**LAWRENCE NCUBE**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 13 NOVEMBER 2019

**Bail Application**

*M Nxumalo,* for the applicant

*B Gundani,* for the Respondent

**MOYO J**: This is an application for bail pending appeal which I heard on 13 November 2019 and dismissed in an *ex tempore* judgment primarily for lack of prospects of success. Applicant’s counsel has since requested for written reasons for my judgment and I provide them herein.

The applicant was convicted of rape as defined in section 65 (1) of the Code. The allegations were that on the 29th of May and at Maudie Sibanda’s homestead, village 2B, Dundubala, Insuza, the accused unlawfully and intentionally had sexual intercourse twice with Isabel Sibanda a female juvenile aged 12 years and incapable of consenting to such an act. The accused and complainant were related, the accused being complainant’s uncle and they resided at the same homestead, that is, Maudie Sibanda’s homestead. On the day in question the complainant and her sister Lindokuhle Sibanda were sent by their grandmother to their aunt’s place of residence. They played at their aunt’s place until late and their grandmother then decided to go and look for them. The complainant and her sister used a different route back home from the aunt’s place so their grandmother did not find them. When they got to their home, the accused called them to his bedroom hut and told them that they should stay there and be silent because their grandmother wanted to assault them.

When the grandmother later arrived, accused told her that the complainant and her sister were at their aunt’s place. The accused then shared his bedroom hut with the complainant and her sister. He slept next to the complainant. The accused then had sexual intercourse with the complainant without her consent. The accused had sexual intercourse again later in the night with the complainant without her consent. The matter came out on 30 May 2015 when the complainant’s grandmother asked the complainant where they had slept and the complainant then told her aunt the allegations that accused raped her. The accused person in his defence stated that he shared the bedroom hut with the children but did not rape the complainant and that their grandmother beat them up and forced them to lie against him because he had accommodated the children at night in his bedroom hut. In his notice of appeal, the applicant raised the following issues:

1. That the court *a quo* erred by basing its conviction on the evidence of a single child in circumstances where the trial court is not shown to have been alive to the need to exercise caution in evaluating such evidence, given the dangers attendant to the acceptance of single witness evidence in sexual offences. This issue has not been married to the facts in the court record by applicant’s counsel in his own submission.

In any event it is trite that in criminal law, a court can competently convict on the evidence of a single witness especially where there is corroboration like in this case. The medical report does corroborate the sexual complaint as there are tears in the hymen and the doctor concluded that penetration was effected. Lindokuhle Sibanda corroborates complainant’s evidence that they slept in accused’s bedroom and that they were beaten for that. However, her evidence vitiates collusion in that she does not then say she witnessed the rape, which she certainly did not witness as she was asleep. Lindokuhle even says she does not know why accused was arrested by the police. At page 31 of the court record, the learned magistrate carefully examines complainant’s evidence. I do not know whether defence counsel wanted the learned magistrate to state that “I am now hereby exercising caution, as exercising caution is a careful exam in action of the facts and not necessarily mentioning that term.” In any event, there is corroboration by the medical affidavit.

The second ground of appeal is that the court erred by convicting where a complaint was extracted through prompting, probing questioning and physical violence. I am not convinced that these 4 terms used by applicant’s counsel as the means to extract the complaint have all been proven factually in the court record. The complainant’s testimony at page 6 of the court proceedings in the court *a quo* shows that the granny assaulted the complainant to reveal where they had put up for the night not to reveal what happened to them. These in my view are 2 different things that defence counsel unnecessarily wants to bundle together to create confusion. The aunt (and not the grandmother then asked if they had just slept in accused’s room). She then told her what accused had done to her during the night. I have not seen from these facts, probing, prompting, physical violence used to extract the complaint, that is, if the court record were to be taken for what it is. Even Lindokuhle told the court that they were beaten for putting up in accused’s bedroom.

In the case of *Mandebvu* v *The State* HH 96-11 the accused was convicted of 2 counts of having sexual intercourse with a minor. He appealed against conviction and sentence. The complainant and accused were related and lived in the same house together. The complainant was a quiet and reserved person. Almost a year after the incident in question, she reported the abuse to her former school teacher but did not disclose the perpetrator’s identity. The teacher in turn reported the matter to the police resulting in appellant’s arrest. The complainant was a single witness. Accused argued that complainant was not credible because she delayed to make the report and also cited inconsistency in her evidence. The court held that it is permissible to convict a person on the single evidence of a competent and credible witness as provided for in terms of section 269 of the Criminal Procedure and Evidence Act. In such a case, the court held, the judicial officer must weigh the evidence, consider its merits and demerits and decide whether it is credible despite some shortcomings or defects and make sure that he is satisfied that the truth has been told. The court further held that the exercise of caution must not displace common sense.

It was held further in that case that a common sense approach must be applied and if the court is convinced beyond a reasonable doubt that the truth has been told, it must convict. Whilst corroboration is not essential, any other factor that increases the reliability of the single witness may also overcome caution. In that case, the court confirmed the conviction.

The applicant’s counsel, seems to attack the fact that a question was asked for complainant to state what happened during the night as they slept. What he must appreciate is that, it is the totality of the evidence tendered before the court *a quo* which matters. The question to be asked should be, given the total circumstances of the case, is there any danger of false incrimination? Is there any danger of fabrication? Pieces of evidence need not be perfect but their sum total should be so as to convince a reasonable decision maker who carefully examines the facts, that indeed the accused person is guilty of the crime, with which he is charged, beyond a reasonable doubt.

It is my view that the sum total of the facts of this case, leave no doubt in any reasonable person’s mind, who diligently applies their mind to the case, that a crime of rape was indeed proven as alleged against the accused person. In the South African case of *Sauls and others* 1981 (3) SA 172 an (Appellante division case,) it was held that there was no rule of thumb to be applied when deciding upon the credibility of a single witness testimony. The court must simply weigh the evidence and consider its merits and demerits and decide whether in its view the testimony is truthful. The approach in Sauls case has been adopted in many cases decided in our jurisdiction.

The third ground of appeal is that the court *a quo* failed to appreciate the danger of substitution of the real culprit by the complainant acting at the instance and inducement of persons who forced a report out of her. I have not seen the facts in the court record to back up this ground. It is a ground that is not factually based within the 4 corners of the record.

Ground 4 and 5 are dealt with in my analysis of the 1st ground as they deal with the court’s failure to assess complainant’s testimony properly and thereby arriving at a wrong conclusion. I have already dealt with the probative value of complainant’s evidence as corroborated and I will not revisit that point.

It is for these reasons that I have dismissed the application for bail pending appeal.

*Ncube Attorneys*, applicant’s legal practitioners

*The National Prosecuting Authority*, respondent’s legal practitioners