LUCKMAN MANGWANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP AND UCHENA J
HARARE, 22 September and 6 October 2011

Criminal Appeal

D Machaya, for the appellant
F Kachidza, for the respondent

UCHENA J: The appellant was charged and convicted, by a regional magistrate sitting at Harare Magistrate's Court on a charge of rape. He was sentenced to 10 years imprisonment of which 5 years was suspended on conditions of good behavior. He appealed to this court against both conviction and sentence. The respondent opposed the appeal. After hearing the appeal we upheld the appeal and set aside the appellant's conviction and sentence, and indicated that our reasons would follow. These are they.

The appellant's appeal is premised on the trial magistrate's finding that the appellant was staying at the complaint's deceased parent's house at the time the offence was committed. In his defence the appellant, had proffered a defence of an alibi stating that he started staying at the complainant's house in June 2009. His defence was that he could not have committed the offence as he was not at the place where the offence was committed when it was committed.

The trial magistrate relying on the evidence of the complainant, Tendai Mavhaire and Elizabeth, convicted the appellant without, giving serious consideration to the appellant's defence of an alibi. The defence of an alibi must be properly investigated by the Police who must be able to assist the State to prove that the appellant was at the place where he says he was not, at the time the offence was committed. If the defence of an alibi is not properly investigated, and properly disproved by the state at the accused's trial the state's case must fail, because the onus to disprove the defence of an alibi is on the state.

In this case the state relied on the young complainant's evidence that the appellant had come to stay at their house, before she was raped in June 2008. She said he was staying there looking after his uncle Brenda's father's property. Her evidence was however clearly not reliable as to when the rape occurred and when the appellant came to stay at their house as she later said she was raped after her mother who died in December 2008 had died. She was thus confused as to when she was raped and when the appellant came to stay at their house. The appellant's alibi is made more probable by Elizabeth Dick's evidence, who said she did not know the appellant even though she stayed at a house next to the complainant's. If the appellant had stayed at the complainant's house for as long as the complaint tried to make the court believe he had , then how could, Elizabeth who seems to have been noticing what was happening at the complainant's house not have noticed him. On p 9 of the record of proceedings, Elizabeth told the trial court, that she did not know the appellant. She was however in May 2009 able to notice the way the complainant was walking and sitting, and reported the case to the police. This portrays her as an observant neighbour who should have noticed the appellant if he had stayed there for as long as the appellant said he did.

Tendai Mavhaire the complainant's aunt, who stays in Emerald Hill, gave evidence for the state. She on p 8 of the record said;

> "Accused may have started staying at complainant's place of residence in March 2009. If accused says he did not rape her because around that time he was not staying at the house I would not know if he was staying there. She only mentioned accused and Priscilla's father."

Her evidence does not inspire confidence that the appellant was staying at the complainant's house at the material time. Under cross-examination on pp 8 to 9, she had the following exchange with the appellant;

> "Q You said I used to hand you rentals. How many times?
> A Twice and it was in the evening and you handed it to me.
> Q Is it not my uncle who handed you because I was not yet staying there?
> A I would not know, I would just receive understanding it was from Brenda's father
> Q When did Ronica start staying at the house?
> A May 2009
> Q Was I now staying there?
> A I would not know but I talked to Carlton's mother who said you were now

staying there."

Miss *Machaya* for the appellant submitted that the above exchange proved the witness was not sure whether or not the appellant was staying at the complainant's house at the material time. She submitted that this witness's evidence on what she was told by Carlton's mother is hearsay as Carlton's mother was not called to testify.

The appellant in his evidence told the court that he started staying at the complainant's house in June 2009, and stayed there till July 2009. He was therefore saying he could not have raped the complainant before he came to stay there as he was not at that house and had no opportunity to commit the offence. In her evidence the complainant told the court that she was staying with an elder sister and elder brother, and several lodgers. They were however not called to testify on when the appellant came to stay at the complainant's house.

The appellant called his brother Discharge Mangwanda and Jonathan Mazvita Matinyarare who both told the court that the appellant was not yet staying at the complainant's house at the time the complainant was raped.

The determination of this case depends on whether or not the state proved the appellant's alibi to be false beyond a reasonable doubt. In the case of *S v Musakwa* 1995 (1) ZLR 1 (SC) at p 3 D-E McNALLY JA commenting on the defence of an alibi said;

> "The alibi defence is referred to in s 158 of the Criminal Procedure and Evidence Act and in Hoffmann and Zeffertt South African Law of Evidence 4 ed at p 619. The onus is on the State to disprove the alibi: *R v Biya* 1952 (4) SA 514 (A); *S v Khumalo & Ors* 1991 (4) SA 310 (A) at 327H.
> The State made no effort to disprove the alibi in this case. Mistakes in identification can happen. The police should know this. They should have checked."

In the case of *S v Mutandi* 1996 (1) ZLR 367 (HC) at p 369 F to 370 D GILLESPIE J also dealing with how the defence of an alibi must be dealt with said;

> "The treatment, in the rest of the passage, of the appellant's alibi is also open to the objection that it required the appellant to prove his alibi'. We were referred by counsel for the Crown to a passage in the judgment of Juta AJA, in *R v Dube* 1915 AD 557 at p 582, where the learned judge is reported to have said: Where the defence is an alibi it lies on the accused to prove it', but, with great respect, this statement cannot be supported. If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have

committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.

Similarly, in South African Law of Evidence 4 ed by Hoffmann & Zeffertt, the following appears on p 619:

> 'If there is direct or circumstantial evidence which points to the accused as the criminal, the most satisfactory form of rebuttal is for him to show that he could not have committed the offence because he was somewhere else at the relevant time. This is called the defence of alibi, but it is a straightforward denial of the prosecution's case on the issue of identity. Courts have occasionally fallen into error by treating it as though it raised two separate issues: (a) did it look as if it was Smith who broke into Jones's shop at midnight, and (b) was Smith really at home in bed? Splitting up the inquiry in this way leads the judge to say that if the prosecution adduces strong evidence on the first issue, the onus should be on the accused to prove his alibi. But the reasoning is fallacious because the prosecution has to prove beyond reasonable doubt that Smith is the burglar, and if the court considers it reasonably possible that he may have been at home in bed, it must acquit'.

There is no question but that the magistrate has misdirected himself on this question of onus. In my judgment this misdirection has in addition affected his assessment of the evidence as a whole."

The mistaken view held by the magistrate in the Mutandi case (*supra*) might have led to the State's laxity in leading cogent evidence to rebut the appellant's alibi. The defence calls for proper investigation by the police which can conclusively rest the State's suspicion against a suspect. If properly investigated the confirmation of the alibi will rest the State's case. It would result in only cases where the alibi can or may be rebutted being brought to court for trial.

I am in this case convinced that the appellant's defence of an alibi was not properly dealt with by the State which should have called evidence from the complainants elder brother or sister or their lodgers to establish whether or not the appellant was staying at the complainant's house at the time the offence was committed. The complainant's evidence is shaky on this and other aspects and can therefore not be relied on to rebut the appellant's alibi which has been confirmed by his brother and another lodger who both stay at the complainant's house where the offence was allegedly committed. These therefore are the reasons why we upheld the appellant's appeal.

Thondhlanga & Associates, appellant's legal practitioners
Attorney General's Criminal Division, respondent's legal practitioners.