HH 611/17
CA 873/13
CRB KBA 464/13

NOMORE NKOSA
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE 17 MARCH 2015 AND 13 SEPTEMBER 2017

Criminal Appeal

M. Chakandida for the appellant
E. Mavuto for the respondent

BERE J: The appellant was convicted of 4 counts of contravening section 4 (1) as read with section 3 (1)(a) of the Domestic Violence Act Chapter 5:16 and sentenced to 36 months imprisonment of which 6 months were suspended for 5 years on condition of good behaviour. All the counts were taken as one for purposes of sentence.

Aggrieved by both conviction and sentence the appellant filed this appeal against both.

As against conviction the appellant contended as follows:

"(i) That the lower court misdirected itself by disregarding the appellant's defence that the complainants had lied owing to the appellant's refusal to marry her.
(ii) The court *a quo* misdirected itself, by failing to consider the inconsistencies in the complainant's testimony which was not supported by the doctor's findings.
(ii) The court *a quo* misdirected itself by failing to consider that the complainant reported the offence almost two weeks after the assault and that the initial report suggested that the complainant had been raped and not assaulted."

The sentence imposed by the court *a quo* was attacked on the basis that it was excessive and induced a sense of shock.

The respondent opposed the appeal against conviction but conceded the appeal against sentence and advocated for a non-custodial sentence.

Appeal against conviction

In order to sustain the convictions the state was obliged to lead sufficient evidence of assault in respect of each and every assault allegedly perpetrated against the complainant.

The principles of law to be applied

Arising from the contentions raised, it is convenient at the outset for me to consider the apposite applicable principles of law and then attempt to apply them to the evidence canvassed in this trial.

When it came to the actual assault itself in all its various forms the only direct evidence available in this case came from the complainant and the appellant. In the case of *S* v *Chingurume*[1], I did emphasise the need for the trial court to exercise extreme caution when dealing with the evidence of a single witness as provided for under section 269 of the Criminal Procedure and Evidence Act [Chapter 9:07]. When the trier of fact is faced with the evidence of a single witness one must not blindly accept such evidence particularly when there is a reasonable motive to lie or exaggerate. Section 269 is not a passport for easy convictions based on the usual parroting of the credibility of the single witness in order to justify a conviction.

Secondly, as I highlighted in *S* v *Chingurume*, again, the trier of fact must be wary of the "boxing match approach" in such cases as eloquently expressed by McNALLY JA in *S* v *Temba.*[2]

In my view, the greatest safety value when one is faced with cases of this nature is to strive to look for independent evidence to ensure that deceptive evidence does not assume centre stage.

It is common cause in this case that the appellant and the complainant were lovers and that the appellant suspected that the complainant was cheating on him with one Taka. It is also

1. 2014 (2) ZLR 260 (H)
2. S-81-91 at p 2

not in dispute that when the complainant eloped to the appellant, the appellant declined to marry her. That there was an unsuccessful attempt to trump up charges of rape against the appellant through the complainant's uncle was to some extent confirmed by the complainant's sister Benhilda.

The conviction

The judgment of the court *a quo* is completely silent on the principles of law that I have highlighted and the issues which I have summarised concerning those facts which were not in dispute.

Of particular concern to me is that when it came to the actual assaults, these assaults were allegedly committed in public and that the complainant had every opportunity to mitigate those assaults but in her testimony she gave the impression that she opted to remain aloof in circumstances where a reasonable person under such threat as she highlighted would have behaved in a more rational way.

In my view the assessment of the complainant's testimony should not have assumed the simplicity given to it by the court *a quo*. Both the complainant and the appellant had the potential to deceive the court given their contrasting positions. Benhilda did not and could not have witnessed the assaults. In any event she was clearly an interested party given her close relationship with the complainant.

All these assaults are alleged to have taken place at public places and the narration given by the complainant suggests these were serious assaults. Is it not surprising that not a single

independent witness was called to confirm a single of these several assaults? Is it also not surprising that throughout these several assaults, the complainant did completely nothing to draw the attention of other third parties to her persistent assaults by the appellant?

It is even more curious that after having been subjected to such savage attacks, the complainant crowned it up by having a night of intimacy with the appellant barely 4 metres away from her own house?

Even the doctor who examined the complainant was unable to confirm the injuries which were consistent with the assaults as stated by the complainant. I think in the circumstances of this case, the state was expected to do more to ensure that the conviction was safe. This was not a safe conviction.

The appellant in his defence outline and evidence in chief narrated that he suspected that the complainant was cheating on him and that when she eloped to him he refused to marry her. The appellant went further to say that the assault allegations were trumped up to fix him for having refused to marry the complainant.

The delayed report of the assaults adds another dimension to this case. Whereas the complainant stated that she reported on the morning following the alleged assaults but was advised by the police to try and resolve the issue at home, this is all hearsay evidence as no police officer was called by the state to confirm this.

In my well considered view, this is one case that provided a fertile ground for deception on the part of both the complainant and the appellant. In such cases the benefit of doubt must benefit the appellant and not the complainant.

In conclusion, the appeal succeeds. The conviction and sentence are accordingly set aside.

Hungwe J agrees ……

Chamutsa & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners