regarded in certain quarters as being merely a standard of proof in a criminal case – a court cannot convict unless it considers guilt to have been proved beyond a reasonable doubt. The cogency of circumstances which all point to the same conclusion. The question here is whether the evidence as a whole furnished sufficient proof of the accused's guilt – *R v Sibanda* 1963 (4) SA 182 (SR) at 188 and *S v de Bruyn* 1968 (4) SA 498 (A).

Mr Justice HC Nicholas in *Fiat Institia: Essays in Memory of Oliver Deneys Schreiner (1982): The Two Cardinals Rules of Logic in Rex v Blom* at 320 admirably said –

> "In a criminal case the ultimate proposition to be proved, the *factum probandum,* is the guilt of the accused. Where the case is one depending on circumstantial evidence, the *factum probandum* is established as a matter of inference from the proved facts, the *facta probantia.* But a *factum probans* may itself be a proposition to be proved by way of inference from other facts.
>
> In considering whether the *factum probandum* has been established in a criminal case depending upon circumstantial evidence, the trier of fact must decide two questions: whether the inference of guilt can on the proved facts logically be drawn; and whether guilt has been proved beyond a reasonable doubt. The later requirement does not necessarily mean that 'every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied'. But the question remains whether the second rule in Blom applies to the drawing of intermediate inferences. It is submitted that it does apply."

I agree with the above remark. The rule is only a device to detect fallacious reasoning – *The South African Law of Evidence, supra* at 592.

In this cased the learned trial magistrate found that the evidence established the following *facta probantia* –

(a) That the complainant was sexually abused during the material period. Bearing in mind that the complainant is considered to be unable to

consent to sexual intercourse this was proof that a crime of rape had been committed by someone i.e. the *corpus delicti.*

(b) That on the day of the alleged rape, the accused was in the house with complainant. The latter was crying with intensity as if she was "about to be killed".

(c) that witness Maria Mangwanya went to investigate the source of the disturbing cries.

(d) That Maria went to the back of the house first and heard the accused say, apparently to the complainant, "Shut up! Is it painful".

(e) That Maria then went to the front of the house and got next to the door and made traditional announcement of her presence – "Gogogoi".

(f) That the accused did not immediately respond.

(g) That when he later responded and came out she, in passing, asked him about the whereabouts of the children and the accused lied and said the complainant was asleep.

(h) That the accused lied in his defence when he alleged that the complainant was crying as a result of being bathed, and

(i) That the complainant sustained genital injuries.

From these proved facts, the only logical inference that could be drawn is that of the accused's guilt. The trial magistrate cannot be faulted in is finding that the guilt of the accused person had been proved beyond a reasonable doubt. There was sufficient circumstantial evidence of the accused being the rapist of the complainant. The guilt of the accused person, the *factum probandum* was established as a mater of inference from the proved facts.

The issue before the trial court was primarily an intermediate inference – the identity of the person who had sexual intercourse with complainant. The only inference to be drawn which was consistent with all the proved facts is that the complainant was crying in the course of the rape by the accused as rightly found by the trial magistrate. The proved facts were such that they

excluded every reasonably inference from them save that the accused person raped the complainant. The cumulative effect of the proved facts was consistence with the guilt of the accused person and the trial magistrate was right in being satisfied with the cogency of the circumstantial evidence before him.

I accordingly confirm the conviction as being in accordance with real and substantial justice. Nothing turns on the sentence of ten years imprisonment imposed by the trial court and is likewise confirmed it.