SIMBARASHE DAVID CHIEZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 24 July 2009

Bail Pending Appeal

Mr Tafirei, for applicant
Mr Murevanhema, for the respondent

CHATUKUTA J: On 9 June 2009, the applicant filed an application for bail pending appeal. Submissions were made on 24 June 2009. The matter was postponed to 25 June 2009 for my ruling. The applicant's counsel did not appear in court on that date and the matter was struck off the roll. The application was reset for 24 July whereupon I dismissed the application. I gave *ex tempore* reasons for the refusal of bail pending appeal. The applicant has requested written reasons for decision. The following are my reasons.

The applicant was convicted of raping his 9 year old daughter. He was sentenced to 18 years imprisonment of which 5 years were suspended on the usual conditions of good behaviour. The facts giving rise to the conviction are that the complainant and her young brother resided in Chitungwiza with the applicant's sister, one Drapper. When the schools closed in December 2005, the complainant and her brother went to stay with their father in Epworth. It is during this holiday that the applicant was found to have raped the complainant. The complainant returned to her aunt when schools opened.

The applicant appealed against both conviction and sentence. The appeal against conviction is based on the main ground that there was no evidence to support the state's case. The state had therefore failed to prove its case beyond reasonable doubt.

It is trite that in every case where bail after conviction is sought the *onus* is on the applicant to show why justice requires that he should be granted bail. In determining an application for bail pending appeal, the court is required to consider the following factors:

(i) likelihood of abscondment;

(ii) prospects of success on appeal;

(iii) right of the applicant to liberty; and

(iv) potential of the delay before the appeal is heard. (see *S v Dzawo* 1998 (1) ZLR 536)

In determining the prospects of success on appeal, a court is required to take each ground of appeal and examine the judgment of the lower court to ascertain whether there is substance in the criticism (see *S* v *Musasa* S-45-02). The following are the grounds of appeal:

"1. The learned trial magistrate misdirected herself by failing to give consideration to the fact that the rape complainant was obtained by inducement and appellant's name was actually suggested to the little complainant as the assailant.

2. The learned trial magistrate erred by failing to be alive to and apply her mind to the fact that the rape complaint was not prompt and only arose after some probing.

3. The court *a quo* erred by failing to give consideration to the fact that there was bad blood between appellant and Drapper which would have given rise to the surfacing of these false allegations.

4. The learned trial magistrate erred by failing to call the Investigating Officer who is alleged to have been present when the appellant's name was suggested as the culprit. She ought to have invoked the provisions of section 232 (b) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

5. The court *a quo* erred by rejecting appellant's defence when in fact his story was reasonably possibly true and to that extent the benefit of doubt should have been resolved in his favour.

6. The lower court erred by returning a guilty verdict in circumstances where appellant's guilt was not beyond reasonable doubt.

I shall now turn to an examination of the grounds of appeal. Regarding the first ground of appeal, the applicant submitted that it was suggested to complainant at the police station that the applicant was the one who had raped her. It was submitted that the paper on which the complainant wrote his name was not produced in court. In support of these submissions, I was referred to pp4-5 and p15 of the judgment respectively.

The relevant evidence on the issue is on pp15 and 17 of the record. On p15, the complainant testified as follows:

> "When I went to the police that is when I revealed that the accused was the culprit. Police Officer asked me to write down the name of the perpetrator on a piece of paper and give it to aunt. I then wrote down that it was my father."

Under cross examination the complainant testified as follows:

> "Q. were you not influenced by anyone to implicate me
>
> A. Noone (*sic*)" (see p 17)

The above evidence does not in any way support the applicant's contention that the complainant was influenced to name the applicant. In my view, the evidence proves otherwise.

Mr. Tafirei, for the applicant, conceded that the evidence was not supportive of his submissions. He failed to direct the court to any other part of the record where one would deduce that the complainant had been influenced. In fact, it appears the references given by the applicant appear to have been intended to mislead the court. The bail statement indicated, at p4 that the paper on which the complainant wrote the applicant's name at the police station had not been produced in court. However, at p 15 of the record of proceedings, it is clear that the piece of paper was produced in court although it was not part of the bail papers. The record reads as follows:

"This is the piece of paper I (*the complainant*) wrote on-exhibit 3. I never said anything to the counselors."

Mr. Tafirei again retracted his submissions that the piece of paper had not been produced. In view of the concessions, it appears to me that the applicant will not be able to sustain the first ground of appeal.

The first ground gives rise to the fourth ground of appeal that the learned trial magistrate erred by failing to call the Investigating Officer who is alleged to have been present when the appellant's name was suggested as the culprit. It was contended that the court ought to have invoked the provisions of section 232 (b) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

S 232(b) empowers a court to subpoena any person if his evidence appears to it essential to the just decision of the case. The applicant referred me to *S v Todzvo* 1997 (2) ZLR 162, *S v Togara* HH 165/98 and *S v Yusuf* 1997 (2) ZLR 102. All three cases are distinguishable from the present case. The first case related to the production of medical reports which were not clear. The court ruled that where medical reports have abbreviations and have no explanations to the nature and extent of injuries, it is necessary for the trial court to assist an unrepresented accused by calling the doctor to explain his/her report. In *S v Kingstone Togara*, the accused had denied raping the complainant. He had named one John Paradzayi as the culprit. When he was summoned by the headman after allegations of rape had been levelled against him he had advised the headman that he had caught Paradzayi in the act. The accused had indicated that he wanted the headman to be called. The Attorney General conceded in that case that it would have been necessary to call Paradzayi. GARWE J, as he then was, observed that the complainant was, in view of the accused evidence that he had caught her *in flagrant delicto* with Paradzayi, a suspect witness. The court should therefore have called the headman and Paradzayi as their evidence might have cast doubt on the complainant's evidence. In *S v Yusuf*, an unrepresented accused had disputed being the author of some documents that had been produced in court. He had expressed his intention to call a witness to prove that he had not authored the documents. The court did not call a

handwriting expert. GILLESPIE J ruled at p106G-107C that it was a miscarriage of justice that the court had not called the handwriting expert where the accused had indicated his interest.

In the present case, the accused did not challenge before the court *a quo* the piece of paper that led to his arrest. He did not state that the paper was not clear. What he stated was that prior to writing the name and over a period of time, the complainant had been influenced by Drapper to implicate him. What she wrote on the paper was as a result of that prior influence. In the absence of any challenge of the authenticity of the paper it was not necessary to call the police officer. The complainant had not testified that she told the police officer that she had been influenced by Drapper. The police officer could therefore not have been in a position to testify on the prior influence. It appears that the investigating officer would not have been of assistance to the court. Therefore there was no misdirection in not calling him to testify.

I shall proceed to deal with the second and third grounds jointly as they are interlinked. The second ground was that the court a quo erred in not making a finding that the rape complaint was not prompt and only arose after some probing. This contention is premised on the fact that it took some time and a number of visits to the clinic and to counselors before the complainant finally implicated the applicant. The third ground was that the court did not consider that there was bad blood between appellant and Drapper which would have given rise to the surfacing of these false allegations.

The record reveals that the court a quo addressed these concerns. At p28, the magistrate stated as follows:

> "In March 2006 complainant's aunt noticed that the complainant had developed an unusual sleeping habit. She then took the complainant for bilharzias and diabetes tests. If it was Drapper who fabricated these rape charges, why would she take complainant for bilharzias tests well knowing that they had fabricated the story against the accused? Why would she wait from March to August to name the culprit if this was Drapper's plan.
>
> The complainant clearly implicated the accused. This was corroborated by:-

(a) a note she wrote to the police; and

(b) her evidence was also corroborated by Drapper.

Complainant further explained that she did not tell anyone because accused had told her not to tell anyone."

Whilst the complaint was indeed not prompt, the court *a quo*'s findings cannot be faulted. The trial magistrate believed the complainant's evidence that she had been told by the applicant not to tell anyone. There was no basis to make a finding that the complaint had been fabricated. Drapper went to the police on two separate occasions. She sought medical testing and counseling for the complainant. As rightly observed by the court, Drapper did not need to go through all these endeavors when she knew that she wanted o implicate the applicant anyway. It appears to me she would have, if she had intended to do so, induced the complainant to report as soon as she noticed that the complainant was not well.

The last two grounds are again interlinked and I shall deal with them jointly. The applicant submitted that the appellant's defence was "reasonably possibly" true and to that extent the benefit of doubt should have been resolved in his favour. The court therefore erred by returning a guilty verdict in circumstances where appellant's guilt was not proved beyond reasonable doubt.

The decision of the court was based on the credibility of the state witnesses. An appeal court rarely interferes with the finding of a lower court on the credibility of a witness. The exception is where facts in the record do not justify or support the findings of fact by that court. (see *S v Isolano* 1985 (1) ZLR 62 (SC), *Edmore Musasa v The State* SC 45/02, *Bertha Hollington & Dicko Kaila v The State* HH 125/02, *Robert Mugwanda v The State* SC19/02 and *Chalmers v F Chimbari & 4 Ors* SC 59/06).

The applicant's defence was that Drapper did not like him because their parents had died and left him in charge of their parent's house. This is the same Drapper who was looking after the complainant and her sibling. She is the same person who the applicant accepts was concerned about the complainant's health and took her to the clinic for treatment and for counseling. The Drapper's conduct in this regard is not consistent

with a person who did not like his brother. She was willing to bear the responsibility of looking after the applicant's children, when she did not have an obligation to do so whilst the applicant resided in the family home. It was clear from the complainant's evidence that she preferred to reside with her father as opposed to Drapper whom she alleged ill treated her. Despite her preference to reside with the applicant, she still identified him as the person who had raped her.

The finding of the court that Drapper did not influence the complainant to implicate the appellant cannot be faulted as already alluded to above. I therefore find that the applicant has no reasonable prospect of success on appeal.

In this case the applicant was convicted of a serious offence and sentenced to a long term of imprisonment. In view of my finding on prospects of success, the temptation on his part to abscond is likely to be very high indeed.

In the result, the application for bail pending appeal is dismissed.

Mushangwe & Company, legal practitioner for the plaintiff

Attorney General, legal practitioner for the defendant