INNOCENT KWENDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 28 June, 2017 and 11 April, 2018

Bail pending appeal

Applicant in person
T Mapfuwa, for State

CHITAPI J: The applicant applied for bail pending appeal by application filed on 31 May, 2017. After several postponements, I determined the application and issued an order dismissing the same on 28 June, 2017. I endorsed on the reasons for dismissing the application that the applicant had no reasonable prospects of success against both conviction and sentence. The applicant therefore failed to discharge the onus imposed upon him to show on a balance of probabilities that his release on bail pending appeal was in the interests of justice.

The record has been referred to me today and on perusal of numerous letters written by the applicant, I noted that on 6 July and 9 August, 2017 the applicant requested for my written reasons for dismissing his application. It is necessary therefore to set out the rest of the paper trail on record so that the court which deals with the subsequent application after my order of dismissal of the application appreciates the paper trail.

On 20 December, 2017, the applicant filed a document headed "Special Request for a court order for Rapid Test : Request Form of Tariro Audry Chomutigidi in the case of *State* v *Innocent Kwenda* [CRB R 823/15] BAIL No. 672/17 Case No – 1030/15; Appeal No 68/15]." In this document, the applicant avers that my order of dismissal of his application was illogical because of irregularities which existed in the trial proceedings. He gave an example that the court should consider the medical affidavit on the HIV/AIDS status of the complainant. The applicant in the same document quoted s 66 of the Criminal Law Codification & Reform Act, [*Chapter 9:23*] as read with s 62 (2) of the Constitution of Zimbabwe 2013 and averred that he had a right to information held by any person to protect his rights. He stated in the document as follows:

> "As such it is my sincere request that this Honourable Court may order the complainant in the matter to forward a copy of her Rapid Test Request Form for such document is essential to support of the plea that I entered against the verdict of the court *a quo*, same is also essential in exercising and protecting my right to freedom as enriched in section 62 (2) of the Constitution of Zimbabwe….."

On 18 January, 2018, the applicant filed another request similar to the one of 20 December, 2013. He stated therein that he wanted to file a Rapid Test Request Form showing his HIV and AIDS status to support his changed circumstances.

On 2 February, 2018, the applicant filed an application alleging changed circumstances. The application awaits set down and determination. The applicant has since followed up the application by letters dated 9 February, 2018 and 28 February, 2018 requesting a set down of the matter. The applicant of course has a right to request for a set down of his application for bail based on changed circumstance. With respect to the request for the Rapid Test Form it will be necessary that the judge hearing the application for bail based on changed circumstances establishes from the applicant what it is that he seeks this court to do in his favour.

Although, I have set out the paper trail in the court record, this does not by any means make this application a partly heard matter before myself. I only laid out the paper trial because the applicant has been writing numerous correspondences to the court following up on the reasons for dismissal of his application and also requesting for the complainant's Rapid Results Form.

I now revert to giving my reasons for dismissing the applicant's bail application pending appeal. It will be up to the applicant to file any supplementary submissions to his pending application for bail based on changed circumstances in the light of my reasons for judgment.

The applicant was convicted by the Regional Magistrate at Harare on 20 November, 2015 on a charge of rape as defined in s 65 (1) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. He was sentenced to 16 years imprisonment with 3 years' suspended for 5 years on conditions of good behaviour. Through his legal practitioners, he noted an appeal to this court on 1 December, 2015. The appeal which is still pending determination is filed under Case No. CA 6032/15.

On 31 May, 2017, the applicant, self-acting, filed this application for bail pending the appeal aforesaid.

As I write these reasons for my order dismissing the application for bail as aforesaid, I note with surprise that the applicant does not appear to have expended more of his efforts and

energy to have his appeal determined which would seem logical. He appears intent on pursuing the freedom route at the expense of the appeal determination even though the appeal record was long prepared. It is of course his right to exert his efforts to try to get his freedom although it is a bit of mountain to climb once the first bail application has been dismissed. I say so because since the finding that the applicant had no prospects of success on appeal largely informed the court to dismiss his bail application pending appeal, a contrary finding before the same court would appear to be incompetent as the finding was based upon a consideration of the record of appeal. This court pronounced itself on the point is now *functus officio* on it.

The allegations against the applicant were that on 21 September, 2015 at house No 216 Mupani Avenue, Mufakose, he unlawfully had sexual intercourse with one Tariro Chomutigidi without her consent. The complainant was aged 17 years old and the applicant, 40 years. The applicant is a step father to the complainant. On the fateful day, the State alleged further that the complainant retired to bed. Her mother, the applicant's wife had gone to work as she was on night duty. She was deployed to provide guard duties at Mhishi Shopping centre Mufakose to guard over a ZESA substation at that Shopping Complex.

Around 10.00pm the applicant returned home and woke up the complainant. He offered to find a boyfriend for her since she looked lonely. The complainant told the applicant off and that she was not interested in the issue. She retired to bed and fell asleep. The applicant is alleged to have later sneaked into the complainant's blankets whilst she slept and forced himself upon the complainant and raped her without her consent. The rape occurred in the same room used by both the applicant and the complainant. The set up was such that the applicant slept on the bed the complainant on the floor.

The complainant failed to scream loudly enough to be heard because the applicant had closed her mouth during the rape act. The applicant returned to his bed after the rape and the complainant went to her mother's work place and reported the rape. The complainant's mother returned home and found the applicant at home. When she confronted the applicant with the allegations, the applicant allegedly apologised for his actions. He however fled after it became apparent that the rape case was going to be reported to the police.

The case was reported to the police and the complainant was medically examined on the following day after the date of the rape, that is on 22 September, 2015. The report which was produced as exh 1 before the trial court confirmed that there had been penetration of the complainant's vagina and a hymenal tear was noted at 4 o'clock of the vagina. The doctor noted that the complainant looked sad during the examination.

In his defence outline, the applicant denied not only that he did not rape the complainant but averred that the complainant was lying that she had been raped. In other words, the applicant denied that the complainant was sexually violated. He admitted to having joked with the complainant about finding a boyfriend for her. He however denied that the alleged rape could have occurred or been committed by him without the incident being witnessed by two other siblings of the complainant aged 11 and 13 years respectively who were in the room that night. He outlined that the complainant had first reported that the applicant had attempted to rape her before changing her version to actual rape. He also outlined that the complainant's mother was of a violent disposition and occasionally behaved or conducted herself violently towards both the applicant and the complainant.

The applicant was convicted on the basis of the evidence of the complainant, whom the magistrate believed as a truthful witness who made a voluntary and timeous or immediate report of the rape to her mother. The complainant reported the rape to her mother the same night that it was perpetrated upon her and a medical examination on the following day confirmed the sexual violation. The magistrate found corroboration of the complainant's evidence from the testimony of not just the other state witnesses but from the applicant himself on material points. The magistrate found that the complainant's evidence was very convincing and had a ring of truth. The magistrate expressed the view that even without the evidence of other witnesses, she would have convicted the applicant on the complainant's evidence and the medical report.

A reading of the record and the evidence of the complainant and as correctly submitted by Mr *Mapfuwa* for the State, reveals a simple narration on how the complainant was raped. The issue became whether or not the complainant made up the story. The applicant could not provide a motive for the complainant to lie, save to suggest that she could have been offended by his suggestion given in jest that the complainant perhaps needed a boyfriend as she looked lonely. It would really be stretching one's imagination too far to imagine that the remarks by the applicant could have annoyed the complainant to the point of vacating the house late at night to find her mother and report a rape.

The magistrate found the applicant to be a poor witness who presented a fabricated defence. Indeed the magistrate reasoned that the applicant was fighting his conscience. The relationship between the applicant and the complainant prior to the commission of the offence was said to have been cordial and this again showed that there was no fabrication by the complainant as there was no motive for her to lie.

The applicant's grounds of appeal seek to attack the credibility of the complainant, a no mean task, because quite apart from issues of credibility being a province of the trial court which has the benefit of observing the witnesses giving evidence, a reading of the record and complainant's evidence does not reveal any contradictions or inconsistencies. An appeal court will unlikely find the credibility findings made by the magistrate to have been wrong.

In my view, I concluded with certainty that the applicant's proposed appeal had no prospects of success at all especially in regard to conviction. With respect to sentence, the sentence of 16 years imprisonment with a portion suspended on the face of it would appear to be harsh. However, when one considers, as the magistrate was properly directed, the relationship between the applicant and the complainant, being one of stepfather and stepdaughter, the applicant did not deserve anything less because instead of being the protector of the complainant, he became the predator. The magistrate also considered the age disparities between the applicant and the complainant, a whopping 23 years. When one considers again that sentencing is a domain of the trial court, not to be interfered with in the absence of a misdirection which when established places the appeal court at large to reconsider sentence, it is again clear that there were no misdirections committed by the magistrate in assessing sentence. The appeal against sentence is equally without prospects of success.

Under the circumstances, the bail application was dismissed on the basis that there were no prospects of success against both conviction and sentence.

National Prosecuting Authority, respondent's legal practitioners