

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A), M. Twomey (J.A), F. Robinson (J.A)]

CriminalAppeal SCA21/2017

(Appeal from Supreme Court DecisionCO 77/2015)

Nicholas Brian Julie

Appellant

Versus

The Republic

Respondent

Heard: 21 August 2018

Counsel: Mr. N. Gabriel for the Appellant

Mrs. L. Rongmei for the Respondent

Delivered: 31 August 2018

JUDGMENT

A. Fernando (J.A)

1. The Appellant has appealed against his conviction for sexual assault contrary to section 130(1) read with section 130(2)(d) of the Penal Code and the sentence of 7 years imprisonment imposed on him.
2. As per the particulars of offence X (name withheld) on 2nd October 2015, in the vicinity of Stad Linite, Roche Caiman, Mahe, without consent, sexually assaulted V (name withheld) by the penetration of her body orifice, namely the vagina, of the said V for a sexual purpose.

3. **Section 130 (1) of the Penal Code** states: *“A person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years.”*

4. According to **section 130 (2) (d)** “sexual assault” for the purposes of this section includes-

“...the penetration of a body orifice of another for a sexual purpose”.

5. According to section **130(3)**: *“A person does not consent to an act which if done without consent constitutes an assault under this section if-*

(a) the person’s consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act;

(b) the person is below the age of fifteen years; or

(c) the person’s understanding and knowledge are such that the person was incapable of giving consent”.

6. According to section **130(4)**: *“In determining the sentence of a person convicted of an offence under this section the court shall take into account, among other things-*

(a) whether the person used or threatened to use violence in the course of or for the purpose or committing the offence;

(b) whether there has been any penetration in terms of subsection (2)(d); or

(c) any other aggravating circumstances.”

7. Facts in Brief:

The victim who was 24 years old testifying before the court in her examination-in-chief, had stated that on the day of the incident she had gone to the Amusement Centre after work with two of her friends for a drink. Around 9-10 pm, her friends had left to go by bus and she had waited for her boyfriend. Since her boyfriend had got late to arrive she had approached the driver of a small white coloured car which was a ‘taxipirat’, (unlicensed taxi) that was parked at the Amusement Centre to take her to her home in

Sansousi. The driver is the Appellant in the case. The victim had not stated that she gave any other directions to the Appellant, who was a total stranger, as to the whereabouts of her home in Sansousi. She got into the front passenger seat and had fallen asleep. Suddenly she had woken up and found the Appellant, the 'taxipirat' driver, had been on top of her and strangling her with his hands around her neck. The victim had screamed but the Appellant had asked her to shut up. She had told court that "He raped me". The victim does not give any indication as to when the Appellant stopped having sex with her. The question therefore arises did he stop when she screamed or continued to have sexual intercourse even after she screamed? To the leading question "So you mean he penetrated your sexual organ, vagina" from the learned Prosecutor the victim had said "Yes". Again to the leading question "So he penetrated your sexual organ with his sexual organ", the victim had said "Yes". She realized the car had been parked behind the 'Stad Linite' stadium. This was not in the direction of Sansousi.

8. The victim had then managed to escape and run towards a place where she heard music. This was the Golden Plate Restaurant. While getting out of the car, the victim's telephones a Nokia and an Alcatel, had fallen inside the car. In answer to the question as to how she managed to escape, the victim had said: "I must have hit him with my phone. I just grabbed my bag and I ran". The victim in answer to a question by the learned prosecutor had said that she did not consent to have sex with the Appellant. To the leading question: "That is why you screamed and you hit him and you escaped from the car" the victim had said "yes". At the Golden Plate Restaurant she had sought assistance from a lady whom she saw there. The lady had then called the Police. The Police thereafter arrived and the victim had been taken to the hospital, where she had been examined. The following day she had given a statement at the Mount Fleuri police station.
9. Six days later the victim had identified the Appellant at an identification parade held at the Central Police station. In court she had identified the Appellant again and the car the Appellant was driving, from the photographs shown to her. She had also pointed out to the front seat, where she alleged, she was raped. The car is a small Daihatsu Charade numbered S 15448. It is clear from looking at the photographs of the car any non-consensual sexual intercourse while seated in the front seat of the car, in the manner

described by the victim is difficult, if not almost impossible, unless the seat was put into a reclining position. There is no evidence before the court that the front passenger seat of S 15448 could have or had been put into a reclining position. After the victim had said that she fell asleep because she had a few drinks the learned prosecutor had asked the victim “So I presume you started your work on that day very early in the morning and then in the evening you had this party which made you sleep in the car”, the victim had said, yes. She had not said what she drank or how much she drank. The victim had not said that she was intoxicated at any stage as not to know what was happening. Even if we are to accept that the victim was drunk, it is to be noted that drunken consent is also consent. The victim had stated that she did not ask the Appellant to take her to any other place nor does she recall going with the Appellant to any other place and had only told him to take her home to Sansousi.

10. We have highlighted some of the questions asked in examination-in-chief to warn prosecutors that they should not ask leading questions in eliciting evidence from witnesses for the prosecution. In view of the fact that the defence in this case is one of consent, no prejudice could therefore have been caused to the Appellant in regard to those questions.
11. The victim under cross-examination had said that this was the first time she had fallen asleep in a stranger’s car. The victim had never seen the Appellant before. That was the reason to hold an Identification Parade. She had said that no sooner she got into the car she had fallen asleep as she had taken a few drinks and was tired since she had started working that day early in the morning, and that is the reason why she did not notice in which direction the car was being driven. She denied the defence allegation that after she had got into the car, she had drinks with the Appellant at La Louise. When questioned as to whether she consented to buy alcohol after she got into the car of the Appellant, the victim had said that she did not recall as she was drunk and tired. She had said that a breathalyzer test had not been conducted on her nor was she subjected to any alcohol test when she was taken to the hospital after the incident. She had said that at the hospital she had been examined by a gynecologist. It had been the defence position that was put to the victim in cross-examination, that within the confined space of the front seat of the Appellant’s small car and taking into consideration the fact that the Appellant is a person

with a large body, it was not possible for the Appellant to have had sex with the victim without her consent. The victim had said that she does not know whether the doctor had found any marks on her neck when she was examined. The victim had stated that her panties got lost that night but had not been able to explain how her panties were removed by the Appellant without her realizing it. The victim had not spoken of her clothing being torn. She had stated that she is not aware how the seat of the car was put into a reclined position or how she was pushed up, for the Appellant to have sex with her. It has been the defence position that the victim's legs normally would have been on the footpath under the dashboard, indicating that it is difficult to have penetration of the vagina in that position. The victim had stated that on the next day when her sister rang one of her phones, that had got lost during the incident, namely the Alcatel one, according to the sister, the Appellant had, answered the phone. The phone had been later returned by the Appellant.

12. PW 4, the victim's sister testifying before the court had stated that the victim had come home around 4 or 5 am, on the 3rd of October 2015 morning (incident was on the previous night) and wanted her to wake her up at 7 am. When the victim woke her up the following morning PW 4 had asked her where she was going and it was only then, that the victim had told her that she has to go to the hospital to get some pills and the police station, as she had been raped. The victim's sister had accompanied her to the hospital and police station. Thereafter the victim's sister had called the Alcatel number of the victim, which had got lost during the incident on the previous night. She then had said a man's voice had answered from the other end. The person had told her that the phone had got lost when he was driving around and he does not know for whom that phone belongs. When asked how she could get back the phone, she had been told that he lived at Port Glad behind the police station and that she could come and pick it up. A little later he had called to ask her whether she could wait as he was coming to town around 3 or 4 o'clock. She had promised to call him back but instead passed on the information to the police.
13. PW 6, a general helper working at Golden Plate Restaurant, Roche Caiman had corroborated the victim's evidence of her having come running towards the restaurant and seeking assistance. According to PW 6 around 10.30 to 11 on the night of the 2nd of

October, the victim had come from the left side of Stad Linite screaming, towards where she was with two others, and fallen in front of them. When they raised her up she had been crying and had told them that she had been raped. Her hair had been messy. The victim had also told her that she came from the Amusement Centre, that she took a 'taxi pirat' to bring her to Sansousi but the driver had brought her to Roche Caiman and that the driver had taken her mobile. She had given PW 6 her phone number to call but the phone had rung but had been cut off. The victim had also given her boyfriend's number to PW 6 to call, but there had been no response. PW 6 had then called the police, who arrived and took the victim away. PW 6 had not said that the victim was or appeared to be drunk.

14. PW 7, was a police officer who came to Golden Plate on the night of the 2nd of October on receipt of the call from PW 6. The victim on being questioned by her had said that she had been sexually abused. She had then taken the victim to the Mont Fleuri police station. On examining the victim she had seen two 'red marks' under the right side of her neck. There was no evidence before the Trial Court as to what these 'red marks' were and what possibly caused them. She had then issued her with a paper to go to the doctors. PW 6 had not said that the victim was or appeared to be drunk.

15. PW 8, the Gynecologist, who had examined the victim in the early hours (1.10 am) of the 3rd of October 2015 had stated that he had seen a scratch on the right side of the neck of the victim and that there had been inside her vagina, a white discharge. Although a vaginal swab had been taken, no report had been produced. The gynecologist had not been questioned as to what could have possibly caused the scratch marks found on the neck of the victim. The doctor had not spoken of any other injuries, inflammations, abrasions or scratch marks on the body of the victim, her thighs or in the region of her vagina. The gynecologist had not stated that the victim was under the influence of liquor when he examined her. The doctor under cross-examination had categorically stated that he was unable to confirm any sexual activity, leave aside rape.

16. PW 5, was a doctor at the Victoria Hospital. He had examined the Appellant at the hospital on the 3rd of October 2015 at 2.25 am at the Casualty. He had noted that he had found multiple superficial abrasions over the right and left area on the back of the shoulder and over the scapula. According to the doctor the abrasions could have been caused by scratching or could have been inflicted during love making but unable to give a time as to when the abrasions had occurred. In cross-examination he had stated that he referred the Appellant to a Surgeon. There is some anomaly or confusion regarding the evidence of PW 5, as the Appellant had not been arrested or even identified at the time the doctor had claimed he examined the Appellant. Unfortunately, this has gone unnoticed by the prosecutor, the defence counsel and the learned Trial Judge and no attempt had been made to have the matter clarified and corrected. Since it is not clear whom PW 5 had examined we cannot place any reliance on the evidence of PW 5.
17. The cautioned statement of the Appellant, namely P 6, had been led in as part of the prosecution case. According to the Appellant: "I want to say to the police that I was already consuming alcohol me and that woman and we went to buy more beer at the Baba's shop at Plaisance, we continue to drink me and that woman in the car. And that woman agreed for doing sex with me and then I gave that woman Rs 400. Then we continue to ride and we were taking some drinks and then I took her off that woman at the Barrel Trading. I want to say that before I took her off she vomit in the car. I want to tell the police that I did not tell that part before because I will have problem with my lady. The evidence that I gave with the police, I was being told that I can change, add and correct what I want and the evidence is true and I gave it voluntarily."
18. If as the Appellant states that he had dropped off the victim at the Barrel Trading, which is quite a distance from Stad Linite, Roche Caiman, the question arises how was it possible, at around 10.30 to 11 on the night of the 2nd of October, the victim came to be found at the Golden Plate Restaurant at Roche Caiman by PW 6 in a distressed state, complaining that she had been raped by a 'taxipirat' driver, the Appellant. The learned prosecutor in his examination-in chief had not questioned the victim about the SR 400.00 given to her by the Appellant for having sex with him as stated in the Police

statement of the Appellant, which was led in as evidence by the prosecution as part of its case. In consequence this has to be taken as an admitted fact by the prosecution.

19. The Appellant had in exercise of his rights under article 19(2) (h) of the Constitution remained silent at his trial without giving evidence on oath or making dock statement. **Article 19(2) (h) of the Constitution** states: *“Every person who is charged with an offence shall not have any adverse inference drawn from the exercise of the right to silence either during the course of the investigation or at the trial.”*
20. There are two fundamental questions that necessarily arise for determination on the facts of this case. Did the victim, as claimed, not consent to having sex with the Appellant and was the Appellant aware that the victim was not consenting? An answer to the first question can be found only on the basis of the evidence of the victim and the corroboration of her evidence by that of PW 6, who had stated that the victim came running to them in a distressed state and with disheveled hair, complaining that she had been raped. The only inference that can be drawn from disheveled hair of a person after sexual intercourse is not necessarily that she had been raped especially taking into consideration that the act had taken place within the confines of a small car. The medical evidence in this case is inconclusive in view of the gynecologist’s evidence that he was unable to confirm any sexual activity, leave aside rape and that of PW 5, the doctor at the casualty who was obviously mistaken about the time of the examination had stated that abrasions found on the back of the Appellant could have been caused by scratching or could have been inflicted during love making but unable to give a time as to when the abrasions had occurred. The victim had been examined within 2-3 hours after the incident and the question therefore arises as to the absence of any injuries, inflammations, abrasions or scratch marks on the body of the victim, the thighs or in the region of her vagina, save that of the scratch marks on the neck of the victim and especially in view of her evidence that this was a case of non-consensual and forcible sex and she had to put up some sort of a struggle to escape from the Appellant.
21. The victim’s evidence has to be examined in the backdrop of the evidence that she did not know what was happening to her, until she found the Appellant on top of her and the defence position that was put to the victim in cross-examination, that within the confined

space of the front seat of the Appellant's small car and taking into consideration the fact that the Appellant is a person with a large body, it was not possible for the Appellant to have had sex with the victim without her consent. Further there is no evidence that the victim was intoxicated at any time that evening. The victim's evidence that she got in to a stranger's car and fell asleep no sooner she sat down, her inability to explain how her panty came to be removed and how the front passenger seat came to be put into a reclining position, if that was the case, casts doubts on her version.

22. As regards the answer to the second question, namely was the Appellant aware that the victim was not consenting, we have only the evidence of the Appellant who in his statement to the police had said that the victim consented to having sex with him. There is no evidence to indicate that the victim was so drunk that she was incapable of giving consent due to her inability to understand or have knowledge of what was happening to her at the time of the alleged incident. The evidence of PW 6 and 7 referred to at paragraphs 13 and 14 above do not indicate that the victim was in an intoxicated condition and that was within minutes of her having escaped from the Appellant as stated by the victim. The only remaining question being had the victim got into such a deep slumber from the time she got into the car up to the time she saw the Appellant on top of her as not to understand or know what was happening to her to the extent that she was incapable of giving consent. The victim had not stated that she is one who normally falls into a deep sleep, as to be totally oblivious as to what is happening around her. In the absence of any evidence in this regard, she has to be viewed from the standard of a normal person.

23. Under our Penal Code there is no evidential presumption as under section 74 of the Sexual Offences Act 2003 of UK that if the defendant knew that the complainant was asleep the complainant is taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it. There is no evidence to bring this case under section 130(3) (c) referred to at paragraph 5 above.

24. Counsel for the defence in his submissions to the Trial Court had drawn the attention of the court to the fact that there were no injuries or torn clothing suggestive of forcible sexual intercourse. The Appellant according to PW 4, the victim's sister, had told her that the phone had got lost when he was driving and he does not know for whom that phone belongs. When asked how she could get back the phone, she had been told that he lived at Port Glad behind the police station and that she could come and pick it up. A little later he had called to ask her whether she could wait as he was coming to town around 3 or 4 o'clock. It had been the submission that this behavior is not consistent with a person who had raped the victim the previous night in the circumstances described by the victim, and especially one who had been hit by the victim with the phone before she escaped.

25. The learned Trial Judge had convicted the Appellant on the basis of the following facts as stated by him at paragraphs 13 -15 in his judgment:

- The distress state in which PW 6 found the victim soon after the alleged incident and the victim's prompt complaint of rape to both PW 6 and PW 7, indicative of consistency of the victim's evidence. The learned Trial Judge himself had taken note of the judgment in **R VS Romeo [2004] Crim L.R** where it had been held that subsequent distress conduct of the victim could possibly be feigned, but concluded that the victim's distress conduct was spontaneous.
- The victim's evidence that she was strangled is supported by the evidence of PW 7 and PW 8 who saw scratch marks on her neck, indicating trauma in that region. This is a wrong basis for the learned Trial Judge to have relied upon as there is no evidence what those scratch marks were and how they had been caused, leave aside the scratch marks being indicative of trauma. Certainly there is no evidence to support the victim's allegation of strangulation with the hands of the Appellant.
- That the Appellant had posed off as a 'taxipirat' - There is no evidence that the Appellant posed of as a 'taxipirat' as stated by the learned Trial Judge.

26. It is not that we totally disbelieve the victim's version or believe the version of the Appellant, as found on the recorded proceedings, but we find that both parties are hiding

something and not coming out with the whole truth. This is one of those cases that there certainly are doubts in the prosecution case, that have been highlighted below, which both the learned Prosecutor and the learned Trial Judge have failed to deal with.

- Is it possible that the victim fell into a deep slumber no sooner that she got into the car of a stranger, the Appellant, a ‘taxipirat’, even without telling him where in Sansousi she had to be dropped?
- Is it possible that the victim realized that she was being raped only after her panty had been removed, the seat in that small car having been put to a reclining position and the victim been placed in a position where vaginal penetration was made easy?
- Is it possible that the victim got into such a deep slumber so as to be oblivious to all these happenings? The victim had not said that she is one who goes into a deep slumber when she sleeps, nor is there any evidence to say that she was intoxicated to such an extent as not to know what was happening and the Appellant took advantage of the position he found her in.
- Is it possible that had she been intoxicated to such an extent as not to know what was happening to her when the appellant raped her, and PW 6 , 7, and 8 who saw her thereafter failed to notice it?
- Is it possible that the victim could have coherently narrated to PW 6 the alleged incident and the events that led up to it if she was asleep or intoxicated at the time of the incident?
- Is it possible that her clothing remained intact, without being torn and there were absolutely no injuries or scratch marks on her body especially her thighs and no inflammation in her vagina suggestive of forcible and non-consensual sexual intercourse as alleged by the victim?
- Had the prosecution offered any evidence as to the possibility that the two red marks found on the right side of the neck of the victim by PW 7 and the scratch mark found by the Gynecologist on the right side of the neck of the victim could possibly have been as a result of the Appellant attempting to strangle the victim as alleged by her and or not as a result of a love bite?

- It was the prosecution evidence that the Appellant answered the mobile phone of the victim with which the victim claimed she had hit the Appellant and that had fallen inside the Appellant's car and identified himself giving his address and later showing his willingness to bring it along and hand it over to her in town, when PW 4, the victim's sister called him on the day after the incident. Is this not consistent with his innocence?

27. The Prosecution has not offered any evidence to dispel these doubts nor has the learned Trial Judge dealt with these doubts. The learned Prosecutor has failed to question the doctor as to whether the scratches found on the neck of the victim are consistent with her being strangled, which would have helped the court to make a correct determination in this case. We are reluctant to disturb the findings of a Trial Judge on facts and credibility, but when there has been no evaluation or critical analysis of the evidence by the learned Trial Judge but a mere reliance on the evidence and that mainly of the complainant, we are compelled to intervene. The learned Trial Judge had failed to consider the version of the victim as regards the alleged incident of rape as described by her, as probable and can be relied upon without a reasonable doubt, vis-a vis the version of the Appellant as being reasonably possible. The reasons set out in the judgment by the learned Trial Judge as referred to at paragraph 23 above, for convicting the Appellant are insufficient and unsatisfactory as he had overlooked certain facts and improbabilities.

28. Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where he overlooks facts or improbabilities. When evaluating or assessing evidence, it is imperative to evaluate all the evidence and not be selective in determining what evidence to consider. In the South African case of **S V Van der Meyden 1999 (1) SACR 447 (W) 450** it had been stated: *“What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false and unreliable, but none of it may simply be ignored”*.

29. We cannot close our minds to the well-known principle that the benefit of any doubt has to go in favour of the accused, especially when the overall picture arising from those doubts creates a reasonable doubt as to the guilt of an accused person. This Court had

held in **Raymond Lucas VS The Republic SCA 17/09** that it was not obligatory on the Court to give a corroboration warning in cases involving sexual offences before convicting an accused person, but when as in this case there are doubts in regard to the victim's evidence and the case in its entirety and which cannot be resolved and which leads up to a reasonable doubt we have no option but to give the benefit of that reasonable doubt to the Appellant.

30. It was held in the South African case of in **S V Van der Meyden 1999 (1) SACR 447 (W)** that: *“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”*
31. In the Canadian case of **R VS Lifchus [1997] 3 SCR 320** it was held: *“Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt...”*
32. In the United States Supreme Court decision in **Re Winship [1970] 397 US 358**, the court held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution. The same could be said in regard to article 19(1) of our Constitution which states that *“every person charged with an offence has the right to a fair hearing”* and under article 19(2) (a) *“is innocent until the person is proved or has pleaded guilty”*. **Brennan J** said in **Re Winship**: *“Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”*
33. The Supreme Court of India said in **B. N. Mutto & Another v. Dr. T.K. Nandi [1979] 1 SCC 361**: *“It stems out of the fundamental principle of our criminal jurisprudence*

that the accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But, fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him.” (emphasis added)

34. The Supreme Court of India said in the case of **State of Punjab v. Jagir Singh [1974] 3 SCC 277**: “A criminal trial is not like a fairy tale wherein one is free to give flight to one’s imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged..... In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts.....”
35. In the South African case of **S v T 2005 (2) SACR 318 (E)**: “The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law...”

36. In the South African case of **Ricky Ganda vs The State [2012] ZAFSHC 59**, it was held: “..... The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”
37. Also in the South African case of **Zulman JA in S v V2000 (1) SACR453 (SCA)**: “It is trite that there is no obligation upon an accused person, where the State bears the onus, “to convince the court”. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false....”(emphasis added)
38. In the Zimbabwe case of **S V Makanyanga 1996 (2) ZLR 231** the court observed: “A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of the criminal complainant, but the fact that such credence is given to the testimony does not mean that conviction must necessarily ensue. Similarly the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that the complainant be believed. It demands that a defence succeeds wherever it appears reasonably possible that it might be true.”
39. In **R V Cooper [1969] 1 All ER 32 at 34** it was said an appeal court: “*must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it...*”In this case there is a lurking doubt in our minds as to

whether the conviction should stand based on an analysis of the evidence of both the victim and the Appellant, but the general feel of the case.

40. For the reasons enumerated above we have decided to allow the appeal, quash the conviction and acquit the Appellant forthwith.

A.Fernando (J.A)

I concur:.

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F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 31 August 2018