THE STATE
versus
BENEDICT CHIRO

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 2 December 2014

Ruling

E. Makoto, for the State
Mrs H.S Tsara, for the accused

CHGUMBA J: This is an application for admission to bail pending appeal brought in terms of s 23 (1) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

Applicant was convicted on 3 October 2014 of contravening s 65 of the CODE (Rape) (one count) and sentenced to 20 years imprisonment of which 2 years were suspended on the usual conditions of good behaviour. Applicant is 46 years old and he is currently serving an effective 18 year sentence.

Applicant has appealed against both conviction and sentence under CA/851/14.

The notice of appeal was filed of record on 6 October 2014. The grounds of appeal include the allegation that the court *a quo* misdirected itself by accepting the complainant's evidence as credible despite inconsistencies between her oral testimony and her written statement, the allegation that the rape report was not made freely, the allegation that two state witnesses Rutendo Kapinge and Kesiya Chiremba contradicted themselves, the allegation that the applicant's defence was disregarded, the allegation that it was not proved that the semen that was found on the complainant belonged to the applicant, and the allegation that a sentence of 20 years is too harsh and that the court *a quo* failed to take into consideration the mitigatory factors.

<u>The applicable law</u>

Barros and Anor v *Chimpondah* 1999 (1) ZLR 58 (S).

The Supreme Court set out the principles that a court on appeal should utilise in order to interfere with the discretion of a lower court. The exercise of discretion by a lower court can only be interfered with on limited grounds.

> "It is not enough that the appellant court would have taken a different course from the trial court. It must appear that some error had been made in exercising the discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affect its decision, making mistakes of fact or not taking into account relevant considerations."

The relevant law is to be found in s 123 (b) (ii) of the CODE

(a) Prospects of success.

(b) Likelyhood of absconding in light of sentence imposed.

(c) Likelyhood of delay before appeal.

(d) Right to liberty.

It is this court's view that the applicant's prospects of success on appeal are poor.

The inconsistencies in the record particularly at record pp 33, and 41 are inconsequential and not significant to the conviction and to the sentence.

This court does not agree with the assertion that the rape report was not made freely and voluntarily because it was made to a friend of the complainant later on during the day in question instead of earlier on to an aunt or to complainant's mother. The case law that has interpreted the meaning of the making of a rape report freely and voluntarily does not in my view, say that the report must in all cases be made to the first person that the complainant meets. It depends on the circumstances of each case. It does not mean that the complainant lied or was inconsistent.

The note to the friend about the alleged rape conveyed that a rape had been perpetrated on the complainant by her teacher. It is a matter of semantics whether the note read "my teacher raped me" or "I came at break time because my teacher raped me." Applicant admitted that he saw the complainant on the day in question. He did not dispute the medical evidence of sexual abuse.

The parties disparity in HIV status is compounded by the fact that applicant is HIV positive and he exposed the complainant to the dangers of this incurable disease.

The disparity does not buttress applicant's innocence, if regard is had to the fact that the test was done one month after the commission of the offence. The sentence imposed was not too harsh. Applicant's HIV status is aggravatory.

For these reasons the court is of the view that applicant's prospects of success on appeal are not good. Application for admission to bail pending appeal is therefore dismissed.

In conclusion, it is this court's view that the court *a quo* exercised its discretion correctly and did not misdirect itself in regards to conviction and sentence as alleged or at all.

The applicant will have difficulty in convincing the court on appeal to interfere with the decision of the court *a quo*. This in my view, renders the application's prospects of success on appeal very slim. In regards to sentence, again in my view the applicant will have an uphill task to convince an appeal court that the sentence imposed is excessive, so excessive as to induce a sense of shock. Applicant was in a position of trust when it is alleged that he took advantage of a minor. She is 12. He is 46 and is HIV positive. In this day and age when even stiffer penalties such as life imprisonment are being called for, applicant's prospects of success in his appeal against sentence are not good.

For these reasons the application for the admission to bail pending appeal is dismissed.

Attorney General's Office, State's legal practitioners
Tsara and Associates, accused's legal practitioners