ONBERT MAPFUMO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & KWENDA JJ
HARARE, 5, 19 & 28 February 2019 & 1 September 2021

Criminal Appeal

G R J Sithole, for the appellant
E Makoto, for respondent

KWENDA J: The appellant appeared before the Regional Magistrate for the Eastern Region sitting at Harare charged with six counts of rape involving four women. The allegations were that he raped four adult female members of his church during the period extending from 2015 to 2016. Counts one and two were reported by one Sarah Mhere, count three by Sarah Kadzere and counts four and five by Mercy Nhepura and count six by Evelyn Chinzou. According to the State the appellant raped the three women in counts 1 to 5 at his prayer house situated at stand 7937 New Canaan, Highfield. The sixth incident took place at an unnamed lodge in the central business district of Harare. The State evidence common to the cases was that (1) all the female complainants regarded the appellant as a prophet and who healed through prayer; (2) they were all lured separately by the appellant to a secluded place, ostensibly for private prayers and healing sessions; (3) the appellant ended up having sexual intercourse with the complainants at the secluded places without their consent. The appellant would ask the complainants to bring body lotion which he applied to the body and the vagina. Thereafter he would have sexual intercourse with the complainants. None among the complainants complained immediately or soon after the sexual abuse. The crimes came to light after more than a year at the behest of, one Tilda Karimazimba also known as Tilda Moyo, a radio presenter, who interviewed the complainants live on radio pursuant to certain information which she had received. After the interview, Tilda Moyo nudged the complainants to report to the Police what she (Tilda Moyo) concluded were cases of

sexual abuse. The complainants did make the reports resulting in the appellant being charged with the various counts of rape.

The appellant pleaded not guilty. He denied having sexual intercourse with the complainants. He said the complainants fabricated the allegations after leaving his church with a breakaway faction in acrimonious circumstances. The charges were contrived and reported one and half years after the period during which they were alleged to have been committed. The matter came to a head when the false accusations were aired on radio by Tilda Moyo who pushed the complainants to make reports to the Police. Later the complainants ganged up to extort money from him. The complainant in the sixth count demanded a sum of USD10 000 from him which he refused to pay.

The State withdrew the sixth count before the trail commenced. The trial progressed with the appellant pleading not guilty to counts 1 to 5. At the close of the State case the appellant was acquitted of counts 3 to 5 following a finding by the trial court that the complainants in the said counts had been generally untruthful and it was unlikely that they were raped.

The appellant was put on his defence on counts 1 and 2 only, both reported by Sarah Mhere. She testified that the appellant raped her twice, that is on the 4th April 2015 and in January 2016. At the conclusion of the trial the appellant was convicted of the two counts and was sentenced ***a quo*** to imprisonment for 14 years on each count. Out of the total sentence of 28 years imprisonment the trial court suspended 6 years on the usual conditions of good behaviour.

The appellant appealed against both the convictions and sentences. He relied on eight grounds of appeal against conviction reproduced below: -

1. "The trial court erred in coming to the conclusion that the complainant was a credible witness yet she changed her versions of what transpired on various occasions during the trial.
2. The trial court erred at law in coming to the conclusion that the complainant of rape to a sympathetic witness only referred to as an unnamed Police Officer without evidence being led from that alleged Police Officer.
3. The court *a quo* erred at law in accepting the criminal complaint as admissible evidence yet it was not made spontaneously and promptly but was only made as a result of a live radio broadcast.
4. The trier of fact erred by concluding that there had been sexual penetration of the complainant by the appellant on the sole basis of the mere say so of the complainant whose evidence was

erroneously taken as the gospel truth of what transpired without considering the circumstances under which the offence is alleged to have been committed.

5. The court *a quo* erred in concluding that the inordinate delay in reporting the alleged sexual attack could be explained away by alleged intimidation and brainwashing yet the state had not advanced any proof beyond reasonable doubt of the intimidation.
6. The court *a quo* erred in believing the appellant that there had been sexual intercourse twice between the appellant and the complainant on the basis of the latter's mere say so without having regard to the appellant's own testimony in his defence which was reasonably possibly true
7. The trial court erred in just dismissing the accused's defence without adequately analysing the accused's explanation and the circumstances under which the offences were alleged to have been committed.
8. The court *a* quo erred at law in convicting the appellant in circumstances where the evidence of the initial complaint to Mercy Nhepura and its content were not consistent with the evidence of the complainant."

As against sentence the appellant submitted that

"The court *a quo* erred in imposing a draconian sentence which induces a sense of shock. The court *a quo* ought to have avoided imposing a globular sentence but ought to have ordered that the two sentences run concurrently or he ought to have considered the two counts as one for the purposes of sentence since the offences pertained to one complainant and were closely related in time and space."

The State opposed the appeal against conviction, both on technical grounds and on the merits. The State contested the validity of most of the grounds of appeal except grounds 2 and 3. According to the State grounds of appeal against conviction nos 1, 4,5,6,7 and 8 are not clear and specific and thus do not comply with rule 22(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979. The State cited, among other cases, *S v McNab* 1986(2) ZLR 280 (SC) at p 282C-D and *S v Jack* 1990(2) ZLR 166(S). The principles emerging from the cases are that grounds of appeal must be clear, concise, precise and specific. They must not be argumentative. They must direct the court to the findings made by the trial court below either at law or fact which are being contested.

The State submitted that while the first ground attacks the complainant's evidence on the basis that she changed her versions on various occasions there is no hint on the areas of

inconsistence. The fourth ground speaks to the failure by the trial court to take into account the circumstances under which the crimes were committed but gives no clue as to the specific circumstances referred to. The sixth ground of appeal simply states that the State failed to prove brainwashing and intimidation beyond reasonable doubt without being precise about the nature of brainwashing and intimidation. The ground of appeal was described by the State as 'meaningless and hardly a ground of appeal.' With regards to grounds six and seven, the State submitted that it was insufficient for the appellant to merely state that the trial court did not take his defence into account without being specific about what in particular was not considered. Overally, the State submitted that the impugned grounds of appeal against conviction are so bad at law that it had difficulties in comprehending them in order to respond.

On the merits the State made the submissions summarised below. The appellant was correctly convicted. The complainant genuinely regarded the appellant as a prophet who could spiritually cure her of disease and protect her from evil spirits. She had good reason for holding such faith in his spiritual capabilities because the appellant had miraculously cured her of the HIV infection through prayer. She had also witnessed other miracles or prophesies performed on other church members who were cured of cancer and hernia by the appellant. She therefore respected and feared his supernatural powers. When she was raped for the first time she thought she was undergoing faith healing. On the second occasion she was both frightened and confused but still believed in the appellant's supernatural powers. She delayed her report because the appellant had brainwashed her and in addition to that she feared that he could curse her. She, however, finally reported voluntarily to her friend and church mate, Mercy Nhepura (Mercy), to whom she was comfortable to make a report. She made the report to Mercy before the radio interview. However, she did not speak of the rape on radio because she was embarrassed and at the same time she wanted to protect her marriage. The trial court had found the complainant to be a credible witness and a finding on credibility may not be easily displaced on appeal. The State submitted that the complainant's acquiescence to sexual intercourse did not signify genuine consent since, at law, consent in sexual offences is vitiated where the assailant uses violence, threats of violence, intimidation or unlawful pressure or fraudulent misrepresentation to induce a woman to believe that something other than sexual intercourse was taking place.

With respect to sentence, the State submitted that the trial court did not misdirect itself at all. The sentence is appropriate.

The grounds of appeal against conviction were inelegantly crafted and tend to be repetitive. Broadly the convictions were attacked from three fronts. One angle of attack was that the trial court erred in concluding that the complainant was a credible witness yet there were material contradictions in her testimony. The conviction was also attacked on the basis that the trial Court improperly admitted evidence of complaint adduced by the State for the purpose of disproving the appellant's defence of recent fabrication and proving absence of consent when such evidence did not meet the legal requirements for the admissibility of evidence of sexual complaints set out in case law. Lastly the conviction was attacked on the grounds that there was no clear basis for rejecting the appellant's defence that he did not lure the complainant to a secluded place as alleged and that he did not have sexual intercourse with her.

To an experienced magistrate, the definition of rape seems so straight forward and elementary that he or she may not find the need to refresh his or her memory and let alone, re-state the essential elements in a judgment. It is however advisable to constantly refer to the definition of a crime and related provisions during a criminal trial or when preparing judgment because quite often the statute defines terms or words used by the legislature ascribing to them certain special meaning depending upon the peculiarities of a case. This was not the straight forward case of rape where consent is vitiated by the use of evident violence. The State therefore had to prove before court, not only that sexual intercourse took place but in addition to that, that even if the complainant appeared to agree to have sexual intercourse with the appellant such acquiescence was not valid consent in the eyes of the law. The State also had the obligation to alert the Court and the appellant in the State outline that the legal basis of the rape charge was that even if on the face of the allegations, the complainant appeared to agree to sexual intercourse, her consent was legally vitiated, stating the circumstances thereof. The factors negating consent ought to have formed the main thrust of the State evidence.

The salient features of the State evidence are summarised below.

The complainant testified. She was medically examined but nothing turns on the medical evidence since the complainant was examined one and half years after the dates on which she said she had been raped and in the meantime she had been sexually active. She said she knew the

appellant as a prophet at By Grace Ministries and had joined the church after hearing of the appellant's healing powers. She was HIV positive but had tested negative after his prayers. In April 2015 she told the appellant of her intention to travel to South Africa. The appellant offered to pray for her before the journey whereupon he invited her to his prayer house in New Canaan, Highfield. The prayer room is attached to a tuckshop and entry to it was not restricted. The appellant told her that she had to be exorcised of certain evil spirits. The complainant had brought some body lotion in her bag. He asked her to give it to him and so that he could apply it on her body to protect her from spirits which were likely to attack her before delivering her baby. She was 4 months pregnant at the time. She agreed and he applied the lotion on her stomach. He later said he wanted to apply the lotion on her vagina to prevent the evil spirits from entering her body through sexual intercourse. She agreed because he had spiritually healed her of HIV infection and he did apply the lotion on her vagina. Later he said he wanted to use his sperm to cleanse her. He applied the lotion on her vagina. After that he told her that he wanted his sperm to enter her body. He asked her to lie down. He held his penis as if to masturbate. And then inserted the penis in her vagina and had sexual intercourse with her for 2 minutes after telling that her life and business would flourish and she would never suffer HIV infection again. He later withdrew and ejaculated outside her vagina. She did not say anything or react in any way to the sexual intercourse since she had no feelings towards it. She kept her hands raised. She gave him some money regarded by the religion as 'seed' and left. She bade farewell to the people in an adjoining tuckshop as she was leaving. She did not, immediately or soon thereafter disclose the sexual intercourse to anyone. She gave various reasons for her failure to complain at the earliest opportunity. The appellant had warned her not to disclose. She respected him as a prophet who had helped her. Disclosure would embarrass both the appellant and herself. She said it was difficult to disclose that one had had sexual intercourse with a man of God. She had many things on her head. She respected him. She had developed fear for him during the 4 months that she attended his church. She panicked when he called her to his prayer room.

Sometime later the complainant discovered that she was HIV positive again. When she told the appellant he invited her for prayers again at the same prayer house. She went. At the prayer house he asked her whether she still had faith in him. She confirmed her faith in his healing powers because she did not want to belittle him. She then knelt before him. He ordered her to lie down,

pushed her, removed her trousers mounted her and has sexual intercourse with her. The door was open, so initially she refused to open her legs for that reason because she feared that people would walk on them while having sexual intercourse. As he was having sexual intercourse with her, his phone rang. She took the opportunity to stand up when he answered it. She put on her clothes and went to stand near the door. After completing his call, he beckoned her to return but she shook her head. She was very angry but again she did not report at the earliest opportunity. She said her intention was to report to Mercy but she could not find her. The complainant decided to leave the appellant's church. Sometime later the appellant called a meeting where he said those who wanted to leave were free to do so. He however asked for the sum of $20 which she owed him. She promised to pay later. As she was walking home she spoke to Mercy whom she told about her ordeal and the unusual prayers. Mery Nhepura said the same thing had happened to her and appeared unmoved. The complainant did nothing further and went to stay in Murehwa.

About a year later, a former church mate at By Grace Mininstries, one Sarah Kadzere went to see the complainant and told her she and her friend had spoken to someone at Star FM who wanted to interview them and that she wanted the complainant to join them. A certain Prosper took them (the complainant and her friends, Mercy Nhepura and Sarah Kadzere) to Star FM studio where they were interviewed live on radio by radio announcer known as Tilda Moyo in the presence of four former members of the appellant's church and Mercy's husband. At the interview Sarah Kadzere and the complainant neither complained of illicit sexual intercourse nor complained of rape. Be that as it may, Tilda Moyo advised the complainants to make reports of sexual molestation to the Police. The complainants reported at Machipisa Police Station.

Under cross examination the complainant conceded that her complaint was delayed. She said she had not reported the abuse because she believed that the appellant was helping her. She knew that she was having sexual intercourse with the appellant but she believed it would solve her problems and it would change her HIV status. On the second occasion the appellant stopped having sexual intercourse with her when his phone rang. She waited for him to complete his call and then bade him farewell. She accepted that the door was not locked but she did not leave running through because she did not want people to surmise what had happened. She said she was traumatised but she decided not to report to the Police, her husband or relatives. She said she had no intention to make any report to the Police. She was minded to report to her friend, Mercy Nhepura, but she

could not find her. She said although she had not expressed her desire to have sexual intercourse, she was willing to have sex with him for her own benefit. She believed that would heal her of her HIV infection and in addition make her business more productive. She admitted that one Wakai was the one who took up the matter with the broadcaster. The same Wakai had later demanded money from the appellant for him to escape prosecution.

Wakai Dausi testified for the State. He said he had stumbled on evidence of the affair between the appellant and his wife Mercy Nhepura. He later found out that the appellant had impregnated the wife. She was one of the complainants at the trial. He had demanded compensation from the appellant in the sum of USD10 000 whereupon, the appellant offered $2500. The money was however not paid.

Tilda Karizamimba also known as Tilda Moyo, testified for the State. She received a tip off through a text message that the appellant was abusing his church members whereupon she made arrangements to interview the appellant, Mercy Nhepura Sarah Kadzere and the complainant live on radio. They all agreed and she proceeded to interviewed them. She wanted to know from the women whether they had been raped and if so, why they had not reported. All of them said they had approached the appellant separately because they believed he could spiritually rid them of various ailments and life challenges. He would apply oil to their private parts and had sexual intercourse with them. None of them had been coerced or forced to have sexual intercourse with the appellant. They had all had sexual intercourse with him in order to derive personal benefit from it.

The appellant testified in his defence. He said he had prayed for the complainant in church and denied luring her to a prayer house and that he had sexual intercourse with her at the prayer house.

In my analysis it is common cause that the complainant testified that she reported to Mercy Nhepura. The issue to be determined is the probative value of that testimony taking into account other circumstances of this case. According to the rules of evidence, ordinarily, a previous consistent statement has no evidential value. The common law position is well summarised by respected authors LH Hoffmann and DT Zeffert in their textbook *The South African Law of Evidence* 4th edition at page 117 citing numerous South African decided cases as authority.

> "A witness may not be asked in chief whether he has made some previous statement which tends to confirm his testimony……. This is often called the rule against narrative or self-corroboration. The principal reason for the rule is that a witness's previous consistent statements are insufficiently relevant. It does not ordinarily add anything to the value of his evidence to be told that he had always adhered to the same view…. Evidence of previous consistent statements also has the disadvantage, especially when given to support evidence of a party, that it can easily be manufactured. A witness would be able to create any amount of evidence by repeating his story to a number of people".

However, evidence of a complaint has been, in appropriate cases been admitted in sexual cases. The common law position is aptly stated at pages 118 and 119 of the *The South African Law of Evidence, supra* as follows: -

> "Thus the practice of proving an early complaint to negative consent was so deeply established in law that it survived the growth of the hearsay rule and the prohibition against self-corroboration."

In *S* v *Banana* 2000 (1) ZLR 607 (the Banana case) at page 616 A-C the Supreme Court held, per GUBBAY CJ held that

> "Evidence that a complainant in an alleged sexual offence made a complaint soon after its occurrence, and the terms of the complaint, are admissible to show the consistency of the evidence 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 requirement for admissibility of the complaint 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 (G) at 39 G-H
> 2. It must have been made without undue delay and at the earliest possible opportunity, in all the circumstances, to the first person to whom the complainant could reasonably be expected to have made it. *See R v C* 1955 (4) SA 40 (N) at 40 G-H, *S v Makanyanga* supra at 242 G-243C"

The complainant did not make a report at the earliest possible opportunity. According to her evidence she did not report the first incident to anyone. She made a belated report of the second incident to Mercy Nhepura. She made a report to the Police one and half years after the incident. Even then, she did not make the report on her own initiative. She was nudged by Tilda Moyo who for some reason believed the complainant had been raped although the complainant had not

complained of rape during the interview. The complaint was therefore suggested to her. In my view the complaints to either Mercy or the Police do not meet the requirements set out in the *Banana* case, supra.

The trial court accepted and treated Mercy Nhepura's evidence as corroborative of the complainant when she said the complainant complained to her. However, the same court had, at the close of the State case, dismissed Mercy Nhepura's evidence with regards to her own complaint of rape on the basis that she had been so discredited that no reasonable court acting carefully could rely on the evidence. There is no explanation why the trial court found would find her credible with respect to the complainant's complaint. The complainant attended the radio interview at the behest of Sarah Mhere. The radio interview, however, seemed to be part of an elaborate scheme to pressurise the appellant to part with money. This gives credence to and tends to render the appellant's defence reasonably possibly true.

The law with regards to vitiated consent is set out in s 69 of the Criminal Law (Codification and Reform) Act [*Chapter 9:27*].

> "**69 Cases where consent absent or vitiated**
> (1) Without limiting Part XII of Chapter XIV, a person shall be deemed not to have consented to sexual intercourse or any other act that forms the subject of a charge of rape, aggravated indecent assault or indecent assault, where the person charged with the crime.
> (*a*) uses violence or threats of violence or intimidation or unlawful pressure to induce the other person to submit; or
> (*b*) by means of a fraudulent misrepresentation induces the other person to believe that something other than sexual intercourse or an indecent act, as the case may be, is taking place; or
> (*c*) induces the other person to have sexual intercourse or to submit to the performance of the indecent act, as the case may be, by impersonating that other person's spouse, or lover; or
> (*d*) has sexual intercourse or performs an indecent act upon the other person while that other person is asleep, and that other person has not consented to the sexual intercourse or the performance of the act before falling asleep; or
> (*e*) has sexual intercourse or performs an indecent act upon the other person while that other person is hypnotised or intoxicated from the consumption of drugs or alcohol so as to be incapable of giving consent to the sexual intercourse or the performance of the act, and that other person has not consented to the sexual intercourse or the performance of the act before becoming so hypnotised or intoxicated.
> (2) The burden of proving that a person referred to in paragraph (*d*) or (*e*) of subsection (1) gave consent to sexual intercourse or the performance of an indecent act before falling asleep or becoming hypnotised or intoxicated, as the case may be, shall lie with the person charged."

Of relevance to this case are the situations portrayed in s 69 (1) (a) and (b) above. The situation referred to in s 69(1) (b) does not arise because the State evidence was that the appellant

disclosed that he intended to introduce his sperm into her vagina using his penis. Penetration of the vagina by the male organ constitutes sexual intercourse. With regards to s 69(1) (a), it was not the State case that the appellant had used violence or threats of violence. What I must consider is whether the totality of the complainant's evidence permits of only one conclusion as the only reasonable inference that the complainant was intimidated or some unlawful pressure was brought to bear upon her. In *S v Gumbura* 2014 (2) ZLR 539, as he then was, made the following remarks at page 543G-544C PATEL JA: -

> "In the court *a quo*, the learned judge elaborated "the subjective nature of religious dogma" in more cogent terms. To paraphrase and summarise his findings, the complainants were subjected to frequent indoctrination in the notions of total separation and submission to authority. They were not allowed to fraternise with their relatives and were conditioned to believe that matters of church should not be discussed with outsiders. The appellant displayed a pattern of predatory behaviour, characterised by rampant sexual perversion, manipulating and luring the complainants to accept and endure his deceptively benign patriarchal authority.
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> As was eloquently observed by Justice Douglas in *United States* v *Ballard* 322 US 78 (1944) – quoted by both of the courts below – religious doctrines and beliefs cannot be subjected to the rigours of legal proof. I would take this sentiment further to opine, in the circumstances presented by this case, that the quasi-mystical force of religious dogma might overwhelm its conscripts and devotees to the point where it operates to vitiate and negate any meaningful consent to sexual abuse and exploitation by their spiritual masters."

The sentiments by PATEL JA, as he then was, were made in the context of an application for bail pending appeal. The application of s 69 (1) (a) and (b) to the concept of vitiated consent is ably illustrated in the judgment of MUSHORE J in the case of *Robert Martin Gumbura v The State* HH 665/17 which dismissed Gumbura's appeal against conviction. The circumstances of the case were peculiar in that the victims were subjected to systematic pressure, isolation for long periods of time and threats of mystical curses, which in combination had the effect of condemning the complainants to submit to sexual subjugation. At page 7 of her cyclostyled judgment the learned judge explained the burden of proof in sexual offences as follows: -

> "**BURDEN OF PROOF**
>
> The complainants deny ever having consented to engaging in sexual intercourse with the appellant. It is trite that the State bears the burden of proving the absence of consent even where sexual intercourse is denied by an accused person.
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> ` As a reminder on this common law principle here are the oft stated words by MHANTLA JA stated by him in *S* v *York* 2002 (1) SACR 111 (SCA): -

> 'Regarding the appellant's decision to raise the defence of consent on appeal, I accept that there is no onus on appellant. However, one would have expected him to have pertinently raised this issue during the trial. Be that as it may, my view is that since the outcome of this appeal turns, *inter alia*, on the element of consent, it would therefore be necessary to consider the possibility of consent even where the appellant has denied sexual intercourse'"

MUSHORE J went to great lengths to demonstrate how the victims in the *Gumbura* case were made extremely vulnerable through non-stop unlawfully pressure, indoctrination and systematic threats, to the extent that they became feeble minded and could not possibly resist Gumbura's acts of sexual predation. The victims were indoctrinated, trapped, subjugated and unable to escape from the captivity. By way of example, the following quotes extracted from the witnesses' testimony appear at page 9 of the cyclostyled judgement: -

> P301 "I was afraid because whenever he would actually abuse me he would actually read some bible verses for me"
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> P 304- No-one showed any resistance, we were all afraid'
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> P 304 "Accused actually asked Tendayi Ganyani to show me how sexual intercourse is performed between a man and a woman …I was called to observe the sexuality between a man and a woman" "Thereafter I was forced to remove my clothes and lie down…I did not want but he forced me"
>
> P 306 "…we were actually called because it was actually said that we were actually ignorant or we were not very much aware how to have sexual intercourse with a man'
>
> P 309 "He then told me that I needed sex because I had stress"
>
> P 311 "He then told me that for him to renovate my flat I was supposed to have sexual intercourse with him whenever he wanted but I refused;
>
> When she tried to leave the church under the pretext of wanting to go to the UK to renovate her parents' house, appellant told her that it was church law for her get married before leaving.
>
> P 311 'Accused said that for me to go to the UK I had to have sex with him whenever he wanted"

Having done so the learned judge made the following conclusions of fact at pages 23 and 24 of her cyclostyled judgment: -

> "I find that appellant's attack on the complainants' credibility is fanciful. It is conceivable and acceptable that the complainants were fearful for their lives and intimidated out of making a report to the Police for fear of reprisal and consequences. It is my finding that the environment within the confines of the church was oppressive and intimidating. It was impossible to feel as though it was a place of safety. It would have been impossible for the complainants to object to appellant's conduct toward them whilst they were kept within the church because appellant wielded a God-like

presence to the congregants who were fearful of him. Trust issues abounded between the congregants. It certainly would have felt risky to show any serious objection to anything which the appellant did to them no matter how repulsive. Church doctrine was accepted and made acceptable to all parishioners including appellant's manipulation of the Bible."

At page 25 the learned judge concluded as follows: -

"In my view the complainants genuinely believed that the appellant had the power to place them in the hands of Satan at any time in their future. The threat to their lives was for an indefinite period, and I find that even at the time that the complainants made their reports whilst outside the confines of that compound, they still felt as though the threat to their lives existed. In the case of Hazvineyi and Winnie they only felt it safe to give their statements to the Police when they found out that appellant was in prison. Clearly the likelihood of the threat of harm to their lives diminished from the fact that appellant would not be in a position to carry out his sermons where he placed people in the hands of Satan from prison. Precious who made the first report testified that when she made a report to the Police immediately after her escape that she didn't even mind dying by making that report. The threats of suffering fatal or other harm to the complainants' lives was a real likelihood to them."

I do not believe the same can be said of this case. This is a case where the complainant joined the appellant's church for what she testified to as miraculous faith healing of many among the appellant's flock. She believed that she was healed of HIV infection when the appellant prayed for her. Whether or not the complainant and the other members of the church were indeed miraculously healed of the various ailments as claimed by them are matters of faith that cannot be subjected to scientific proof as explained in the *Gumbura* case cited above. See also *In re Chikweche 1995(1)* 235. Consent means the exercise of free will. It was not vitiated in the circumstances of this case where the complainant made a decision, based on faith, to indulge in sexual intercourse for personal benefit just because she later regretted the wisdom of her decision or that the trial court may have had misgivings about the practicality of faith healing. See *R v Williams* 1931 (1) PH H 38 and *R v K* 1965 RLR 571 (A). In essence the complainant indulged in transactional sex. If indeed it was the intention of the legislature to make sex intercourse in the process faith healing unlawful then the necessary amendment would have been made to 69 of the Criminal Law (Codification and Reform) Act.

The trial court made reference to intimidation and brain washing. I have examined the complainant's evidence closely, I am unable to find where she was intimidated or subjected to unlawful pressure, to induce her to submit. Her evidence was that the appellant told her how he was going to heal her. The appellant did not misrepresent what he intended to do. He explained to her that he was going to administer lotion on her and later told her that he wanted to insert his sperm in her. He asked her to lie down so that he could insert his penis in her. He held the penis and mounted her. He had sexual intercourse with her for two minutes in the usual way that she had indulged in intercourse before. She let him do it because she wanted to derive benefit from it. She knew that by inserting his penis into her vagina he would be having sexual intercourse with her but agreed because he had healed her before and she wanted to receive final healing. She was not under any misapprehension about the fact that she was indulging in sexual intercourse. The fact that she believed that he had healing powers is not intimidation.

In my view the trial court erred in coming to the conclusion that the complainant was a credible witness. She contradicted herself. She appeared to say she had submitted to sexual intercourse because she feared the appellant. Later she implied that he tricked her. Fear and trickery do not mean the same. Where fear is concerned, the victim submits with the full knowledge and appreciation of the consequences of the abuse. In trickery, the complainant believes that some other act other than sexual intercourse is taking place. Later, in evidence, she said she agreed to sexual intercourse because she believed the act would heal her. She therefore changed her versions about what actually transpired. In my assessment the appeal against conviction has merit. On her own evidence she did not complain the first case of abuse soon after its occurrence. She made the wilful decision to go back to the appellant for what she described as final healing, well knowing of what to expect. The evidence that she made a complaint was improperly admitted. According there was no evidence which removed the risk of fabrication beyond any reasonable doubt. The acrimonious breakup at the appellant's church was not disproved by any evidence. It is correct, as argued on appeal that the complaint of rape to a sympathetic witness only referred to as an unnamed Police Officer was not confirmed by State evidence. The court *a quo* erred at law in accepting the criminal complaint as admissible evidence yet it was not made spontaneously and promptly but was only made as a result of a live radio broadcast. The court *a quo* erred in concluding that the inordinate delay in reporting the alleged sexual attack could be explained away

by intimidation and brainwashing yet the State did not adduce evidence of intimidation. The appellant's defence remained reasonably possibly true.

I must conclude by saying in cases of rape arising from vitiated consent, the State must make the basis of the charge clear in the State outline for the benefit of the person charged and the Court.

There are religious practices such as some methods of circumcision, spiritual healing and deliverance; resistance to conventional medical treatment; child marriages; witch hunting and 'seeding' of money; to mention a few, which many, in society, find unconscionable, repulsive and abhorrent. In this case the State led evidence of gross invasion of the complainant's security of person, and personal dignity. To the enlightened the method of spiritual cleansing which the complainant said she underwent was clearly of no benefit to her and disgusting but in her own words she sought the treatment and voluntarily partook in the healing processes because she believed in its efficacy. The contact does not disclose rape. Such malpractices cannot be adequately addressed through judicial activism for a number of reasons. Without being exhaustive, some of the reasons are that, firstly, our criminal law is now codified and there is no room for judicial activism. Secondly, it is difficult to convince the victims of deception that he or she has been or is being fooled. Thirdly, the malpractices are carried out in secrecy with the complicity of the victim. Fourthly, the perpetrators resist scrutiny buoyed by the protection to freedom to practise and give expression to one's religion enshrined in s 60 of the Constitution. It would, in my view, be more beneficial to empower women to enable them to make informed decisions before submitting to potentially harmful practices. The legislature may consider amending the constitution in order to create an independent commission similar to the South African Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to act as a watchdog regulating the contact of churches and with the specific mandate to promote and protect freedoms and rights of persons in religious communities. People of faith are more likely to identify with and accept the measures implemented by such a body making it effective as watchdog or in educating people and lobbying for legislative interventions on issues concerning the rights of persons belonging to different cultural, religious and linguistic communities.

Disposition

The failure by the trial court to find the appellant's defence reasonably possibly true was a gross misdirection in the circumstances of this case as discussed earlier in this judgment resulting in a miscarriage of justice. The appeal against conviction must therefore succeed.

In the result it is ordered that the appellant's appeal against in counts 1 and 2 be and is hereby upheld and the conviction is quashed.

CHATUKUTA J agrees……