EDWARD CHIWANDIKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 5 January, 2021

Bail Pending appeal

Applicant in person
D.H Chesa, for the respondent

CHITAPI J: The applicant applies for bail pending appeal number CA 1109/15. The applicant was convicted of the offence of rape as defined in s 65 of the Criminal Law (Codification & Reform) Act. [*Chapter 9:23*] by the regional magistrate sitting at Mutare on 17 December, 2015. The applicant was on account of the conviction sentenced to 20 years imprisonment. Through his legal practitioners the applicant noted an appeal against both conviction and sentence on 31 December, 2015. The allegation against the applicant was that he was employed as the Deputy Headmaster at the school where the complainant, a 12 year old pupil was attending grade 6. The applicant was then aged 56 years old. It was alleged that on 30 October, 2015 the applicant lured the complainant into the storeroom at the school where she was a pupil and the applicant was the Deputy Headmaster, to arrange books thrown around by her classmates. The applicant allegedly entered the storeroom, locked it from inside and raped the complainant after closing her mouth with one hand and using the other hand to forcibly remove complainant pant and unzipping his trousers before forcing his manhood into the complainant's private part. The complainant as it was alleged did not consent to the sexual act.

It was alleged further that after raping the complainant, the applicant zipped his fly, placed some biscuits into the complainant's satchel and warned the complainant not to disclose the incident to anyone. The applicant unlocked the storeroom door and went into the classroom. The complainant left the storeroom crying. She subsequently reported the ordeal to her class

teacher during break time. The class teacher in turn led the complainant to two other lady teachers before the complainant was then referred to Mutare General Hospital for medical examination where the complainant was examined on 1 November 2015.

The applicant filed a defence outline through his legal counsel. The applicant therein denied any sexual encounter with the complainant. He outlined that he did not meet the complainant at all on 30 October, 2015. He averred that the alleged rape allegation was nothing but a made up story and a fabrication by some teachers and other individual whom the applicant did not name because of personal grudges, again whose nature and content the applicant did not outline. The applicant again outlined that he was a strict disciplinarian in respect of both pupils and teachers and that there was a plot to influence that he should be transferred from the school, hence the false allegations which were "activated by malice and falsehoods." In summary therefore, the applicant's defence was that he did not commit the offence in question and that the allegations were made up by fellow teachers and other individuals who wanted him out of the way because he was a strict administrator as deputy headmaster.

The State led evidence from the complainant, from the complainant's classmate, Nomatter Gwenzi, complainant's class teacher to whom complainant made a report, and a nurse who compiled the medical report after examining the complainant for possible sexual assault. The learned magistrate was impressed by the evidence of State witnesses and their demeanour. As regards the applicant, the learned magistrate correctly determined that the applicant proffered a bare denial of the allegations. On reading the record of proceedings, it is also clear that the applicant simply denied all evidence of his being the perpetrator although he agreed that the complainant was crying and he asked some teachers to investigate why the complainant was crying. He admitted that the medial evidence showed that the complainant was sexually abused. The learned magistrate correctly determined that the fact that the complainant was sexually abused was a given and that the issue for determination was to identify the abuser or culprit.

The learned magistrate meticulously considered the evidence against the applicant and commented on the witness evidence. The learned magistrate determined that the complainant's narration of how she was raped by the applicant was very clear and was corroborated by complainant's classmate who narrated that the applicant called the complainant to the classroom where the storeroom was situate. The classmate also testified to seeing the

complainant crying as she came out of the classroom where she had been with the applicant. The complainant' class teacher testified to seeing the complainant crying during break time and upon enquiry as to the reason for crying, the complainant reported that the applicant had raped her. The matter was reported to the police after the complainant had been examined at the local clinic. The local nurse who examined the complainant gave evidence too and explained her report and findings. It was common cause that sexual penetration of the complainant's private parts was not in dispute. The evidence thereon was conclusive as the medical report indicated that the complainant's hymen was stretched with recent bruising of the vulva observed and noted.

The accused did not develop the false incrimination motive any further and as the learned magistrate noted, the applicant's defence was a bare denial. I considered the applicant's evidence in depth. It is noted that the applicant did not deny having interacted with the complainant on the fateful day. He however denied ever being with the complainant in private. The applicant admitted that he tasked the complainant to collect some books left scattered in the class room. He testified that he entered the storeroom to collect his food. As he entered the storeroom, the complainant was leaving the same storeroom. He then proceeded to eat his food as he inspected his registers. The applicant testified that at all times relevant, the complainant was in the company of another pupil Reason Gumbochuma. The applicant did not mention the fact of the presence of Reason Gumbochuma in his defence outline. Reason Gumbochuma did not testify and the applicant did not call her as a defence witness. Applicant testified that he was surprised to see people gathered at his brother's (a fellow teacher) house within the school area. Police subsequently came and arrested him. The applicant also alleged an entrapment which he said had been contrived in the evening of 30 October, 2015.

The applicant did not give flesh to the allegations of entrapment. The probabilities did not support his denial of the commission of the offence. The motive for false incrimination was not established save for a bare assertion that there was a ploy to have him transferred by staff members and other individuals dissatisfied with the applicant's strictness on them. Again no details of the strictness nor details of people who desired the applicant's ouster from the school were given. It was not shown as to why those who schemed for the applicant's ouster chose the complainant as the bait. Even if one were to accept that the complainant was used a bait, this does not explain how medically, evidence of recent sexual intercourse was noted. It meant that

the plot would have been deeper to include the sexual abuse of the complainant and passing off the applicant as the abuser. The learned magistrate correctly and justificably on the evidence found that it was improbable that the complainant would shield the actual perpetrator and pick on the applicant as the rapist. The applicant's prospects of success are next to non-existent.

The grounds of appeal in the notice of appeal are generalized and the applicant is warned to revisit the notice of appeal to avoid it being struck out as invalid. The applicant advised in the grounds of appeal that the learned magistrate erred "on points of law and facts" in deciding without explanation that the complainant was raped whilst in a standing position." It is not clear as to what misdirection of law is alleged whilst the attack on the factual findings is also a bare attack and does not state how such a finding could not be sustained. The applicant also averred that the learned magistrate was misdirected on the facts to find that it was possible for the applicant to commit the rape at break time. It was also alleged in the grounds of appeal that the learned magistrate erred in law in failing to determine allegations of bad blood between the applicant and other staff members. As already discussed, the applicant did not give details of the alleged feud and in the absence of such evidence, there was nothing for the learned magistrate to interrogate and determine on the alleged issue. The same applies to the ground that the learned magistrate erred in fact in not interrogating the defence that other staff members and were making false reports to incite villagers to demonstrate against the applicant. The learned magistrate could not be expected to create evidence and then make findings on such evidence. The applicant did not lead such evidence. There was nothing for the learned magistrate to decide in this regard.

In regard to sentence appellant averred that the sentence of 20 years without suspending a portion was unduly harsh and induced a sense of shock. The applicant proposed a sentence of 18 years imprisonment with 3 years suspended on conditions of future good behaviour. In this respect, I consider that the appeal against sentence has prospects of success. It is salutary to suspend a portion of a sentence imposed upon a first offender. The fact that the applicant exercised *loco parentis* on the complainant was not on its own sufficient in my view to disqualify the applicant from being accorded the benefit of a partial suspension of the sentence. My view is that this aggravatory factor would affect the length of the suspended portion rather than render a suspension of a portion of the sentence undesirable. The applicant has suggested an effective sentence of 15 years imprisonment. The applicant therefore accepts that a

substantially long sentence of imprisonment is warranted. The applicant has only served 5 years and still has a substantial portion to serve. Bail should therefore not be granted under such circumstances.

I need to mention a commendation to the state counsel, Mr *Mavuto* for how he agreed that the applicant's application for reinstatement of appeal should be disposed of at the same time as the bail application. What happened was that it was noted upon perusal of the appeal court record which I requested it be placed before me that the applicant appeal had been dismissed for want of prosecution. The applicant averred that he was not advised of the dismissal. I then advised of the dismissal. I further advised the applicant on the need to apply for reinstatement of appeal first. Mr *Mavuto* was comfortable to deal with the application when made, since he had read the record and filed a response to the bail pending appeal whilst oblivious to the fact of the dismissal of the appeal. It was on my part also convenient that I deal with the reinstatement application as l had also gone through the record. The applicant then filed his application for reinstatement of appeal and it was granted. This opened the door to deal with the bail application now disposed of by this judgment. I take the view that in justice dispensation, unless it would result in prejudice to the state and the applicant, the judge should consider bringing matters to finality than simply take the ease way out to strike out applications for bail which is a liberty issue because a reinstatement of appeal or condonation for late noting of appeal is pending determination. It is I think desirable to call for the reinstatement or condonation record and deal with it since considerations of prospects of success dovetail.

Reverting to this application substantively, it is dismissed for reasons given.

National Prosecuting Authority, respondent's legal practitioners