GOLDEN MUTIZE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA and MANGOTA JJ
HARARE, 14 and 28, January, 2015

Criminal appeal

J. Mutebere, for the appellant
R. Chikosha, for respondent

MANGOTA J: The appellant was tried and convicted of attempted rape as defined in s 65 (1) as read with s 189 (1) (a) of the Criminal Law [Codification and Reform] Act [*Cap 9:23*]. He was sentenced to 36 months imprisonment; 18 months of which were suspended for 5 years on the usual condition of good future conduct.

The State's allegations were that, on dates to the prosecutor unknown but during the period which extended from July, to September, 2012 and at Mutize Complex which is at Murehwa Business Centre in Murehwa, the appellant did, on several occasions, attempt to have forceable carnal knowledge of the Paidamoyo Munemo who, at the time, was 16 years of age.

The appellant denied having ever attempted to rape the complainant. He stated, during the trial, that his political foes were using the complainant with a view to tarnishing his image. He said he was an aspiring MDC-T candidate for his area and his enemies worked with the complainant to soil his personal standing in the community ahead of the elections which were then due. He stated further that the complainant became hostile to him some months before the report of the alleged attempted rape. The hostility, he said, surfaced when the complainant started flirting with men who furnished her with goodies and drove her in

their motor vehicles at night as a result of which the appellant told her that he was no longer able to stay with her at his home.

The appellant appealed against both conviction and sentence. He stated, in his grounds of appeal against conviction, that the trial court:

(a) erred in convicting him on a charge of attempted rape when there was no evidence which showed, beyond reasonable doubt, that he committed the offence;
(b) misdirected itself in convicting him when evidence which the state led showed that it did not pass the test for admittance of a complaint of attempted rape – and
(c) erred by failing to give due weight to his defence which was probable in the circumstances of the case which was then before it.

In so far as the sentence which the court *aquo* imposed upon him was concerned, the appellant submitted that:

(d) the sentence was so manifestly excess and harsh as to induce a sense of shock – and
(e) the trial court erred in not taking into account factors which exist in s 65 (2) of the Criminal [Codification and Reform] Act. He said if the court had considered the mentioned factors, it would have arrived at a sentence which was different from the one it reached.

The respondent's attitude to the appeal was that the conviction was unsafe and should, therefore, be quashed and the sentence set aside. It stated that the evidence of witnesses for the prosecution was not only contradictory but was also inconsistent, conflicting and uncorroborative of each other. It made eight observations of matters which it said fell into the one or the other or all of the mentioned categories. It, in this regard, requested that the appeal be dealt with in terms of s 35 of the High Court Act, [*Cap 7:06*].

Evidence which is filed of record showed that the complainant is not an unintelligible girl. She gave what may be regarded to have been a detailed account of what she said the appellant did to her. A cursory reading of her evidence would convince a non-circumspective judicial officer that what she alleged against the appellant was what actually took place. A close analysis of her testimony, however, shows that the complainant is a very resourceful girl who can easily lay a false charge against someone and, with little if any difficulty, pin him or her on to the case.

The complainant's evidence was that the appellant made an effort to have forceable carnal knowledge of her on two consecutive occasions in July, 2012. She said her aunt who is the appellant's wife was in Harare when the incidents occurred. She was candid to inform the trial court that she did not report the incidents to her aunt on the latter's return home from Harare. She proffered no reason for not reporting.

The complainant's abovementioned conduct is, in the court's view, not consistent with that of a victim of attempted rape or rape. Such a victim does, by and large, make every effort to report the crime to a person she is reasonably expected to do so at the earliest opportunity which offers itself to her. The remarks of GILESPIE J in *S* v *Zaranyika*, 1997 (1) ZLR 539 are pertinent on this aspect of the case. The learned judge stated, in the mentioned case, that:

> "Both the promptitude and the spontenous or voluntary nature of the complaint are important elements rendering such a complaint admissible" [emphasis added]

The complainant did not report the alleged attempted rape promptly. She reported some four months after the event. She reported in November, 2012. She did so to one Patricia Zvibate Mupfuti who was Headmistress of the school where she was attending her secondary education.

The report which she made to Mrs Mupfuti was substantially at variance with what she told the trial court during the time that she testified. This fact alone casts a very serious doubt on her credibility as a witness.

The complainant, in substance, corroborated the appellant's version of events. She was asked in - chief and she answered as follows:

> " X Did you share your story with anyone
> -Yes, Mai Andrew, Mai Palmer, Mrs Mupfuti and my brother's child who is in Bulawayo.
> X What about your aunt
> -I later told her after my uncle started shouting that he no longer wanted to stay with me, I should go back to the rural area where my grandmother was" [emphasis added]

There is no doubt that the words of the appellant triggered the report which the complainant eventually made to her aunt. The probabilities of the matter are that, if the appellant had not uttered the words which he did, the complainant would have remained

mum about the alleged attempted rape. That fact further supports the view which the court holds of the matter. The view is that the appellant did not ever attempt to rape the complainant, as the latter alleged.

The complainant's story which was to the effect that she did not report the alleged attempted rape to her aunt because of what the appellant had told her is a very far-fetched matter which does not resonate with reality. She stated that she did not report the incidents of attempted rape because the appellant told her that what he had done to her was secret which should not be disclosed to anyone. She stated, further, that the appellant used to give her money for her use at school but would caution her against buying items which her aunt would see.

The above cannot, by any stretch of imagination, constitute the reason for not reporting what she said had been done to her against her will. The probabilities of the matter are that she did not report the alleged attempted rape because such did not ever occur. She reported only as a way of fixing the appellant who did not subscribe to the idea that she remained staying at his home. She did so when he arranged that she returned to her communal home area. It was when she was in her home area that she reported the alleged offence(s).

The above observed matters should have placed the trial court on its guard before it proceeded to accept, as it did, the testimony of the complainant. It misdirected itself in a material way when it accepted the mere say so of the complainant's evidence without a critical analysis of the same.

The cardinal rule which stands out clearly in complaints of a sexual nature is that the complainant must be believed before any corroborative is sought. Where the complainant is, as *in casu*, not credible, the matter ends there. The parties are in this regard referred to the case of *State* v *Mhandu*, 1985 (1) ZLR 288(9) in which the rule was succinctly articulated.

The complainant's evidence left a lot of loose ends to it. It was at best unbelievable and at the worst contradicting the testimony of other state witnesses. It was indeed difficult for the court to appreciate the reasons which persuaded the trial court to come to the conclusion that the appellant's guilt was proved beyond any shadow of reasonable doubt in

circumstances where even a *prima facie* case was not sticking. The respondent's concessions were properly made and the court associates itself with them.

The appellant, in the court's view, was erroneously tried, convicted and sentenced. He established his innocence on a balance of probabilities. The appeal, therefore, succeeds. It is, in the result, ordered as follows:

(a) that the conviction of the appellant be and is hereby quashed and the sentence set aside;

(b) that the appellant be and hereby found not guilty and is acquitted of the charge.

CHATUKUTA J agrees …….

Nyaushaya Kasuso & Rubaya, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners