PRIDE MASIYAMBIRI
and
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE,10, 18, 22, 23 & 24 November, 2016

Bail pending appeal

Applicant in person
F I Nyahunzvi, for the respondent

CHITAPI J: The applicant applies for bail pending appeal. He was convicted of the offence of rape as defined in s 65 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] after a full trial by the Regional Magistrate setting at Marondera on 4 May, 2015. The applicant did not attach a franked notice of appeal to his application. There is no indication therefore that he has a pending appeal properly awaiting determination. The application however has attached to it, the magistrate's response to grounds of appeal. I will therefore assume that the applicant did file a notice of appeal to which the magistrate commented. In applications of this nature, it is desirable to indicate in the application, details of the date when the appeal was filed following sentence. The appeal reference if given by the appeal court should be noted. The draft order should indicate that the order sought is for admission to bail pending a specified appeal number to avoid confusion.

The respondent has not taken issue with the absence of the notice and grounds of appeal from the applicant's application papers. The applicant is a self-actor. This application will therefore be determined on the merits because albeit the absence of a franked notice of appeal, the applicant has attached a photocopy of a document headed "notice of appeal on grounds against conviction." At the end of the document is indicated "against sentence." The applicant indicated that this document was in fact the appeal which he filed.

I have decided to deal with the application on the assumption that the applicant's appeal is pending. He thus appeals against conviction and sentence. He was sentenced to 15 years imprisonment with 3 years suspended on conditions of good behaviour. The allegations

against the applicant were that he had unlawful sexual intercourse with a female juvenile aged 9 years. Such a juvenile in law is deemed not to be capable of giving consent. The applicant was alleged to have unlawfully defiled the juvenile in the month of October, 2013. The applicant is an uncle to the juvenile. The applicant and the juvenile were staying at the applicant's mother's homestead in Macheke. The offence was revealed by the juvenile to her teacher in October 2014. The teacher then accompanied the complainant to the police where the complainant medical a report. Upon examination of the complainant by the doctor, the result was that penetration had been effected. The applicant consented to the production of the medical report. The applicant testified in court in the victim friendly court setting.

The only issue for determination in the light of the admission of the medical report by the applicant was whether it was the accused who sexually violated the complainant. The learned regional magistrate in his judgment correctly identified the issue to be determined as one of the identity of the perpetrator.

In his defence outline the applicant alleged that he was falsely being implicated because he had problems with the complainant's mother. He said that the complainants' mother stopped paying school fees. The complainant and another sibling (s) of the complainant were then sent to their mother. Two weeks later the applicant was telephoned by someone who told him to run away from the area because there were allegations made against the applicant that he had raped the complainant. He however did not run away.

A reading of the record shows that the complainant gave clear evidence which was easy to follow. She testified as to the relationship between her and the applicant and how he had removed her panties and did indecent things to her. She described the act of the applicant of putting his penis into the vagina and of the act being painful. The incident happened in the house and the complainant's grandmother had gone to the garden. She testified that the accused admonished her not to reveal the incident to anyone. She later revealed the incident to her teacher. Under cross examination the complainant refuted that the applicant was always away herding cattle till evenings. She also said that she did not report because the applicant told her not to report. The applicant's teacher testified that the complainant made a report to her following a lesson on child abuse. She also observed the complainant to be withdrawn and not participating in class activities. The teacher's evidences corroborated that of the complainant with regards how the complainant was raped as testified by her in court.

The applicant adopted his defence as his evidence in chief. Under cross examination he stuck to his story that he was being framed by his half-brother and complainant's mother

because the complainant and her siblings had been sent to their mother who was not paying school fees for them. He also alleged that his half-brother's wife had said that he had seen the complainant having sex with her child. The complainant's grandmother, accused's mother, denied that there was bad blood between complainant's mother and her. She is the one who took the children to their mother and the children were well received. Under cross examination the grandmother testified that the accused's half-brother had reported that he had seen the complainant and his own child having sex and on questioning complainant where she learnt acts, the complainant said that she had learnt the acts from the accused.

The learned magistrate was alive to the dangers associated with taking evidence of young children at face value. He commented that evidence of sexual abuse was sufficiently proven. The learned magistrate was impressed with the complainant's evidence and dismissed the applicant's evidence that charges were fabricated against him. The complainant's behaviour of reclusing in class and only revealing her ordeal after a lesson or talk on sexual abuse by the teacher typified how such offences ordinarily surface or are revealed. There was no reason for the complainant to point out the applicant as her molester given their relationship.

The applicant seeks to attack the magistrate's judgment on the basis that the complainant only reported the matter after one year. The applicant of course is misdirected because the complainant did not make a report. She revealed the abuse following a development at the school when there was talk of sexual abuse by her teacher. She most likely would not have told anyone. The magistrate gave reasons for accepting the late revelation as well explained.

The applicant went at length to try and fault the magistrate's finding of rape on the basis that the medical evidence only showed that the complainant's hymen was stretched or attenuated. There is no substance to this submission. The doctor found evidence of penetration and the applicant did not dispute the doctor's findings.

The applicant's grounds of appeal do not really merit much consideration. They deal with issues which the applicant did not raise at trial. The sole issue for determination was whether or not the applicant raped or sexually abused the complainant. The issue was one of whether or not the complainant fabricated lies against the applicant. As indicated above, the learned magistrate was very much aware that he was dealing with evidence of a young child and the safeguards he needed to be guided by him. In the absence of a demonstrable misdirection of fact or law committed by the magistrate, the prospects of success of the

applicant's appeal succeeding are non-existent. As for sentence, the applicant's sentence fell within the range of sentences imposed for such offences. The sentence which the court may impose is imprisonment for any period up to life imprisonment. There are no prospects of the sentence being disturbed on appeal moreso in view of the learned magistrate not having misdirected himself with respect to determining sentence.

The applicant in an application of this nature bears the onus to demonstrate on a balance of probabilities that it is in the interests of justice that he be admitted to bail pending determination of his appeal. The onus is placed on him by s 115C (2) of the Criminal procedure & Evidence Act. In discharging this onus the applicant should demonstrate that his appeal has prospects of success, that there is no like hood of him absconding, that he will suffer prejudice arising from a likely delay in the hearing of his appeal. *S* v *Dzawo* 1998 (2) ZLR 593. In my judgment the applicant's prospects of success on appeal are hopeless and non-existent. The interests of justice dictate that he should serve his sentence notwithstanding his pending appeal.

In view of my findings that the applicants appeal against both conviction and sentence are non-existent or hopeless I dismiss his application for bail pending appeal and it is so ordered.

National Prosecuting Authority, respondent's legal practitioners