

SIMBARASHE GWASHAVANHU
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 26 July 2019 & 20 September 2019

Bail Ruling

N Chigoro, for the applicant
E Makoto, for the respondent

NDEWERE J: The applicant was charged with rape and convicted after a full trial on 20 June 2019 and sentenced to 16 years imprisonment.

On 5 July 2019, he noted an appeal against both conviction and sentence. The grounds of appeal were as follows:

“AD Conviction

1. The court *a quo* misdirected itself when it convicted the applicant when there are serious inconsistencies between the complainant’s evidence and that of the father of the complainant.
2. The court *a quo* erred by validating the evidence of the complainant which differed from what she told the police and her father.
3. The court *a quo* erred when it stated that accused had failed to challenge complainant’s evidence at the same time admitting that he was a self-actor and not knowledgeable to court process.
4. The court *a quo* erred when it disparaged the evidence of the defence witness without any cause.
5. The court *a quo* erred when it convicted the appellant without considering the reliability of the complainant against material differences in the state case.

AD Sentence

The sentence arising out of a wrong conviction need to be quashed. Wherefore appellant pray that the conviction be set aside and substituted with that of “Not Guilty” and the sentence be quashed.”

On 11 July 2019 the applicant filed an application for bail pending appeal. He referred to the following principles which guide bail pending appeal and which were referred to in *Mungwira v The State* HH 216/10 as follows:

- i) prospects of success on appeal
- ii) likelihood of abscondment in light of the gravity of the offence and the sentence imposed.
- iii) Likely delay before the appeal is heard.
- iv) The right of an individual to liberty.

He referred to *S v Dzawo* 1998 (1) ZLR 356 which state that of the above principles, the most cardinal in an application for bail pending appeal is whether there are prospects of success.

The applicant submitted that he had prospects of success on appeal.

The State filed a response on 18 July 2019. It did not oppose bail.

The court was not convinced that the concession by the State was proper so it invited submissions from the applicant. The matter was argued on 26 July 2019.

After going through the record of proceedings and hearing the submissions, the court’s view is that the applicant has no prospects of success on appeal.

The background facts are that the applicant raped his sister in law. The applicant and the complainant lived at the same homestead. On 16 October 2018, the complainant went to a neighbour’s homestead to text her husband whom she had expected to meet that day. She exchanged text messages with her husband. The applicant later joined her at the neighbour’s. He requested to be allowed to place his sim card in the neighbour’s handset so that he rings the complainant’s husband. The request was granted. After the termination of the call to the complainant’s husband, the neighbour accompanied both the complainant and the applicant and took them half way and returned to her homestead. By then it was around 7 p.m. After the neighbour had gone back to her house, the applicant asked to have sexual intercourse with the complainant. She refused and began to run away. The applicant ran after her, caught up with her, overpowered her and had sexual intercourse once with her without her consent. The

complainant cried out but the applicant covered her mouth with his hand. When he was through, the applicant left the complainant on the scene, crying; and proceeded home.

The complainant later proceeded home and reported the rape to the applicant's wife who questioned the applicant. The following day, 17 October 2018, she told applicant's mother. The following day, 18 October 2018, she left her in law's residence and went to her parents where she reported to her parents. She said she reported the rape to the police and she was referred to hospital for medical examination. The medical report was not part of the record of proceedings provided to the court although it was indicated as produced as exh 1 on p 10.

An analysis of the evidence does not reveal any misdirection by the court *a quo*. If there was no misdirection, an appeal court cannot interfere with the case. If an appeal court cannot interfere then bail pending appeal should not be granted.

In his defence outline, the applicant admitted following the complainant to Manduna's home. He admitted it was in the evening. He admitted leaving Manduna's home together with the complainant, but denied raping her. He said he did not know why she lied against him. So the applicant admitted the basic factual background of being together with the complainant at the relevant time.

The complainant's evidence was that on their way back home from Manduna's, the applicant asked to have sexual intercourse with her, saying she had gone for a long time without sexual intercourse. She ran away and the applicant ran after her, caught up with her and tripped her. She fell down and he lay on top of her, pushed her underpants aside and inserted his penis into her vagina. She said she tried to scream but he had covered her mouth with his hand. When he was finished, he left her on the scene, crying. He ordered her not to disclose the rape to anyone. She later proceeded home and informed the applicant's wife who confronted the applicant about the rape.

The following morning, she informed the applicant's mother. She later left her in laws residence and proceeded to her parents' home where she informed her parents. She reported the matter to the police and was referred to hospital for a medical examination.

The applicant cross-examined the complainant but she maintained her testimony of being tripped and raped by him on the way from Manduna's homestead.

The second state witness was the complainant's father. He said the complainant came to his homestead on 18 October 2018 accompanied by her aunt and told him that she had been raped by the applicant. He said when she got to his home, she had already reported the matter to the police.

In the 1st ground of appeal, the applicant said they were serious inconsistencies between the complainant's evidence and that of her father. When the court looked at the evidence of both the complainant and the father, it did not see any "serious" inconsistency. The evidence of both state witnesses was very short and the cross-examination was brief as well. It was therefore easy for the court to consider their evidence.

On p 12, the complainant said she reported the case to the police and she was referred to hospital for medical examination. She was not asked the date when she made the police report either during her evidence in chief or during cross-examination.

On p 14 of the record, the father's testimony was about the report the complainant made to him on 18 October, 2018. When he was asked about the police report, he said the complainant had already reported the case to the police when she got to his home.

During cross-examination, the complainant's father maintained that when the complainant got to his homestead, she had already reported the matter to the police. He said the rest of his testimony about the rape itself was what the complainant had told him. He was asked if he knew the exact day the complainant reported to the police and his answer was that it was on 16 October, 2018.

The above evidence does not reveal inconsistencies between the complainant's evidence and that of her father. They both said it was the complainant who reported the matter to the police. The complainant was not asked when she did so. The father is the one who was asked about when the report was done and he said it was by the complainant, before she got to his house. When pressed about the date, he said 16 October. There is nothing in the complainant's evidence which is inconsistent with her father's testimony, cited above because she herself did not mention any date.

The inconsistency about the police report appears in the State outline. Paragraph 8 of the State outline says the complainant's father advised her to report the matter to the police. The State outline also gave the date the report was made as 19 October, 2018.

It is a known fact that the State Outline is a document that is drafted by third parties in the police or National Prosecuting Authority. The State outline is what it says, an outline. It provides a summary of the State case that is to be proven by the evidence yet to be led. So, it is the evidence that clarifies issues during a trial. So, the evidence from the complainant and her father clarified issues and established that the complainant reported the matter to the police, before she got to her parent's home, not as a result of advice from her father when she got there on 18 October, 2018. There was no evidence that what was in the outline was what the

complainant had told the police. No one even asked her about it. So, a court cannot disregard evidence led in court in favour of an unsubstantiated State outline. What is in the evidence carries the day.

Furthermore, there was no inconsistency at all about the rape facts themselves. The complainant's evidence tallied with that of her father. The importance of that is that it showed consistency on the part of the complainant; that what she told the court is what she had told her father thus negating the possibility of fabrication.

As correctly pointed out by the magistrate in his judgment the inconsistency is about "petty and peripheral issues", which could be clarified through the police diary log if they became relevant. So, the magistrate did not misdirect himself in any way when he convicted the applicant.

The grounds of appeal raise the issue of the applicant having been representing himself when the complainant gave evidence. On p 9 provisions of ss 263 and 188 of the Code were explained to the applicant. On p 12, the purpose of cross-examination was explained to him. Indeed, he cross-examined the complainant. But as indicated by magistrate, his questions were suggestive of consent on complainant's part, yet he had denied having sexual intercourse with her.

Another issue raised in the grounds of appeal was that of dismissing the evidence of the defence witness without just cause.

The defence witness's evidence appears on pp 24 to 26 record. On p 24, she confirms that applicant and complainant both got to her homestead and they left together.

On p 25, she confirmed that she did not know about the rape since she had returned home. But on p 26, she denied that the applicant raped the complainant. Yet she confirmed that she would not know what transpired after she had returned home.

So, the magistrate was correct to disregard the defence witness's testimony. She was not there, having gone back to her house so she could not take the accused's defence any further. Her bare denials simply expose her as a person who wanted to do her neighbour a favour.

The notice of appeal says nothing of substance about the sentence. The sentence itself is in line with sentences passed by our courts in cases of rape. Indeed, during the hearing, the defence counsel conceded that there was no appeal against sentence.

Since the applicant has no prospects of success on appeal against conviction, there is no point in granting him bail pending appeal. Furthermore, appeals are now being processed

faster than previously so he can prosecute his appeal whilst serving his sentence without any delays. It is ordered that the application for bail pending appeal be and is hereby dismissed.

Chigoro Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners