LIBERTY MAGUREYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 November, 2016 and 22 November 2016

Bail Pending Appeal

N Mabhoyi, for the applicant
I Muchini, for the State

CHITAPI J: The applicant applies for bail pending appeal against sentence. The applicant was convicted on his own plea of guilty to one count of contravening s 70 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The section of the law criminalizes the act of having sexual intercourse with a young person and related or kindred offences. A young person is defined as a boy or girl below the age of 16 years.

The applicant was convicted by the magistrate sitting at Guruve court on 22 July 2016 on allegations of having had sexual intercourse with the complainant who was aged 15 years and 2 months. The applicant was aged 24 years old. Sexual intercourse between the two occurred once. The applicant was sentenced to 3 years imprisonment with 1 year suspended on conditions of good behaviour. On 26 October, 2016, MUSHORE J granted the applicant leave to note an appeal against sentence out of time. The applicant filed his appeal on 31 October, 2016. The appeal as indicated is against sentence and it is pending. The penalty provision for the offence in issue provides for a fine not exceeding level 12 or imprisonment for a period not exceeding 10 years. Needless to state that the circumstances of each case will determine what an appropriate sentence ought to be.

The State has opposed the bail application or put aptly the admission of the applicant to bail pending the determination of his appeal against sentence. The approach of the court to such applications is enlightened by s 115 C (2) (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. The section was inserted by s 28 of Act No 2 of 2016 which is coined; 'The

Criminal Procedure & Evidence Amendment Act'. It came into operation on 10 June, 2016. Section 115 C in the relevant part reads as follows:

> "**115 C Compelling reasons for denying bail and burden of proof in bail proceedings**
> (1) …..
> (2) where an accused person who is in custody in respect of an offence applies to be admitted to bail –
> (a) ……
> (i) …..
> (ii) ….
> (b) after he or she has been convicted of the offence, he or she shall bear the burden of showing on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail."

The power to admit a convicted person to bail pending appeal is provided for under s 123 of the Criminal Procedure & Evidence Act. The amendment act has not altered the considerations which a court must take into account in determining such applications. It has simply restated the question of the incidence of onus.

The phrase or term 'interests of justice' where the applicant has been convicted and sentenced and seeks bail pending appeal has not been defined in the Criminal Procedure & Evidence Act. The term has somewhat been defined with respect to applications for bail pending trial as fully espoused in s 117 (1) and (2) of the Criminal Procedure & Evidence Act. The courts have however evolved over time the considerations which are taken into account in determining whether or not to admit a convicted person to bail pending appeal. A failure by the applicant to prove the existence or otherwise of these factors on a balance of probabilities must perforce mean that it would not be interests of justice to grant bail pending appeal to the applicant.

The considerations which looked at are the following, including any other relevant considerations:

(a) the prospects of success on appeal

(b) risk of applicant absconding

(c) likely length of delay before the appeal is finalized

(d) applicant's right to freedom

See *S* v *Dzawo* 1998 (1) ZLR 539 (S), *S* v *Williams* 1980 ZLR 466 (A), *S* v *Kilpin* 1978 RLR 282 (A)

The facts of this case show that the applicant was gainfully employed and stood to lose his employment through incarceration. The complainant fell pregnant as a result of the

sexual escapade with the applicant. The learned magistrate reasoned without evidence to that effect that the complainant's pregnancy placed her at greater risk that as a child complainant she would not be mature enough to carry the pregnancy. The learned magistrate also reasoned that the complainant had dropped out of school due to the pregnancy, thus her education was disturbed. There was on record no such evidence led although it was a reasonable assumption. The learned magistrate reasoned further that the applicant's conduct could not be tolerated at all.

It appeared to me that the learned magistrate whilst correctly taking a serious view of the offence did not take into account some relevant factors which require ventilation in the assessment of sentence. The State outline alleged that sexual intercourse was consensual. Whilst consent is not a defence, it is nonetheless a relevant factor in mitigation because there can be cases where a complainant is for example sweet talked into agreeing to sex with false promises. The behaviour and attitude of the complainant in the process of the commission of the offence is relevant to sentence. The complainant was nearly 16 years old. The disparity in the ages of the complainant and the applicant appear not to have been considered by the learned magistrate. The applicant was a youthful first offender who was still single. The learned magistrate considered that a fine or community service would trivialize the offence.

The State counsel in opposing bail argued that the court had a duty as the upper guardian of minor children to safeguard their interests. Reference was made to s 70 of the Criminal Law (Codification & Reform) Act and the new constitutional dispensation. Counsel argued that the sentence imposed fell within the parameters of penal provisions for contravening s 70 of the Criminal Law (Codification and Reform) Act. I agree with the observation. I also agree that sentencing is a discretion to be exercised judicially by a trial court. I however hasten to add the rider that a discretion can only be properly exercised when the sentencer takes into account all the relevant facts and circumstances of a particular case including the offender's interests and the interests of society. My attention was drawn to the review judgment of my sister CHAREWA J, in *State* v *Shepherd Banda* and *State* v *Everton Chakamanga* HH 47/16. She reviewed both cases and prepared a composite judgment covering both cases. In the two cases, both accused persons were aged 30 years and the girls who were sexually defiled were 15 years old. Both accused persons were sentenced to 24 months imprisonment with half the sentence suspended on conditions of good behaviour. In a well-reasoned and instructive judgment in which the learned judge considered past case law,

provisions of the new Constitution, international instruments on the rights of children, and the circumstances of the commission of the offences and their prevalence, she urged courts to be mindful of the views expressed in *S* v *Onismo Girandi* HB 55/12.

I have read the judgment in *Girandi's case (supra)* and agree that society needs to appreciate that courts will not countenance child sexual abusers. In CHAREWA J'S judgment the learned judge then stated, "I would add that an effective sentence of not less than 3 years should be imposed, on an incremental basis for those accused who are twice the victim's ages, are married with children of their own and impregnate the young persons or infect them with sexually transmitted diseases other than H.I.V." Counsel adopted the approach of the court advocated in the erudite judgment of CHAREWA J.

With all due deference to the learned judge and as I pointed out to counsel in argument, I was not persuaded that the reasoning and bench marking of a 3 year sentence as a minimum in circumstances reviewed would be the proper approach to sentencing without room for departing from it. I am not persuaded that a pronouncement which has the effect of fettering judicial discretion is correct nor is it desirable for a court to bench mark a minimum sentence for an offence. The legislature in its wisdom has provided for the range of sentencing for a contravention of s 70 of the Criminal law Codification and Reform Act. The legislature has not sought to set out the factors which should influence a court on what sentence to impose in any given case. I pointed out to counsel that whilst the review judgment of CHAREWA J was persuasive, there certainly would need to be a full ventilation and argument being presented on the issues raised, lest courts are seen as having set or adopted a tariff approach to sentence. A tariff approach to sentence is contrary to the intention expressed by the legislature in the penal provision under s 70 of the Criminal Law Codification and Reform Act and fetters judicial discretion. A tariff approach to sentencing has its disadvantages notably and in the main being that it focuses more on the offence rather than on all circumstances relevant to sentencing. Each case in my respectful view should be treated on its own facts and I am not persuaded that the presence of the factors enumerated in the review judgment of my sister CHAREWA J must lead in all cases where they are present to a minimum sentence of 3 years imprisonment. It may well be that more or less that 3 years imprisonment would meet the justice of a given case. I was therefore of the view that I could not rule that the applicant had no prospects of success on appeal and adopted the approach

that the appeal would invite researched argument which would lead to the same or a different pronouncement from that reached by CHAREWA J which the State counsel felt bound by.

To the extent that I was not persuaded that the applicant was without prospects of success because of the judgment I have commented upon, I held the view that the provisions of s 70 aforesaid should bind the court and that an argument contra to the dicta in the review judgment aforesaid had prospects of success. There is no doubt that excessive adherence to the cause of deterrence as one of the considerations in tariff sentence approaches easily obscures other relevant factors which should be considered in determining an appropriate sentence in a given case. Indeed the most important factors in assessing an appropriate sentence and as borne by a consideration of our jurisprudence remain the person/offender, the character and circumstances of the offence, the interests of society, with the seriousness and gravity of the offence not being allowed to overly influence a judicial officer to fail to consider and take into account other less important but relevant factors in determining the appropriate sentence.

I have pointed out to the inadequacy of the reasons and the considerations which the learned magistrate took into account in assessing sentence. The appeal is not doomed to fail nor can it be said to be hopeless. Whilst a prison term will be merited it could be that the appeal court may reduce it. It would be a serious indictment on the criminal justice system and would be prejudicial if the applicant were to continue to serve a sentence which the appeal court may interfere with substantially.

Having decided that the applicant's appeal has good prospects of succession, I will not unduly dwell on the other factors of risk of abscondment, delay in the hearing of the appeal and the applicant's rights to liberty. The applicant has sufficiently addressed these aspects. The State has not put them in issue nor sought to controvert them. I must therefore rule under the circumstances that the applicant has satisfied the requirements for bail pending appeal by discharging the onus reposed on him to demonstrate that it is in the interests of justice that the applicant is admitted to bail pending appeal. I accordingly allow the application and impose the following conditions.

1. The applicant is granted bail pending the determination of his appeal No. CA 718/16
2. The applicant shall deposit US$100.00 with the Clerk of Guruve Magistrates Court.
3. The applicant shall reside at 22 Umvukwes Flats Farm, Mvurwi until his appeal is determined.

4. The applicant shall report once a month on the first day of each month at Mvurwi Police Station pending the determination of his appeal.

Maboyi & Associates, applicant's legal practitioners
The Prosecutor General, respondent's legal practitioners