CHARLES MARUMANI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 21October 2014

Criminal Appeal

A. Masango, for the appellant
Ms *F Fero*, for the respondent

In Chambers in terms of Section 35 of the High Court Act, [*Cap 7:06*]

HUNGWE J: The appellant was convicted of one count of rape as defined in s 65of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. He was sentenced to 16 years imprisonment of which five years were suspended for five years on the usual conditions. He appeals against both conviction and sentence.

The appellant raises six grounds of appeal.

The first ground of appeal is that the learned trial magistrate erred by convicting the appellant of rape when the complainant specifically mentioned that she was threatened by the police to testify and as such the charges were not freely and voluntarily laid against the appellant.

The second ground is that the learned magistrate erred in disregarding the appellant's defence that sexual intercourse was consensual in the face of overwhelming evidence suggesting that the complainant and the accused had had bodily contact prior to the sexual encounter which she later reported as rape.

The third ground of appeal recites that the court *a quo* erred in convicting the appellant on the basis of injuries on the complainant's vagina yet these injuries on their own and the evidence led in court could not be conclusive of the fact of rape.

The fourth ground of appeal states that the court *a quo* erred in convicting the appellant when his *alibi* that on Tuesday 3rd September 2013 he could not have had sexual intercourse as he was not present and was not investigated.

The fifth ground of appeal is that the court *a quo* misdirected itself by failing to realize that the charges were only framed by the complainant in order to fix the appellant as demonstrated in the evidence led.

The final ground of appeal was that the court erred by convicting the appellant in circumstances where the appellant's guilt was not proved beyond a reasonable doubt.

In summary, the appellant contends that the evidence which was placed before the court *a quo* did not reach the threshold of proof beyond a reasonable doubt that indeed the appellant had sexual intercourse with the complainant without her consent. In *S* v *Banana* 2000 (1) ZLR 607 (S) it was held that the cautionary rule in sexual cases is based on an irrational and outdated perception which has outlived its usefulness. While it is no longer warranted to rely on the cautionary rule, however, the courts must still consider carefully the nature and circumstances of the alleged sexual offences. The trier of fact is enjoined to exercise proper care and diligence when presiding over sexual offence cases. He must of necessity guard against the risk of false incrimination or concocted allegations on the part of the complainant.

In the instant case the point raised in the appeal is whether or not the admitted sexual intercourse between the complainant and the appellant occurred without the complainant's consent. In the *Banana* case (*supra*) the matter was put this way (at p 616A-B):

> "Evidence that a complaint in an alleged sexual offence made a complaint soon after its occurrence and the terms of that complaint are admissible to show the consistency of the complainant's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant has fabricated the allegation.
>
> The requirements for admissibility are:
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> 1. It must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature. See *R* v *Petros* 1967 RLR 35 at 39H.
> 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. See *R* v *C* 1955 (4) SA (N) at 242G – 243C."

The evidence on record shows that the complainant voluntarily reported the rape to her mother a day after its alleged occurrence. This would, on the face of it, satisfy the requirement for admissibility of such complaint. However, that is not the end of the inquiry.

The second leg, whether the report was made without undue delay and at the earliest opportunity in all the circumstances to the first person to whom complainant could reasonably be expected to make it, needed to have been explored more cautiously, in my respectful view.

The evidence shows that the complainant was "raped" on Tuesday 3rd September at around 16h00. She went straight home thereafter. She did not report to her father who was present at home because she was afraid. The next day, she surprisingly returned to her assailant's residence to resume her duties. This was in spite of what had happened and her fear professed of him. She then had some misunderstanding with the appellant's wife that same morning. She was not fired from her job but was asked to look for a dollar to buy bread by appellant's wife. She then went back home and decided to call her mother to report that the appellant had raped her the previous day. It is not clear from the evidence why she did not do this on the same day she was "raped", nor is it apparent why she had returned to resume her duties at the assailant's residence in the first place. It is not apparent why she only reported rape in the afternoon after an apparent misunderstanding with the appellant's wife. All these deficiencies in the evidence cast doubt on her claim that she had not consented to the act of sexual intercourse when it took place, as claimed by the appellant. The appellant has claimed that sexual intercourse took place with her consent from the outset. Nothing to rebut this claim appears on the record besides the bare denial by the complainant. She has reasons to cry rape since she had this misunderstanding with his wife on the day following the alleged rape. One would have expected her to have reported to her mother that same day and refused to resume duties at his residence as a result of rape. In light of the above it is reasonably possible that the complainant consented to sexual intercourse but changed her mind about the fact of consent well after the event leading to a belated report due to this misunderstanding with the appellant's wife.

At the conclusion of the trial, the appellant's version of events remained probable. The benefit of this doubt ought to have been given to the appellant. Counsel for the State conceded that the conviction is not safe. That concession is well given. As such the appeal ought to succeed.

In the result the conviction for rape is set aside and the sentence is quashed. The verdict of the court *a quo* is substituted with the following finding: "Not guilty and acquitted."

BERE J agrees.

Musunga and Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners