EDMUND TAURAI
versus
STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, J
HARARE, 21 January, 2013

Bail Application

Applicant in person
F Kachidza, for the respondent

CHATUKUTA J: On 21 January 2013, I dismissed the applicant's application for bail pending appeal. I gave *ex tempore* reasons for my decision. It has been brought to my attention that the applicant has filed another bail application now based on changed circumstances and written reasons for my decision are required. The following are my reasons.

The applicant was convicted, after contest, of contravening s 65 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 18 years imprisonment of which 5 years were suspended on condition of future good behaviour. Having noted an appeal against conviction and sentence, the applicant sought bail pending appeal. The application was initially not opposed. After engagement with the court, respondent's counsel conceded that the appeal lacked merit.

The main consideration in determining an application for bail pending appeal is whether there are prospects of success on appeal. (See *S* v *Manyange* 2003 (1) ZLR 21, *S* v *Labushagne* 2003 (1) ZLR 644 (S) and *S* v *Dzawo* 1998 (1) ZLR 536). The applicant, in his grounds of appeal, criticised the findings of the court *a quo* that the state witnesses were credible. He therefore sought to challenge the trial court's findings that the state had been able to discount the applicant's defence of *alibi* and established beyond any reasonable doubt that the applicant had raped the complainant.

The facts giving rise to the conviction were that the applicant was a prophet in the Johanne Masowe sect. The complainant was at the relevant time married to the second state

witness, Ephraim Gwenangumwe. When trial commenced the two were on separation. The two would, on numerous occasions seek spiritual assistance from the applicant. On 16 January 2010, the complainant went to the applicant's home at the applicant's instance. The complainant's husband was aware of visit. The applicant had phoned him earlier to confirm if the complainant was coming. When the complainant arrived at the applicant's one roomed house, the applicant told her that she was afflicted by evil things which were in her stomach. He wrapped himself with a white cloth. He spread another white cloth on the bed which was in the room and asked the complainant to lie on the bed. He started pressing the complainant on the stomach. The complainant went into a stupor. She noted the applicant lying on her and doing something to her but she could not comprehend what was happening. When she came out of her stupor, she saw the applicant coming into the room with a bucket of water. Her pant was on the floor. She observed semen on her vagina. The applicant gave her a white piece of cloth and directed her to wipe the semen off and wash her vagina. He told her that he was going to place the cloth under a tree to hide the evil things he had presumably extricated from the complainant's stomach. The complainant realised that the applicant had raped her. She followed the applicant to a place of worship for prayers and went home. Her husband arrived home at around 1500 hours to find the complainant distraught and crying. The two proceeded to the police and reported the matter.

The applicant contended that the statement in the medical affidavit that penetration was "probable" implies that the complainant was not raped. The complainant was examined two days after the rape. She was married and must have been sexually active. The word "probable" did not discount that complainant had been raped. In fact it implied that it was likely that the complainant had been raped. The complainant's marital status and her sexual activity may have precluded the examining nurse to definitively conclude that there had been penetration associated with the alleged rape.

The applicant had denied the charge raising a defence of *alibi,* that he was in Domboshava worshiping on the day in question. He called one witness, a fellow worshipper, Leonard Makore. Makore testified that on the day of the alleged rape, he had gone to the place of worship in Glen View and prayed with the applicant. They later left at around 1500 for Domboshava. He did not specify the exact time when he went to the place of worship.

As indicated earlier, the decision of the court *a quo* was based on the credibility of the witnesses. These courts have, on appeal, been reluctant to interfere with the findings of credibility by the lower court. (see *Hughes* v *Graniteside Holdings* SC 13/84 and *Barros &*

Anor v *Chimponda* 1999 (1) ZLR 58 (S).) The rationale for that is apparent. The appeal court does not have the benefit of observing the demeanour of the witnesses when they testify. The court can only interfere with the finding of the lower court where there is a blatant misdirection of fact, law or both.

The circumstances of this case were indeed peculiar in that the complainant was not able to state categorically that she observed the applicant raping her despite being a married woman who would have appreciated the act of sexual intercourse. This appears, however, to be understandable given her explanation that she was in a stupor and believed that the applicant was rendering her spiritual attention to resolve her ailment. The finding by the court *a quo* that the complainant may have been drugged is founded on the complainant's own evidence explaining why she could not recall exactly how she had been raped. Religious beliefs and experiences, such as the complainant found herself in, though peculiar and incomprehensible should not be easily discounted as the respondent had done in its response to the application. GUBBAY CJ (as he then was) quoted with approval the remarks of Justice DOUGLAS in the matter *United States* v *Ballard*, 322 US 78 (1944) p 86 to 87;

> "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they be beyond the ken of mortals does not mean that they can be made suspect before the law."

(See *Re Chikweche* 1995(1) ZLR 235 at 241 G.)

The circumstances that the complainant found herself in, after the alleged treatment, leaves only one conclusion that she had been raped in that not only did she have semen on her vagina, but she no longer had her pant on and could not recall how this had happened within the confines of the applicant's room and after having been alone in the room with the applicant.

The report of the rape was made on the very day that it occurred and to the first available person that the complainant could report to. (*S* v *Banana* 2000 (1) ZLR 607). It must have been a difficult experience for the complainant to report her ordeal to her husband. As rightly noted by the trial magistrate, the complainant's evidence was materially corroborated by her husband and hence the finding by the magistrate that the two witnesses were credible. The complainant and her husband were on separation and there would not have been any cause for the husband to collude with the complainant and give false testimony. The husband was consistent in his evidence that he revered the applicant and as a

result he had initially not believed the complainant. His belief in her was subsequently bolstered after the applicant had been arrested and he had pleaded with him for leniency.

The trial magistrate cannot be faulted for discounting the applicant's defence of *alibi* having found the state witnesses to be credible. Leonard Makore's evidence did not support the applicant's evidence. In fact it corroborated the complainant's evidence that she had seen some men with the applicant on the day in question at the place of worship after the rape. Makore confirmed that he only went to Domboshava at about 1500. The complainant was already home at that time and that is the same time that her husband returned home and found her crying. The applicant therefore had not been in Domboshava before 1500.

Despite raising a defence of *alibi*, the applicant's cross examination of the complainant implied that he had sexual intercourse with the complainant albeit consensual. (see pp 28-29 and 35 of the record.) This contradiction obviously had a negative effect on his credibility.

A perusal of the record of proceedings will show that the trial magistrate addressed the above issues and the issues raised in the grounds of appeal and the application for bail. The applicant did not address the court on the ground of appeal against sentence. I therefore did not consider it necessary to consider his prospects of appeal in that regard suffice however to observe that the court *a quo* adequately justified the sentence it imposed. I did not believe then and still do not believe now that another court will arrive at a different conclusion and disturb the court *a quo*'s findings on credibility of the witnesses and the sentence imposed, hence my dismissal of the application.

Prosecutor-General's Office, for the respondent