TINASHE RUZIVE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA and MUSAKWA JJ
HARARE, 3 July and 20 September 2019

Criminal Appeal

L. T. Musekiwa, for the appellant
E. Mavuto, for the respondent

MUSAKWA J: Having dismissed the appeal and given reasons *ex tempore*, a request has been made for the full judgment for purposes of appeal.

The appellant was convicted of rape and sentenced to six years' imprisonment of which three years were suspended for five years on condition of future good behaviour. Although appeal was noted against conviction and sentence Mr *Musekiwa* conceded that the sentence was appropriate. Therefore argument was confined to conviction.

The first ground of appeal is that the trial court erred in accepting evidence that the complainant was raped in the absence of independent evidence in that respect. The second ground is somewhat vague. It contends that the trial court erred in failing to comprehend that what was indicated in the medical report ruled out any sexually transmitted infection and thus that there was no evidence of penetration. The third ground is that the trial court erred in not treating the evidence of the complainant with caution considering that the complainant's mother exerted pressure on her. The fourth ground is that the trial court erred in its assessment of the facts as evidenced by its insistence that the complainant was four years old when she was eleven years old. The fifth ground is vague. It contends that the trial court erred in convicting the appellant in the absence of proof beyond a reasonable doubt coupled with inconsistencies in which the medical doctor was not called.

The facts of the matter are that the complainant and the appellant resided at the same premises but different quarters in Glen View, Harare. The complainant was aged twelve years.

The complainant used to enter the appellant's room at the cottage. She testified that on a particular occasion the appellant told her that he wanted to give her a digital video disc (dvd) as they used to do. When she entered the room she was made to lie on a sofa. Her panty was removed and the appellant inserted his penis into her vagina. She felt some pain. The appellant's parents had gone to church.

The complainant stated that there was no penetration (physical). This according to her was because the appellant's penis could not fit. However, she said she felt pain. The incident occurred in 2006 in November. The complainant's mother, Maud Maboyi had gone to South Africa as she was a cross-border trader. She went on 15 November and returned in December 2006. A domestic worker had remained in custody of the complainant. The complainant's father was at work.

In early January 2007 the complainant complained of stomach pains in the lower abdomen. She also complained of some whitish discharge. The mother asked the complainant if she had been abused to which the complainant initially denied. Later the complainant disclosed the abuse and explained what had taken place. As to why she had not reported earlier, she explained that the appellant had told her that both of them would be arrested. The complainant's father and uncle were then informed. The appellant was later questioned and he denied having raped the complainant. The complainant was medically examined on 9 January 2007. The doctor found no injuries but concluded that sexual abuse could not be ruled out.

The appellant was twenty two years at the time of trial. His defence was to the effect that upon his return from Manyame, he was informed of the allegations. He was also informed that the complainant was infected with a sexually transmitted infection and he should avail money for her medical treatment. The appellant suggested that they go to the Police Station. As part of his defence he stated that there was never a time the complainant was left alone. She was also not allowed to watch television.

Submissions By Counsel

The addresses by both Mr *Musekiwa* and Mr *Mavuto* were basically focused on the absence of penetration against the backdrop of the complainant having complained of a discharge and abdominal pain.

Mr *Musekiwa* submitted that the allegation of rape was prompted by the fact that the complainant had some vaginal discharge. The fact of such discharge was suggestive of penetration. Nonetheless the discharge was not confirmed on medical examination. In the absence of evidence of penetration, then there was no proof of the alleged rape.

On his part Mr *Mavuto* submitted that he did not support the conviction on account of the circumstances under which the rape report was made. He pointed to the fact that the complaint came about after the discovery of a discharge. It was then after the mother questioned her that the complainant disclosed the abuse. He thus submitted that the fact that no discharge was noted by the doctor affects the credibility of the complainant.

Analysis

It will be noted that the appeal falls for determination on the sufficiency of evidence led by the State.

Although the state conceded the appeal and filed a notice in terms of s 35 of the High Court Act [*Chapter 7:06*], we were of the view that the concession was not properly made. That is why we directed counsel to address us.

It is well settled that an appellate court will not lightly interfere with a trial court's findings on the credibility of witnesses before it. In this respect see *S* v *Isolano* 1985 (2) ZLR 62 (S). In the present matter the trial court found the complainant to be credible. It based this on her demeanour and testimony. Although it did not go into detail regarding the complainant's testimony it is apparent that the trial court did not find inconsistencies in the testimony, and indeed there were none.

The testimony of the state witnesses is simple to understand. After being abused the complainant was threatened with an arrest if she disclosed. The threat did work until the complainant complained of lower abdominal pain. She said she had first told the domestic servant who referred her to the mother. The mother's initial reaction was that the complainant was too young to experience such pain that is associated with menstruation. The complainant further disclosed that she had some discharge whereupon the mother asked what was wrong. The mother then followed up with a question whether anyone had abused her. The complainant initially denied but later admitted that she had been abused. She was further asked who was responsible and she implicated the appellant. The complainant cried when she was asked why she had not reported earlier. There is no evidence that the complainant was threatened to disclose who had abused her. Concerning the discharge, the complainant's aunt who is a nurse inspected her but she found nothing.

Essentially the case involves single witness testimony of which such witness must be credible in every material respect. In *S* v *Banana* 2000 (1) ZLR 607 (S) and at 615 GUBBAY CJ summed up the approach to single witness testimony as follows:

> "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 The South African *Law of Evidence* 4 ed at 573 the celebrated authors, Hoffmann and Zeffertt, rightly point out that *Mokoena's* case concerned the situation of a single witness claiming to have identified the accused by the B light of a pocket torch as he ran past in the dark. Accordingly, they contend that the remarks of DE VILLIERS JP should be related to the context in which they were made.

Certainly, in purporting to lay down a general rule the dictum of the learned Judge President has been criticised as unhelpful and tending to obscure the ultimate purpose of the court's inquiry, which is whether the guilt of the accused has been proved beyond a reasonable doubt. See *R* v *Abdoorham* 1954 (3) SA 163 (N) at 165; *R v Mokoena* 1956 (3) SA 81 (A) at 85. In *S* v *Sauls & Ors* 1981 (3) SA 172 (A) at 180E-G, DIEMONT JA said:

> "There is no rule of thumb or formula to apply when it comes to a consideration of the credibility of the single witness.
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> The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told ... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

In Zimbabwe, much the same approach has been adopted. In *S* v *Nyati* 1977 (2) RLR 315 (A) at 318E-G, Lewis JP warned that the test in *R* v *Mokoena supra* is not to be regarded as an inflexible rule of thumb. There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence, a common sense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory. See also *S* v *Nathoo Supermarket (Pvt) Ltd* 1987 (2) ZLR 136 (S) at 138D-F.

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.

I am mindful that the trial court did not go to any length in articulating the law on single witness testimony. However, what emerges from its judgment is that it noted that the appellant and complainant were known to each other. The complainant did not report because of the threat of arrest that had been issued. The trial court noted that such threat would not have worked against a more mature person. It then concluded that the complainant was credible in terms of her demeanour and testimony.

As defined by s 61 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] sexual intercourse between a man and a woman involves the total or slight penetration of the vagina by the penis. The complainant explained that the appellant removed his trousers and also removed her panty. Then he mounted her whilst she was on the sofa. He did not manage to penetrate her vagina as his penis could not fit. She felt pain. In my view, that is adequate evidence of slight penetration. After the act the complainant saw some whitish fluid on her panty.

In my view, nothing turns on whether the complainant had some vaginal discharge. Whilst a discharge, if proven would have corroborated the issue of rape, its absence does not lead to the conclusion that the complainant was not raped. This is because it is not an element of the crime of rape that the victim must develop a vaginal discharge. It is possible that the complainant may have had some discharge that was not detected at the time of medical examination. It is also pertinent to note that there was no internal vaginal examination of the complainant. Additionally, it is also likely that the issue of the abdominal pain and discharge may not have been brought to the attention of the examining doctor as he made no comment on it.

It was for these reasons that we dismissed the appeal.

CHATUKUTA J agrees…….

Musekiwa & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners