MUNASHE CHINDAWI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 14 June 2022

Chamber Application

CHIKOWERO J:

1. This is an application for leave to appeal out of time and for leave to prosecute the appeal in person. The applicant intends to challenge both the conviction and sentence.
2. The trial started and was finalised on 26 June 2019. The magistrates court sitting at Bindura convicted the applicant of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and sentenced him to 20 years imprisonment of which 2 years imprisonment was suspended for 5 years on the usual conditions of good behavior. The effective custodial term is 18 years imprisonment.
3. The court found that the applicant raped his then 12 year old step-daughter. The offence was committed inside the applicant's bedroom in May 2014 at a time when the only persons at home were the applicant and the complainant.
4. The applicant's defence was a bare denial of the charge. He professed that he did not know anything about the offence.
5. Although he has crafted two grounds on which he intends to attack the conviction, these raise one issue. He proposes to argue that the court erred in finding that the complainant was a credible witness
6. As regards the intended appeal against the sentence, he intends to persuade the appellate court to find that the sentence is manifestly harsh and excessive as to induce a sense of shock
7. It is no mean feat to convince an appellate court to interfere with factual findings which are predicated on credibility of witnesses. The appellate court can only interfere with such findings where it is satisfied that they defy logic or common sense. Alternatively, the apex

court would have to be convinced that, on a reading of the record, the factual findings are clearly wrong. See *State* v *Mlambo* 1994 (2) ZLR 410(S); *State* v *Mashonganyika* 2018 (1) ZLR 216 (H).

8. Although the offence occurred when she was only 12 years old, the complainant, five years later, gave a vivid account of the incident which left the learned magistrate, correctly in my view, with no option but to find that the complainant was telling the truth. Indeed, the trial court observed that the complaint gave evidence so well that she could be relied on. The record supports this.
9. The complainant explained why she only revealed her ordeal in 2016. The applicant had threatened the complainant that the police would arrest her if she disclosed the offence to anyone. She fell ill in 2016. She was now staying with her aunt in Chihota. It was only at the hospital that she then disclosed to her aunt that the applicant had raped her in 2014 and had proceeded to threaten her not to make a complaint.
10. Considering the complainant's age at the time of the commission of the offence, that the complainant was then staying with the applicant and the relationship between the aggressor and his victim, the court found that the explanation for the late disclosure of the offence was plausible.
11. The learned magistrate's acceptance of the evidence of the aunt is not subject of the intended appeal.
12. So too is the court's reliance on the medical evidence. The complainant was examined by a medical doctor on 16 September 2016. The medical affidavit, which was produced by consent, reflects definite evidence of penetration in the nature of two healed hymenal tears at 3 and 6 o'clock respectively and a notch at 6 o'clock.
13. The applicant's intended grounds of appeal do not take issue with the court's rejection of his defence. In any event, he did not at the trial suggest any reason why the complainant would falsely incriminate him. Indeed, if she were minded to level false allegations against him one would have expected her to do that on her own accord, and to have done so the moment she left his residence in 2014.
14. In all the circumstances, the intended appeal against conviction is doomed to fail. It is not in the interests of the administration of justice to grant leave to appeal out of time and leave

to prosecute the appeal against conviction in person when the result of such an appeal is a predictable failure.

15. I hold the same view in respect of the intended appeal against sentence. Rape is a serious offence. The court noted that it was prevalent. The applicant stood in loco parentis to the complainant. He not only preyed on the vulnerable young girl but compounded it all by issuing a threat that the police would pounce on her if she reported the matter to anybody. By this, he mentally switched his position for hers. Instead of him being the offender he made it appear as if she was such. Five years later, the physical and psychological damage was still there. In respect of the latter, the complainant gave a vivid account of her ordeal. She was still traumatized. The applicant took advantage of the absence of his two wives (who included the complainant's mother) to ravish the complainant. He is a sexual predator. The magistrate considered his mitigation. At the end of the day, he settled for a sentence which would not only remove the applicant from society for a fairly long period but would also send out a warning to like minded individuals. This cannot by any stretch of the imagination be a sentence likely to shock the appellate court.
16. In light of my conclusion that there is no prospect of success in respect of the intended appeal against both conviction and sentence, it becomes academic to traverse the extent of the delay in noting the appeal, the reasonableness of the explanation for such delay, the need for finality in ligation and the convenience of the court.
17. In the result, the application be and is dismissed in its entirety.

The National Prosecuting Authority, respondent's legal practitioners.