MASIMBA GARANDE
vs
THE STATE

HIGH COURT OF ZIMBABWE
BARTLETT and NDOU JJ
HARARE 31 January 2002 and 10 April 2002

Mr *Kamusasa,* for the appellant
Mr *N.J. Mushangwe,* for the respondent

NDOU J: The appellant was convicted by a Harare Regional Magistrate of raping a 4-year old girl. He denied the charge but despite his protestations he was convicted and sentenced to undergo 8 years imprisonment of which 2 years imprisonment was suspended on condition of good behaviour. The appellant appeals against both conviction and sentence.

The State does not support the conviction in this matter. I hold the view that the concession was properly made by the State although I differ with counsel on the basis of arriving at this conclusion. My grave concern is that the learned trial Regional Magistrate, in her judgment, makes no reference to the glaring inconsistencies in the prosecution case. It is also clear that the manner in which the trial was conducted is less than fair to an unrepresented accused person. The facts of this case are that the appellant is married to the complainant's aunt. The complainant is normally resident with her father and stepmother at Lochnivar in Harare.

On 15 May 2000 she went to visit her mother in the Domboshava area. Due to circumstances not relevant to this case the complainant's mother left the complainant in the custody of her sister i.e. appellant's wife. On 3 June 2000 the complainant's mother took the complainant back to her father in Harare. In this regard it is stated in State Outline:

> "8. On the date complainant arrived at her father's place both the stepmother and father discovered that the child was not feeling well as she appeared to be ill.
> 9. The complainant was further observed by bith (*sic*) Eurita and Jonathan whilst scratching her vagina an indication that the vagina was itching.
>
> 10. Eurita then examined complainant and discovered that she had rash on her vagina. Complainant was asked by Eurita what had happened to her and she disclosed that she had been raped by the accused."

In his defence the appellant stated that he never saw the complainant from 1st May until the date of the trial (1 August 2000). He further stated that the complainant left his home on the 1st May and came back on the 10th June. The appellant, in the circumstances, put two issues of a triable nature before the trial court. Firstly, the trial court had to make a finding on whether or not the appellant and the complainant met during the period 15 May 2000 to 20 June 2000. Secondly, in the event that the trial court made a finding that they indeed met, then it had to decide whether there was credible evidence that the appellant sexually abused the complainant.

The first prosecution witness was the complainant's father, Jonathan Satuku. His evidence was that he and the complainant's mother were on separation at the material time. On 15 May complainant's mother requested to take the complainant away. He initially refused but eventually accepted her request after persuasion by his landlord.

The complainant's mother brought her back on 3 June 2000. He looked at the complainant and she appeared sick. He asked her mother who assured him that the complainant was not sick. He said he was really concerned about the complainant and, according to the record, he further stated "… I really looked at her again and I was still convinced that she was not feeling well". The prosecutor made valliant attempts to establish the witness's basis for his conclusion that the complainant

looked sick. This witness further testified - "On the following morning I noticed that the child was scratching her private parts. I asked the other stepmother to examine her since she had spent almost the whole day scratching". The record of the proceedings reveals further:-

(Examined by Public Prosecutor)

"Q. What is the name of the stepmother?

A. Urita Garanewako. She asked what I could probably suspect when the child was coming from the mother. I just told her to examine her since the way she was scratching was not normal. She urged with me and after some days I told her again to examine the child since she was continuously scratching. I asked her for the third time to examine the child and she kept on ignoring me. On 26th of June I went to Botswana. I came back in July … I eventually called the child and asked her what has been done to her and why she kept on scratching her private parts. She said that she had been poked by Masimba's father."

It seems to me that this previous consistent statement was not spontaneous. It is trite that such previous consistent statements need not necessarily have been spontaneous. The statement was , however, induced by leading questions from her father. His testimony in this regard is as follows: "I … and asked <u>what has been done to her</u> and why she was (*sic*) kept on scratching her private parts". (the emphasis is mine) Generally, previous consistent statements are excluded because they are insufficiently relevant. This is called the rule against narrative or self-corroboration – see *The South African Law of Evidence* – 4th ed. by L.H. Hoffmann and D.T. Zeffertt pp 119-121. A complaint in a sexual case is admitted as an exception to this general rule. Author John Reid-Rowland, in *Criminal Procedure in Zimbabwe,* stated the rule in following terms (paragraphs 21-8):-

> "To be admissible, the complaint must have been made at the first opportunity after the offence which reasonably offers itself. What is reasonable will depend on the circumstances. A great deal will depend on such factors as the complainant's age and the opportunity he or she had to complain to a person to whom he or she could reasonably be expected to complain.

> The complaint must not have been induced by threats or by leading questions, though it need not necessarily have been spontaneous. The terms of the complaint have to be proved as well as the fact that a complaint was made, but the contents of complaint may not be used as independent evidence of the facts alleged. The complaint must give evidence of those."

Before previous consistent statement is admitted in a sexual case the court has to be satisfied that it meets these requirements. *In casu*, the statement by the complainant does not meet these requirements. It was induced by a leading question from her father.

With minimal articulation, the appellant cross-examined the witness on the question of dates. In so doing, he, however, sufficiently established that the issue of dates was in dispute.

The next witness was the complainant's stepmother Eurita Garanewako. She confirmed her husband's testimony that when the complainant's mother returned with her on the 3rd June 2000 the father asked her mother three times if the child was well. She further confirmed that her husband asked her to examine the complainant. She did not examine the complainant until her husband left for Botswana. This is where the major confusion in the prosecution case lies. The complainant's father testified that he went to Botswana on the 26th June 2000 and returned in July 2000. This witness stated that she only examined the complainant when her father was in Botswana. In this regard the record reflects:

> "Q. Where was the child scratching?
> A. On her private parts. Some time passed and I did not examine the child until the father went away to Botswana.
>
> Q. Why did you not examine the child?
> A. I told the father what he honestly thought could be done to the child after she had been from her mother. When the father went to Botswana I remained with the child. The child got serious in her father's absence.

Q. How did the child get serious?
A. She was continuously scratching. I examined the child. I cannot tell whether a child has been raped or not."

When questioned by the court the witness had this to say:-

"Q. Did you see this child scratching?
A. I had not really taken note of it.

Q. Why were you not examining her?
A. I just said to him that what did he think could possible happen to the child when the child was coming from the mother.

Q. What did you mean by that?
A. I did not take it seriously. I just say to him I would examine her."

The dates on the medical affidavit exacerbate the confusion.

The medical report shows that the complainant was examined by a medical doctor on the 5th of June 2000. There can be no mistake as far as this date is concerned because the report was reduced into affidavit form on the 8th June 2000 before the Member-in-charge of Harare Hospital Police Post who even date-stamped next to his signature. If one accepts the dates on the medical report then the complainant was only examined by her stepmother long after she had been examined by the doctor. As indicated earlier on the appellant has put the issue of the dates as triable. The prosecution has adduced dubious and confusing evidence on this material issue. There was no attempt by the prosecutor to clear the confusion during the trial. I am concerned that the learned trial Regional Magistrate equally did not make any reference to this material discrepancy in her judgment.

In the Heads of Arguments, Mr *Mushangwe,* for the respondent states: "The above exchange reveals a totally confused approach by the young complainant in answering questions." To some extent I agree with this submission. In my view, as indicated above, there is, however, more serious and material confusion in the

testimony of the adult witnesses i.e. her father and stepmother. I agree with Mr *Mushangwe*'s observation that the complainant seems to suggest that she was not raped yet the trial magistrate did not see it appropriate to address these issues in the judgment. The other triable issue raised by the appellant was whether or not he raped the complainant. The identity of the appellant as the assailant was not properly established during the trial. Further the learned trial magistrate let the trial prosecutor ask unfair and leading questions. By way of illustration I will cite a few examples:-

"Q. Rumbi do you know Masimba Garande?
A. Yes I know him.

Q. Who is it (sic) to you or how do you know him?
A. He is Tendai …

Q. Do you know "baba Masimba?
A. Yes."

It is not clear from this exchange as to whether "Tendai" and "baba Masimba" both refer to the appellant. This trial was characterised by unfairness to the appellant. I have already alluded to the fact that he was not legally represented during the trial. The trial court allowed another unfair leading question from the prosecutor in the following terms:

"Who put it in your pants or how did it get in your pants?"

Prior to this question the complainant had never mentioned anything being put into her pants. The prosecutor asked another, leading question:-

"Q. Where was the pain?"

Prior this question the complainant had never mentioned anything about pain. It is no safe to rely on such improperly obtained evidence. In any event the quality of this evidence is not high.

Another unfairness highlighted by Mr *Mushangwe* is that the appellant requested that his wife and the doctor who examined the complainant be called to

testify. This request was refused by the trial court. In light of contents of the medical report one would have expected a prudent prosecutor to have called the doctor. Be that as it may, this request coming as it did from an unrepresented accused ought to have been given adequate consideration but the learned trial magistrate appeared not to be aware that the unrepresented accused needed her assistance. Such conduct on the part of judicial officers came under attack in the case of *S v Manyani* HCB 36/90 wherein at pages 4 – 5 of the cyclostyled judgment MUCHECHETERE J (as he then was) had the following to say:

> "Another matter which is of concern is that the trial magistrate appeared not to have been sensitive to the fact that the accused before him was unrepresented – see *S v Mutinidyo* 1973 (1) RLR 75; *S v Hall* GS 190/81 and *S v Kambani Nyoni* HCB 248/85. It is clear that in the end the accused who appeared to be a simple person was facing the prosecutor and an unsympathetic court. Lastly pressure of work and the need to reduce backlog should not excuse the wantom disregard of proper procedures during and after trial. These procedures are laid down for the purpose of ensuring that justice is being done in all cases."

The Zimbabwean system of criminal is essentially adversarial in nature. The essential characteristic of the adversary system is that the presiding officer appears as an impartial arbiter between the parties. Although, according to the well-known dictum of CURLEWIS JA in *R v Hepworth* 1928 AD 265 at 277 a Judge must ensure that 'justice is done', it has been held to be 'equally important' that the Judge must ensure that 'justice is seen to be done' – see *S v Hall* 1982 (1) SA 828 (A) at 831H – 832A when the accused is unrepresented, the judicial officer is then in the invidious position of being an arbiter and, at the same time, an adviser of the accused because he must explain the rules of procedure and evidence to the accused. Over the years there has been a steady progression in the fashioning of rules by the courts in order to mitigate the harshness of putting an unrepresented accused on trial, particularly on serious offences. These rules require positive conduct by judicial officers to assist unrepresented accused in a variety of ways. They are all Judge-made rules, and have

their origin in the fundamental principle of fairness which is the bedrock of law that requires trials to be fair and justice to be equal.

Such a refusal by the trial court was improper and unfair. In this case, although lacking in legal sophistication, the appellant was able to recognise the need to call the doctor. The appellant's request was justified as a perusal of the affidavit deposed to by the doctor reveals that there are aspects that needed clarification. In the affidavit it was not clear as to whether the complainant was sexually abused or not. On whether penetration was effected the doctor opined "Inconclusive". The doctor could have shed light on whether her observations of the hymen, vestibute, vagina, etc. had anything suggestive of sexual abuse. It is trite that for the purposes of rape, penetration is effected if the male organ is in the slightest degree within the female body and that it is not necessary to prove that the hymen was raptured – see *S v Mahlangu* 1987 (1) ZLR 70 (S) at 72F, *S v Sabawu* 1999 (2) ZLR 314 (H) and *Torongo v S* SC 206/96. In this case, however, no evidence was led from the complainant herself or from the doctor to establish if penetration in the legal sense, was a effected. The appellant's request to call his wife was turned down on the basis that she was sitting in court when he testified. This does not seem to be a valid reason for turning down his request. There is no legal basis as this fact only affects the weight to be attached to her testimony. In any event the learned trial magistrate should have asked the appellant at the commencement of his defence case and ensured that any such defence witnesses wait outside during his testimony. There are too many loose ends in this case.

It is a fundamental principle of our law, and indeed of any civilised society, that an accused is entitled to a fair trial. The basic concept is that the accused must be fairly tried – see *S v Alexander and Others* 1965 (2) SA 796 (A) (809C – D); *S v Tyebela* 1989 (2) SA 22 (A) (29G – H); *S v Kanyile* 1988 (3) SA 795 (N); *S v Mushimba* 1977 (2) SA 829 (A) and *S v Davids* 1989 SA 172 (N). I associate myself with the

jurisprudential validity of the above rule laid down in these South African cases notwithstanding the fact that latter judgments were overturned on appeal – see *S v Rudman* 1992 (1) SA 343 (A) at 377. I, with respect, differ with South African Appellate Division in their decision that a criminal trial is not required to be fair, but is required merely to adhere to 'the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.

Although we do not have a provision similar to section 35(3) of The Constitution of the Republic of South Africa, 1996, I hold the view that fairness to the accused should be an overriding requirement to which all rules of evidence in criminal trials will have to conform. (Section 35(3) reads "Every accused person has a right to a fair trial …") In my view, this is the point that being emphasised in the *Manyani* case; *Mutinidzyo* case; *Hall* case and *Nyoni case (supra).* I do not think that we necessarily need a constitutional provision similar to the South African section 35(3) of their Constitution. All we need is the changing of concepts of justice by insisting that criminal court proceedings involving unrepresented accused persons should be fair in substance as well as in form. This is how fairness and justice to the accused was achieved in the United States of America – see the classical judgments in *Powell v Alabama* (1932) 287 US 45 at 68-9 and *Argersinger v Hamlin* (1972) 407 US 25 at 43.

The criminal proceedings, *in casu,* were not fair in substance and in form.

It is clear from the foregoing that the conviction is unsafe. The conviction is therefore quashed and the sentence set aside.

Bartlett J, I agree.

Nduna & Partners, appellant's legal practitioners.
Attorney General's Officer, respondent's legal practitioners.