REASON CHAKUMHARA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA AND TAGU JJ
HARARE, 24 and 28 November, 2014

Criminal Appeal

L. Mauwa, for the appellant
T. Mapfuwa, for the respondent

MANGOTA J: The appellant was charged with two counts of rape as defined in s 65 of the Criminal Law [Codification and Reform] Act [*Cap : 9:23*]. He denied both offences. He was, however, tried and convicted of one count of rape. He was sentenced to 15 years imprisonment of which 5 years were suspended for 5 years on condition of good future conduct on his part. He was, in the premise, slapped with an effective 10 years imprisonment.

The appellant's appeal was against conviction and sentence. His grounds of appeal which he amplified in his Heads of Argument form part of the present appeal.

The State's allegations were that, on some unknown dates but in March 2010, and at number 5070 in New Tafara area Harare, the appellant did, on two separate occasions, have forceable carnal knowledge of one Tinotenda Mazana who was 13years of age at the time. It cited Tinotenda Mazana as the complainant.

The respondent filed its papers in response to the appellant's appeal. It agreed with the appellant that the latter's conviction was not safe. It, in fact, requested that the appeal be dealt with in terms of s 35 of the High Court Act [*Cap 7:06*]. It gave its reasons for adopting the position which it took of the matter.

The court and the parties are *ad idem* on the point that the appellant was erroneously convicted as well as sentenced. His conviction was not safe at all.

It is trite that in cases of sexual assault the complainant's version of evidence must be believed before any corroborative evidence is sought. That is so because his or her version forms the basis of the charge or charges against the accused. Where, as *in casu*, the complainant's story is fraught with inconsistences and/or contradictions either with itself or with the testimony of other witnesses for the prosecution the story must end where its narrator would have left it. Anything which is said beyond the mentioned point would be akin to a situation where the state is inviting the court and the defence to, as it were, accompany it on a fishing expedition, so to speak.

The charge sheet and the outline of the case for the prosecution stated that the appellant raped the complainant on two separate occasions. However, the complainant stated, in-chief and under cross examination, that the appellant raped her once. When the appellant asked her as to why she told the police that he had raped her twice and not once as she was asserting in court, her simple answer to the question was that she was confused. Victoria Mazana who is her mother informed the court that complainant told her that the appellant raped her twice.

The observed inconsistency in the complainant's evidence on that aspect of the case makes it hard, if not impossible, for any person, let alone the court, to believe the complainant as a credible witness. She was the author of the two versions which failed to piece together to make a complete whole.

The stage at which the complainant reported the alleged rape to her friend Tatenda Kachingwe remained as unclear as a foggy morning part of the day. She stated, in chief, that she told Tatenda what the appellant had done to her on the day of the alleged rape and when the appellant was done with her. She said the appellant came into the house into which Tatenda invited her after the incident and threatened her with a knife if ever she revealed to anyone what he had done to her. The threats were issued to her in the presence of Tatenda, according to her. Tatenda who testified for the state informed the trial court that the complainant's initial report to her was that the appellant had made an effort to fondle her breasts. She was adamant on the point that the complainant did not report the alleged rape to her on the day of the incident. It was Tatenda's testimony that the complainant told her of the appellant's alleged rape of her when

Tatenda herself had reported to complainant's mother the appellant's alleged effort to fondle the complainant's breasts.

It is evident from the foregoing that the evidence of the complainant is at variance with that of Tatenda on the issue which pertains to the stage, or point in time, that the complainant reported the alleged rape to Tatenda. She said she reported the rape to her shortly after the incident. Tatenda, on the other hand, stated that she received the complainant's report after she had told the complainant's mother of the appellant's alleged efforts. All the above inconsistencies hinge on the complainant's version of events which cannot be pieced together into a coherent set of events.

The celebrated case of *S* v *Banana*, 2000 (1) ZLR 607 is pertinent to a proper determination of the present appeal. GUBBAY CJ [as he then was] discussed the requirements for admissibility of evidence which pertains to cases, or complaints, which fall in the purview of sexual assaults. The learned Chief Justice stated that :

"The requirements for admissibility of a complaint are:

1. it must have been voluntarily made and not as a result of questions of leading and inducing or intimidating nature.
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" [emphasis added]

The present case fails to meet the first requirement. The complainant was assaulted when she admitted to have been raped by the appellant. Tatenda Kachingwe's testimony on this aspect of that matter is relevant. She was asked, under cross-examination, and she answered as follows:

"X When you allegedly told her mother, her mother asked five times and denied everything and when her mother assaulted her, she then admitted.
- yes"

The five questions which the complaint's mother put to her remained unknown. They may or may not have been of a leading nature. Equally, they may or may not have been of an inducing nature. What is clear, though, is that they were accompanied with physical force being applied on the person of the complainant. That fact alone places the evidence of the complainant squarely in the category of inadmissible evidence.

The medical report which the state produced with the consent of the appellant does not take the prosecution's case any further than where its witnesses left it. The doctor who examined the complainant compiled the report. The examination of her occurred after a certain old woman had, at the request of the complainant's mother, used unorthodox means to examine the complainant. Evidence which is filed of record showed that the woman inserted her finger into the complainant's vagina in the process of examining her. It cannot, therefore, be stated with any degree of certainity if it was the old woman's finger, or the appellant's pennis, which penetrated the vagina of the complainant. The court remains in doubt on that aspect of the case and that doubt is not unnaturally interpreted in favour of the appellant.

In its judgment, the court *a quo* spent a great deal of time and effort repeating the evidence of the prosecution's witnesses and that of the appellant. It then proceeded to draw from the two versions which had been placed before it some far-fetched inferences which had little, or no, bearing at all on what it was called upon to decide. The greatest error which it fell into was to place the *onus* on the appellant to prove his innocence. It is a well-known and a thoroughly acknowledged as well as established rule of practice that the *onus* lies on the state to prove the guilt of an accused person who is before the court beyond reasonable doubt. Where, as *in casu*, the court *mero motu* alters the known and accepted rule of procedural law and places the burden on the accused that court opens itself to unnecessary attack which it will find difficult, if not impossible, to avoid.

The respondent's concessions to the appellant's appeal were properly made in the circumstances of the present case. The appellant, in the view which the court holds of the matter, was erroneously charged, prosecuted, convicted and sentenced. The state could not, and did not, establish the appellant's guilt at all. The court is satisfied that the appellant proved his innocence on a balance of probabilities. The appeal, therefore, succeeds.

It is, in the result, ordered as follows:

1. that the conviction of the appellant be and is hereby quashed and the sentence set aside;
2. that the appellant be and is hereby found not guilty and is acquitted of the charge.

TAGU J agrees:…….

Mugomeza & Mazhindu, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners