ROBERT MARTIN GUMBURA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 4 APRIL AND 19 MAY 2014

Bail Application

T. Magwaliba, for the applicant
E. Mavuto, for the respondent

MUSAKWA J: In this unusual case a man of cloth was arraigned on nine counts of contravening s 65 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] and one count of contravening s 29 (1) (B) of the Censorship and Entertainments Control Act [*Cap 10:04*]. In respect of the latter charge I am not sure how the prosecutor missed it as the correct citation is s 26 (1) (b).

The applicant was convicted on five of the counts of rape as well as the count under the Censorship and Entertainments Control Act. In respect of the rape charges, the applicant was sentenced to 15 years imprisonment, counts 3 and 7 and ten years each in counts 8 and 9. Of the total of 50 years imprisonment 10 years were suspended for five years on condition of future good behaviour. In respect of the charge under the Censorship and Entertainments Control Act he was sentenced to 4 months imprisonment which was ordered to run concurrently with the sentence in count 3. Having noted appeal against conviction and sentence, the applicant sought bail pending appeal. His application before the trial court was dismissed for want of jurisdiction.

I did commence by remarking that this is an unusual case. This is on account of how the offences were committed and the fact that pastors and priests are the least expected to commit such dastardly acts.

The charges were framed as follows:-

"<u>Count Three</u>

Rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]

In that on the date unknown to the prosecutor but during the period extending from the year 2007 to 30 September 2013 and at Number 6 Helena Close, Marlborough, Harare, Robert Martin Gumbura, a male person, unlawfully had sexual intercourse with Precious Dadirai Kapfumvuti, a female person, on divers occasions without her consent knowing that she had not consented to it or realising that there was a real risk or possibility that she might not have consented to it, in contravention of the Act.

Count Seven

Rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]
in that on the date unknown to the prosecutor but during the month (*sic*) of January 2013 and February 2013 and at number 6 Helena Close, Marlborough, Harare, Robert Martin Gumbura, a male person, unlawfully had sexual intercourse with Precious Winnie Sakahuhwa, a female person, three times without her consent knowing that she had not consented to it or realising that there was a real risk or possibility that she might not have consented to it, in contravention of the Act.

Count Eight

Rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]
in that on 14 May 2006 and at house number 64 Queen Elizabeth Road, Greendale, Harare, Robert Martin Gumbura, a male person, unlawfully had sexual intercourse with Hazvinei Ruvimbo Samanyanga, a female person, several times without her consent knowing that she had not consented to it or realising that there was a real risk or possibility that she might not have consented to it, in contravention of the Act.

Count Nine

Rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]
in that during the period extending from December 2006 to 9 March 2013and at house number 6 Helena Close, Marlborough, Harare, Robert Martin Gumbura, a male person, unlawfully had sexual intercourse with Hazvinei Ruvimbo Samayanga, a female person, on divers occasions without her consent knowing that she had not consented to it or realising that there was a real risk or possibility that she might not have consented to it, in contravention of the Act.

Count Ten

Contravening s 29 (1) (B) of the Censorship and Entertainment Control Act [*Cap 10:04*]
in that on 14 November 2013 and at house number 6 Helena Close, Marlborough, Harare, Robert Martin Gumbura unlawfully or without lawful excuse had in his possession two DVDs title Black Street Hookers 37 and Dread Weku Mufombi Zimbabwe which contained videos of naked women having sexual intercourse and are indecent, undesirable and obscene or prohibited in contravention of the said Act."

The Facts

The facts of the case can be summarised as follows. The applicant is a pastor and founder of a church, self-titled Robert Martin Gumbura (RMG) Independent End Time Message. Two of the complainants had either lost one or both of their parents. The third complainant joined the applicant's church and moved in to stay with devout "brothers and sisters" of the church, it being against church doctrine to stay with heathens. The first two complainants were to move to the applicant's residence as he had taken responsibility to take care of them. In due course the complainants would reside at several of the applicant's residences in Harare, Kadoma or Chinhoyi.

In due course the applicant would make amorous advances to the complainants, either by hugging, kissing or proposing marriage. In respect of one complainant, she was first made to undergo HIV test. In respect of the third complainant the applicant would peep at her whilst she bathed. Photographs would be taken of her whilst she was naked. Eventually all complainants were subjected to sexual intercourse against their will. In some instances pornographic videos would be played prior to the sexual acts. In some instances there was group sex where other women were involved.

Following the applicant's arrest and in the course of investigations Police Officers recovered digital video discs which contained sermons delivered by the applicant. In some of the sermons the applicant would curse congregants and remind them of those who had died following his curses.

On 14 November 2013 detectives conducted a search at the applicant's residence. In the process they recovered digital video discs described in the charge sheet. These were in the applicant's briefcase.

The Defence

The applicant's defence was that he is a victim of church politics. He claimed that he was being blackmailed by his rivals and in particular by Pastor Chitsinde of Spoken Word Ministries who used to worship with him. The charges were contrived as the complainants now attend Spoken Word Ministries.

The applicant claimed that he broke away from Spoken Word Ministries in 1980 and has not been on talking terms with Pastor Chitsinde. His religious doctrine embraces polygamy whereas his rivals preach monogamy. Thus his rivals want to gain congregants by casting aspersions about him practising Satanism. He has eleven wives, hence his use of sexual enhancement drugs.

In respect of Precious, he denied having an affair with her. He claimed that the complainant used to reside at his Kadoma house as "sort of a maid." Precious was lured by Innocent Nehohwa whom the applicant used to fellowship with. Innocent now fellowships with Chitsinde and is being used to lure women to Chitsinde's church.

In respect of Winnie, the applicant denied ever abusing her. He was in a relationship with Winnie's sister, Linda for eight years. Linda subsequently eloped to another man and they went to Canada. Linda now attends Chitsinde's church and Chitsinde is using the complainant to bring about his downfall.

On Hazvinei, it was claimed that she was one of his wives whom he stayed with for six years. He sponsored her course for Laboratory Technician at Chitungwiza Hospital. Hazvinei later eloped to a church member. Frustrated with her conduct the applicant preached in church that "he had done with Hazvinei what every other man and woman could do."

In respect of the pornographic discs, it was claimed they were not recovered from his briefcase but from a storeroom in the clerk's office. The discs were awaiting destruction at the convention in December 2013 as "most congregants would have repented and surrendered some to his church".

The plea to the last charge was further elaborated upon. The discs were recovered from a storeroom adjacent to the applicant's clerk's office. They were among other things which were waiting to be burnt at the December convention. The discs belonged to congregants who would have repented and as such the material was stored in a storeroom by the congregants until a time when an annual convention is conducted in December 2013.

The Evidence

Tedious as it may be, it is necessary to recount some aspects of the evidence in some detail.

Precious Kapfumvuti, an orphan used to attend Independent End Time Message church. Her mother used to receive help from the applicant. Following the mother's death in 2007 the applicant offered to take care of the complainant and she accepted the magnanimous hand. She was chauffeured to the applicant's Marlborough residence by a driver. Thereafter, she was informed she would no longer communicate with her relatives.

On 17 August 2007 the complainant was told to go to New Start Centre. She was accompanied by the applicant's secretary, Queen Mbungaand one Rutendo. Having been tested for HIV the applicant asked her for the results. As they used to take turns to clean the applicant's bedroom she was summoned by the applicant. After she entered the bedroom the applicant locked it.

The complainant was asked how she was coping with the bereavement. The applicant proposed to marry her and she declined. She was told to undress and lie on the bed. When she declined she was forcibly thrown on the bed. Against her will she was then raped and deflowered. As she bled the applicant offered her some toilet paper with which she wiped herself. The complainant was then released. She said she informed Tendai Ganyani and was told that is what happened to girls who went to reside at the place.

The complainant stated that the applicant used to quote verses from the bible to justify his deeds. Reference was made to Exodus 21, Proverbs 3 and Corinthians 6 and 10. The applicant would routinely call the complainant where she would be subjected to sexual intercourse against her will. Sometimes there was group sex involving four other women. At some stage she was sent to stay at the applicant's house in Kadoma. She had company in the form of Hazvinei Samanyanga, one of the complainants.

The complainant claimed her late parents left behind a farm and a flat. It is not clear how the farm was being managed and if she derived any benefit from it. But as for the flat, it was being leased for US$150-00. The rentals would be transmitted through the mobile platform, EcoCash. She stated that every time she went to withdraw the money from an EcoCash agent at Greencroft Shopping Centre she would be escorted by Queen Mbunga. She said she would first seek the applicant's permission.

The complainant stayed in Kadoma for seven months starting from February 2013. She had been accompanied to Kadoma by a pastor Bonda from the church. The applicant used to threaten congregants with "placing them in the hands of Satan".

After Hazvinei Samanyanga left for South Africa the complainant was linked up with Simangele Nehohwa. This was after she sought assistance. Apparently, Hazvinei got married when she went to South Africa. She briefed her husband about Precious Kapfumvuti's ordeal. Hazvinei's husband then communicated with Simangele's husband, Innocent. The Nehohwas had quit Independent End Time Message church in 2000 after a fallout with the applicant on moral issues. Precious' escape was executed in the afternoon of 12 October 2013. Having been driven in one of applicant's vehicles to attend church service at Ellis Robins School, Precious was sprung up by Simangele Nehohwa who was accompanied by some other women.

A medical examination of Precious was conducted between 8 and 30 days after the previous sexual act. Her emotional state was noted as stressed. She had no injuries. There were healed hymenal tears at 3, 5 and 7 o'clock.

Winnie Sakahuhwa joined Independent End Time Message church in 2009. At the time of trial she was just 17 years old. Her father died in 2010. She first stayed with a church member, arising from arrangements made by her sister and her husband who were residing in Botswana. Apparently her sister was said to have previously had an affair with the applicant. When the sister and husband emigrated, Winnie moved to the applicant's residence in December 2011. This was again arranged by the sister and her husband. Apparently, Masasa she was staying with had to leave Zimbabwe under unclear circumstances.

When she moved to the applicant's residence the applicant instructed her to write a testimony on his preaching on polygamy and doctrine of total separation. She had not preferred to live with her mother because of the preaching on total separation. On the writing of testimony she had conferred with others and was advised to claim that she was HIV positive and that she had slept with several young men. This was an attempt to ward off the applicant's predatory inclinations.

The first encounter with the applicant was at the garage. She was lured into a dark room. The applicant kissed her against her will. She was pressed against the wall. The applicant told her he had slept with other "sisters" and this ensured good marriages. She said

she was lifted and the applicant then raped her whilst propped against the wall. She was told not to reveal to anyone and if she did so she would be cursed.

On the second occasion she was called to a cottage within the complex dubbed "Chisipite". After being forced to lie down she was then raped. This was now in January 2012.

The third occasion was in February 2012 when she went to seek permission to collect her 'O' level results. She was shown text messages from one of the applicant's wives in which she was inviting to be intimate with him. She was also shown a video of the applicant having group sex. She was then raped. The applicant would insert his penis in a vagina, withdraw and insert again several times.

As to why she did not report the matter she said she was told not to tell anyone or else she would be placed in the hands of Satan. Pressed on why she did not tell her mother she said she did not want her to be stressed as she was hypertensive. The complainant said she only told her brother in-law that the applicant wanted to sleep with her. As to why she did not report the actual rape she said this was on account of what the applicant had cautioned.

She later reported to her brother in-law who is in Canada after reading about the applicant's arrest. She said she could not report to her sister as she had also been in a relationship with the applicant. Winnie was later collected by her mother. She said she reported the matter to her mother after the applicant's arrest in February 2013.

The medical examination of this witness was conducted thirty days after the last sexual act. There were hymenal tears at 3, 4 and 9 o'clock. Her emotional state was noted as withdrawn.

Winnie's mother testified that her son in-law, McNeil Magunde offered to take care of Winnie after the death of her father. After the son in-law and Winnie's sister left for Canada Winnie went to stay with a church member in Buhera. This church member, Emmanuel Musasa had been introduced by McNeil Magunde. Winnie was not permitted to visit relatives during holidays. Winnie then moved in to stay at the applicant's residence in 2011. Winnie's mother is the one who accompanied her to the applicant's residence. Precious Kapfumvuti also went that day. The mother also met the applicant.

It emerged that Winnie's sister, Linda went to stay with the applicant between 2000 and 2008 after she completed 'A' level. The mother did not approve. In February 2013 the mother received a call from Winnie who wanted to move out of the applicant's residence.

She did not ask the reason although Winnie made several calls. When she eventually collected her, no report was made to her.

On 22 November 2012 she received a call from Superintendent Moyo who told her to bring Winnie. She proceeded to Winnie's school where she sought permission to take her to Harare.

Hazvinei Samanyanga testified that she started attending the applicant's church in 1998 whilst doing form two in Shurugwi. She finished school in 2000. In accordance with church doctrine she was not supposed to stay with parents. She left home and went to other church mates in Gweru.

In 2001 she and others embarked on a journey to visit the applicant's farm in Chinhoyi. They passed via the applicant's home in Kadoma where they met one of the applicant's wives. Hazvinei was told by the applicant to remain behind as she was now going to reside at the Kadoma house. There were applicant's children at the house. Hazvinei requested to return home but the applicant objected. She was told that civilisation and education were for the devil.

In due course the applicant would hug the witness and in the process touch her breasts and buttocks. When she questioned this, she was told to trust the applicant. She was also told that if she wanted to continue with studies she had to be intimate with the applicant. She was told bad luck would befall her if she left the church.

In 2003 whilst alone with the applicant, the applicant made advances which she spurned. He pushed her against the wall and she pushed him away. She said she used to cry on account of what she was being subjected to. The applicant would lift her dress. He would sometimes open the bathroom door whilst she was naked.

In 2004 Hazvinei moved to Chinhoyi. In 2005 she wrote a letter of complaint to the applicant. Nonetheless the applicant persisted with her demands. In 2006 she was told she could apply for a course at Seke Teachers College. She travelled to Harare for purposes of attending the interview. She failed to link up with Tawanda Nehohwa who was supposed to assist her. She contacted Queen Mbunga who collected her and took her to the applicant's house in Greendale. There she met the applicant.

As she was bathing the applicant got in. When she protested, she was told she had come to the lion's den. The applicant photographed her. She was told that if she did not have sexual intercourse with the applicant she would not attend the interview. After bathing, she went into a room where she wanted to use lotion. The applicant got in and locked the

door she was forcibly undressed and raped. She said she kept the panties which she wore on that day as she had been deflowered. The panties were produced as an exhibit.

Hazvinei was later accompanied to meet Tawanda Nehohwa by the applicant and Queen. Prior to leaving other girls at the house had laughed at her. She attended the interview and stayed at Tawanda's residence for two weeks. She then commenced studies at Seke Teachers College. She would visit the applicant's residence during weekends and would be raped. By then the applicant had moved to Marlborough. She had been told that church disputes should not be related to non-believers.

This witness would be shown pornographic videos and photographs. She would also be photographed. After completion of her course she went to work in Chinhoyi. She would attend church in Harare. Every Sunday she would be given US$10 and she would be raped. She continued to work in Chinhoyi until 2011. She was subsequently told by the applicant to quit her job and she did so without notice. She then moved to Marlborough where she stayed between July 2011 and 3 January 2013. Thereafter she went to Kadoma. From there she would attend church in Harare. After church they would collect money for groceries. On 9 March 2013 she was again raped. In May 2013 she ran away after telling Precious Kapfumvuti that she was visiting her sick mother in Bulawayo. When she got to Bulawayo where she stayed for two weeks she got a passport and went to South Africa.

Whilst in South Africa Hazvinei communicated with Precious Kapfumvuti who expressed a wish to escape. Hazvinei briefed her husband who in turn liaised with Innocent Nehohwa.

Under cross-examination this witness stated that she used to surrender her entire salary to the church. She further stated that she had stayed in South Africa for five months before she reported the matter. When she was contacted by Superintendent Moyo in connection with Precious Kapfumvuti she then took the opportunity to report the rapes. She further stated that she first wanted to secure her permit before she could report the matter. She further conceded that since 2006 she had been in love with the man who eventually married her. She was barred from communicating with him. When they linked up in South Africa they discussed marriage. In June 2013 she disclosed to her husband that she had been raped. They married in September 2013.

The witness also said she had been rebuked in church by the applicant. Concerning her salary she stated that she would place it together with the withdrawal slip in a sealed

envelope and hand to the applicant. When the applicant was not present she would place in the box for offerings.

Godwin Simplicious Chitsinde testified that he met the applicant in 1978 before both of them became pastors. Later, he was to baptise the applicant whilst undergoing pastoral training. The applicant's brother was a pastor.

This witness had a fallout with the applicant and others within the church. This was due to the fact that he fathered a child before he wedded. As a result he was disciplined and became an ordinary minister. He subsequently became a pastor within the same church in 1991. At that time the applicant was ministering in Gweru.

The witness first received complaints about the applicant's conduct in 1988. In 1995 he received further complaints and spoke to the applicant. In 1997 he held discussions with the applicant and his wife.

Superintendent Moyo was assigned investigations in November 2013. Winnie Sakahuwa who was attending school at Guinea Fowl contacted following receipt of an e-mail from a relative who was in Canada. The applicant was already in custody.

In view of the details disclosed in the evidence of witnesses it was deemed necessary to conduct searches at the applicant's house. The applicant was advised and he led Police Officers to his residence.

The applicant was said to have been very cooperative and jovial. They searched the applicant's office. Then in the secretary's office they recovered envelopes containing confessions by congregants.

Having been led to the applicant's bedroom they found a briefcase with a combination lock which was on the bed. Inside the briefcase were sexual enhancement drugs and two unused condoms. The drugs were of various varieties and the officers queried the applicant if they were prescribed by a doctor. The applicant explained that the drugs were for his personal consumption.

Further searches yielded two pornographic videos from the inner pocket of the briefcase. The applicant explained that the videos were for his entertainment. The witness made reference to the earlier recovery by other officers of a thousand videos which contained, among other things sermons delivered by the applicant. There was amongst these videos footage of the 2012 Christmas party. In his closing speech the applicant was heard rebuking members of the church. Then there was another video in which the applicant was making curses.

The Law

The starting point is s 50 (5) of the Constitutionof Zimbabwe Amendment (No. 20) Act, 2013 which provides that-

> "Any person who is detained, including a sentenced prisoner, has the right—
> (*a*) ……...;
> (*b*……;
> (*c*)…….—
> (i)……;
> (ii)……...;
> (iii)……..;
> (iv)……..;
> (v)……;
> (vi)……..;
> (*d*)……;
> (*e*) to challenge the lawfulness of their detention in person before a court and, if the detention is unlawful, to be released promptly."

Mr *Magwaliba* also cited ss 46 and 49. In this respect s 49 (1) provides that-

> "Every person has the right to personal liberty, which includes the right—
> (*a*)……; and
> (*b*) not to be deprived of their liberty arbitrarily or without just cause."

Mr *Magwaliba* further submitted that when a court applies the common law or interprets statutes, it must be guided by Chapter 4 of the Constitution which deals with fundamental rights. Thus where a decision fails to measure up to the fundamental provisions of the Constitution, its decision must be set aside. He cited the South African decision of *Bato Star Fishing (Pty) Ltd* v *Minister of Environmental Affairs & Ors* 2004 (4) S 420 (ad).

Since the applicant has been convicted and sentenced following a trial, there is no question of him having been deprived of his liberty arbitrarily or without just cause. There being no elaboration on the principles applicable in an application for bail pending appeal in the Constitution or the Criminal Procedure and Evidence Act [*Cap 9:07*] recourse is to be had to precedents. The overall consideration is whether there are prospects of success on appeal. In making such determination the court has discretion where it balances the interests of the administration of justice against the need to uphold individual liberty. Where a person seeks bail pending appeal there is no longer a presumption of innocence as they would have been found guilty. In this respect see the cases of *S* v *Manyange* 2003 (1) ZLR 21 (H), *S* v *Williams* 1980 ZLR 466, *S* v *Tengende & Ors* 1981 ZLR 445 (S), *S* v *Labushagne* 2003 (1) ZLR 644 (S), *S* v *Benatar* 1985 (2) ZLR 205 (H) and *S* v *Kilpin* 1978 RLR 282 (AD).

The notice of appeal articulates several grounds on which the trial court's decision is attacked for having erred. In support of these grounds Mr *Magwaliba* submitted that there are several instances the decision of the trial court does not measure up with the fundamental provisions of the Constitution. He also attacked the trial court's decision for applying the wrong principles in its determination of the state of mind of the complainants. In respect of the wrong principle being applied, Mr *Magwaliba* referred to the trial court's reliance on decisions dealing with the approach to be adopted in relation of the testimony of a victim of rape who is suffering from some defect of the mind whereby her consent is thus vitiated. On that score he submitted that whereas the court ruled that the complainants did not appreciate the sexual acts, the complainants themselves testified that they knew what was happening save that they did not consent.

The trial court made, in my view, superfluous reference to *R* v *K* 1958 (3) 420 in which STEYN A.R. at 425 cited FAWKES R in *R* v *KalilKatib* 1904 O.R.C. 1 tebl 2 thus:

> "..that the crime of rape is committed when by violating a woman when she is in a state of insensiblity and has no power over her will, whether such state is caused by the man or not, the accused knowing at the time that she is in that state."

The trial court further cited the remarks of HOEXTER R quoted in *R* v *K* (*supra*) at 425 in which he said:

> "If, therefore, a man has unlawful intercourse with a woman who is so devoid of reason that she cannot exercise any judgment at all on the question whether she will consent to or dissent from such intercourse, that man is in law guilty."

A reading of the trial court's reasoning does not show that it ruled that the complainants in the matter were under some disability of the mind. It seems the court sought to justify that the complainants were not free. In this respect the trial court went on to state that:

"The witnesses who were called by the state were saying that they were accepting the teaching, so as a result they were not in full control of the situation which obtained. The indication is simply that when dealing with cases involving religion, one has to go a mile further and examine the effects of the teachings. In our own Supreme Court in the matter *Re* (*sic*) *Chikweche* 1995(1) ZLR 235 and in particular p 241, the then Chief Justice GUBBAY

quoted with approval the pronouncements of Justice Douglas in the matter *United States* v *Ballard*, 322 US 78 (1944) p 86 to 87;

> "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they be beyond the ken of mortals does not mean that they can be made suspect before the law."

The above excerpt was used to justify the subjective nature of religious dogma. Quite a lot can be gleaned from the practices of the applicant. The complainants voluntarily joined his church. Thereafter they were subjected to some indoctrination of total separation and submission to authority (as in the form of the applicant). That they could not fraternalise with their relatives is evident. One of the witnesses could not even be allowed to attend her sister's funeral. Therefore some kind of conditioning of the complainants was initiated. That is why they believed that church matters were not to be discussed with outsiders.

One can also detect a pattern of predatory behaviour on the part of the applicant. The complainants appear to have been lured and lulled to accept the applicant's benignity. The complainants were young and therefore innocent. Two of them were told to undergo HIV testing and were then raped after the applicant got to know their status. They had also been made to write testimonies, something akin to confessions about their personal lives. This must have been done with a motive to gain an intimate knowledge of them before they were manipulated.

The trial court did believe the complainants and indeed one cannot think they made up such sordid accounts just to lend support to religious war being waged by Pastor Chitsinde. If there is any doubt about the veracity of the complainants' claims one has to have regard to some similarities in some of the sexual attacks. These are exemplified by the playing of pornographic videos to spice up the acts and the indulgence in group sex. What appears to put the nail in the coffin is corroboration from an unlikely source. It is like the applicant falling on his own sword. These are the pornographic video discs that were found in the applicant's brief case as well as the sex enhancement drugs. These lend weight to the rampant sexual perversion exhibited by the applicant. There is no trace of any perverse conduct of planting these sexual paraphernalia by Police Officers involved in the investigations.

Instead of tripping on the authorities it cited the trial court's first port of call should have been s 69 (1) of the Code which states that;

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…….

There certainly was unlawful pressure and some form of violence used against the complainants to induce submission. In essence the evidence in this case amounts to single witness testimony. As was held by GUBBAY CJ in *S* v *Banana* 2000 (1) ZLR 607 (SC) at 614-615;

> "It is, of course, permissible in terms of s 269 of the Criminal Procedure and Evidence Act [Chapter 9:07] for a court to convict a person on the single evidence of a competent and credible witness. The test formulated by DE VILLIERS JP in R v Mokoena 1932 OPD 79 at 80 was that the evidence of such a single witness must be found to be "clear and satisfactory in every material respect."

In attacking the trial court's reliance on authorities dealing with complainants under some form of mental disability Mr *Magwaliba* submitted that the correct approach is that adopted in *S v Banana* (*supra*). This was in respect of the need to make timeous report of the complaint. On this aspect GUBBAY CJ at 616 had this to say;

> "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."

I have already observed that there was some corroboration of the witnesses. Corroboration is not strictly a requirement but where it exists it cannot be ignored. See also the remarks of GUBBAY CJ in *S v Banana* (*supra*) at 615 where he said;

> "Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution."

The requirements for admissibility of a complaint are:

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 39G-H.

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 *Makanyanga* (*supra*) at 242G-243C."

In the present case the reasons for late reporting of the matters appears plausible. This is especially so in the cases of Winnie and Precious. The two appear to have been in some kind of bondage. They did not appear to have been free to travel as they liked. It is either they would be escorted by a driver or by Queen Mbunga. Although escape from the Marlborough premises was possible it was not easy as observed by the trial court. Again the effect of indoctrination appears to have held sway against any reportage.

The bulk of the observations I have made are not apparent from the trial court's judgment. This may well be a question of approach to writing a judgment as opposed to total misdirection. However, the aspect of corroboration appears implicit in the trial court's reasons. In short, one can sum up a pattern that emerged in respect of these witnesses. There was separation leading to isolation, conditioning or indoctrination, molestation and subjugation. The subjugation was in the form of threats of placing them in the hands of Satan.

Although the applicant tried to demonstrate what he meant by making those curses, it is clear that those biblical verses were never interpreted to the congregants. Therefore the complainants could have genuinely believed the effect of the curses. In matters religious and the metaphysical even the enlightened ones have been found to be gullible. It is improbable that Precious and Winnie concocted all the sordid details of what they endured on behalf of a third party. I would therefore hold that there are no prospects of success on appeal against conviction especially the counts involving Precious and Winnie.

There may be doubt regarding the conviction relating to Hazvinei. This is because the circumstances pertaining to this witness are different from those relating to Precious and Winnie. There is a possibility that on the first occasion Hazvinei may have been raped. Her evidence on that score appears to be credible. However, she appears to have acquiesced on the subsequent occasions. This is particularly so if it is considered that initially she was not residing with the applicant. She would visit the applicant's residence during weekends during which she was then raped. This appears to be unconvincing. After these acts regard should also be had to the fact that she stayed in Bulawayo for two weeks before she went to

South Africa. She then spent several months in South Africa before she fortuitously reported the matter when Police contacted her in connection with Precious' matter. All these and a host of other pertinent issues were not interrogated by the trial court.

The trial court's assessment of the evidence on unlawful possession of obscene or indecent material seems unassailable. The trial court also correctly applied the law. The provision in question states that-

"(1) No person shall, without lawful excuse, have in his possession any—
(*a*) publication, picture, statue or record that is indecent or obscene or prohibited; or
(*b*) recorded video or film material on which is recorded a film that is indecent or obscene or prohibited.
(1a) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

Possession of a thing entails physical control of that thing and an intention to exercise control for oneself or another. In this respect see *S* v *Masson* 1982 (1) ZLR 216 (SC) and *S* v *Ndiweni* 1983 (2) ZLR 49 (H). The evidence overwhelmingly shows that the applicant had the indecent material in his brief case which had a combination lock as opposed to the material being in the store room as he claimed. Even if it were to be grudgingly accepted that the material was in the store room, the applicant was aware of its existence as he said it awaited destruction at a convention. This material was under his roof.

What lawful excuse did he give for its possession? In *R v Mackay* 1964 R & N 51 the phrase lawful excuse was considered in the context of the appellant having been found in possession of a publication that was prohibited. It was held that lawful excuse is a reason for not complying with the law. It therefore means that the applicant must have advanced a reason for possession which is in accordance with the law. It cannot be a lawful excuse that the applicant possessed the indecent material because he wanted to have it destroyed at some future date. By reason of his leadership of the church he arrogated himself the authority to collect and destroy the obscene material. In any event the circumstances of his possession of the material do not lend weight to that explanation. The indecent material must have been meant for corrupting the witnesses or self indulgence within his harem.

No submissions were made in respect of sentence on the rape counts. Nonetheless, in the event that the conviction relating to Hazvinei is overturned it follows that the resultant sentence will also be quashed. That notwithstanding, if the convictions relating to Precious and Winnie are upheld, the sentences imposed may be found to be appropriate. I therefore

see no prospects of success on appeal in respect of those counts. The applicant's moral blameworthiness is high and merits severe punishment. This may well have been a case that deserved to be referred to the High Court for sentence for purposes of precedence.

The sentence imposed on the count for unlawful possession of indecent or obscene material is tainted with irregularity as no reasons were advanced by the trial court. It will obviously be interfered with. The redeeming feature of this sentence is that it was ordered to run concurrently with the sentence in the third count.

In the result, the application for bail pending appeal is hereby dismissed.

Thondhlanga and Associates, applicant's legal practitioners
Prosecutor-General's Office, for the state