HB 69/16
HCAR 1926/15
CRB REG 371/15

THE STATE

Versus

MEMORY SIGABADE

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 29 FEBRUARY 2016

Review Judgment

BERE J: Memory Sigabade (the accused) was arraigned in the Bulawayo Regional Court on a charge of aggravated indecent assault in violation of section 66 (b) (i) of the Criminal Law (Codification and Reform) Act[1].

The allegations were that on the 1st day of February 2015 and at Dumisani Ndlovu's homestead, in Xhanixhani Village, the accused, being a female adult unlawfully and intentionally forced the complainant, a boy of 14 years of age to have sexual intercourse with her. After trial the accused was convicted and sentenced to 13 years imprisonment 5 years of which was suspended for 5 years on the usual conditions of future good conduct.

It is the conviction of the accused person that caught my attention on review.

The facts of this case as set out in the state outline are that at the time of the alleged offence the accused was employed as a maid at complainant's residence and taking care of the complainant and two other young boys with whom she shared a bedroom hut. The accused slept on one end of the room and the three young boys on the other end.

It was the state case that on the 1st of February 2015 the accused remained at the homestead with the complainant and that it was on this night that the accused forced the complainant to have sexual intercourse with him without her consent.

1. Chapter 9:23

The offence came to light when the complainant fell ill and felt some pain on his groin area and had difficulties in walking. It was then that the complainant revealed the accused person for having committed this offence.

The law on cases of this nature has been spelt out with great clarity in the celebrated case of *S* v *Banana*[2] which signified the departure from the need to seek corroboration when dealing with complainants in sexual cases. I feel more inclined to re-state some of the main guidelines which the court emphasised in that case. The then Chief Justice of Zimbabwe Gubbay observed and remarked a follows:

> "Evidence that a complainant 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 of a complaint are
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> 1. It must be made voluntarily and not as a result of questions of a leading and inducing or intimidating nature. See *R* v *Petros* 1967 RLR 35 (9) at 39 G – 11
> 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 40 (N) at 40G – H; *S* v *Makanyange* 1996 (2) ZLR 231 (H) at 242G – 243C"

It is with these guidelines in mind that I must now proceed to look at the judgment of the court *a quo*.

Having analysed the evidence that had been presented to her the learned magistrate concluded by making the following remarks:

> "The evidence of the complainant as to what happened is believable. Lwazi was too shy to explain what happened, that is the reason why he did not open to anyone <u>until the teachers probed him. The probing by teachers led to the discovery of a Sexually Transmitted Infection.</u> (my emphasis)

2.2000 ZLR 611

> 'Round' said the accused person beat the complainant up not for the love triangle alleged but for other things.
>
> Why the accused person did not inform the parents of the complaint or Beauty about the alleged love triangle boggles the mind. She had 'discovered' it on her very day of her arrival and by the second day she had beaten up the complainant. It was too serious an issue to be solved by somebody who had just been employed. The defence of the accused is improbable. Although there were minor inconsistencies in the state's evidence I do not believe that the case against the accused person is not unassailable. The way the issue came to light shows that there was no trace of bad blood between the accused person and the complainant, the accused person and the two boys who testified, the accused person and Beauty[3]."

The first observation that I make flowing from the reasoning of the court *a quo* is that it is settled that the court is not entitled to infer guilt on the accused person except upon cogent evidence adduced by the state. As WATERMEYER AJA pertinently remarked in a case that has become the bedrock of criminal prosecution, viz *R* v *Difford*[4]

> "If an accused gives an explanation even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond a reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

In this case, the learned magistrate, having made a specific finding that the accused's explanation was improbable went further to dismiss it without convincing herself that such an explanation, improbable as it may have been was beyond any reasonable doubt, false.

More importantly, the record of proceedings clearly shows that even at the close of the defence case the learned magistrate was herself not convinced by the evidence that had been adduced by both the state and the accused person. This is demonstrated by her allowing the state to call further evidence of one Limukani "Round" Mpofu to try and bolster the state case at that stage. (See record p 20).

3. Page 6 of record of proceedings

4. 1937 AD 370 @ 373

The record suggests that this witness was called by the state. However, the situation is not helped by an indication in the learned magistrate's judgment (record page 5) when she stated that she had herself called the witness in question in terms of section 232 of the Criminal Procedure and Evidence Act [Chapter 9:07].

My view is that section 232 *(supra)* is not to be invoked to bolster a limping state case or to close gaps in the state case by a court but reliance on it should be motivated by the desire to seek clarification. But even though, there must be an explanation on record as to why that witness has to be called or recalled. The record of proceedings in this case contains nothing demonstrating in my view the lack of confidence in the state case by the presiding magistrate at that stage of the proceedings.

I come now to deal with the manner in which the complaint in this case was made by the complainant. In his testimony the complainant told the court that after the sexual abuse, the accused had threatened him with assault if he disclosed the sexual intercourse to anyone (see record p 3). The assumption is that this threat had a strong bearing on the complainant to the extent that he feared to report the assault. But alas! The evidence of the second state witness Mduduzi Tshuma who literally "battled" with the accused to find out what problem the accused had, told the court that the complainant told the senior teacher (who incidentally was not called to testify) in her presence that on the very morning after the abuse, he reported the sexual assault to MaMo "who said he should not be worried" (record p 8).

The coming into picture of MaMo is of significance in this matter. This MaMo was the first person to receive a report of the alleged sexual abuse and this witness was a crucial witness for the state case. There is no explanation as to why this witness was not called. The state case could not have been complete without this witness' testimony. See *S* v *Makanyange (supra)* and referred to in the *S* v *Banana (supra).*

The second significance of MaMo in this case is that the alleged threats made by the accused to the complainant did not at all affect him because if they had, he would not have been

able to report the abuse the following day. What this boils down to in my view is that the complainant must not be believed when he says he delayed in reporting this matter because of threats. This has a serious dent on the credibility of the complainant in pointing out the accused as the culprit. It will be noted in this case and as correctly observed by the court *a quo* that the complainant did not easily open up about the alleged sexual abuse. It took persistent probing from the teachers to make the complainant reveal what had happened to him. The complainant completely refused to tell Mduduzi what had happened to him. Realising the futility of his enquiry, Mduduzi had to seek the assistance of his senior teacher (whose name remains a mystery) to try and have the complainant open up. To this teacher the complainant started by lying that he was limping because he had been hit by a friend. It was only after persistent probing that the complainant revealed not to the teachers but to a nurse what had happened. It was this revelation which in turn led to the involvement of the police in this case.

This kind of gathering of evidence of a sexual nature as happened in this case goes against the weight of precedent. See *State* v *Banana (supra)* at p 616. As I understand it, the evidence must be voluntarily given and not as a result of begging. A witness must earn her credibility by volunteering such evidence at the first opportunity.

It does seem to me that but for the illness of the complainant, he would not have disclosed this offence. The court is supposed to exercise extreme caution when it deals with evidence gathered in circumstances such as are in this case. A complainant who finds himself in an uncomfortable situation and is constantly probed to open up as to what happened and does so with reluctance is a potentially dangerous witness. The trier of fact in such a situation must not be allowed to hide behind the demeanour of such a witness in assessing such witness's credibility.

There are other pronounced features of this case which make the conviction of the accused unsafe in this matter. The evidence in this case suggests that the accused was in the habit of beating the complainant in this case. The accused said she was moderately chastising him to discourage him from indulging in love relationship with one Nonoza who was also in love

with one Trust who was known to be on Anti-Retroviral Treatment (ART). The complainant himself as well as the last witness Limukani ('Round") Mpofu confirmed the beatings but for entirely different reasons. The beatings are therefore not in dispute. Under such circumstances, the learned magistrate could not have triumphantly concluded her judgment by making a bold statement that there was no bad blood between the accused and the complainant. Factually, that was a wrong conclusion because it went against the weight of evidence that was presented to her. Clearly the complainant had a motive to lie against the accused. The complainant's evidence could therefore not have been blindly believed.

The other unsatisfactory feature screaming against conviction in this case is to do with the alleged sexually transmitted infection which the complainant was said to have. There is no suggestion in this case that the accused had such an infection to probably justify an inference that she had infected the complainant.

In conclusion, the record of proceedings will show that the accused was a self actor throughout the proceedings. Her defence to the allegations was a simple denial of what she was alleged to have done. The record of proceedings will show that despite her limitations as a simple accused person, untrained in the field of law she was able to put her case in a very precise and pointed way to almost every witness who testified against her. It is difficult to imagine what else she was supposed to do to demonstrate her innocence to the court *a quo*. The judgment of the lower court never commented on the defence put up by the accused person. There is no explanation at all as to why the accused's position was rejected in preference of the state's position.

The totality of the evidence adduced in this case clearly screamed for the acquittal of the accused.

Accordingly, the accused's conviction and sentence are set aside. The accused is found not guilty and acquitted.

Bere J …….

Mathonsi J ……. I agree