

ANDREW MKANDLA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 2 MARCH 2017 AND 9 MARCH 2017

Bail Application

L Mcijo for the applicant
T Hove for the respondent

MATHONSI J: Where a person has been convicted and sentenced by a court of law for having committed a serious offence, the presumption of innocence is inoperative unlike the situation obtaining before the person has been convicted where the presumption of innocence operates in that person's favour. In that regard if a convicted and sentenced offender desires to be admitted to bail pending appeal he or she must go beyond showing prospects of success on appeal and must establish that there are positive grounds commending him or her to the grant of bail and that the admission to bail will not endanger the interests of justice. In considering the interests of justice the public perception is an important aspect to be taken into account and where the admission of an applicant to bail may trigger a public outcry the court should be slow to grant it and should instead proceed with cameleonic speed and solomonic wisdom in the resolution of the matter. See *Gardener v The State* HH60-08; *Manyange v The State* HH1-03; *S v Gumbura* 2014 (2) ZLR (2)539 (S).

The applicant is a Bishop of the Zionist Church which does not have a church building but has its congregants gathering for worship at his house namely number 57948 New Lobengula Bulawayo which house, until his arrest, he occupied only with his brother Lovemore, also a pastor at this church. He was convicted by the Regional Court sitting at Bulawayo on 20 October 2016 of two counts of rape and sentenced to 20 years imprisonment of which 4 years imprisonment was suspended for 5 years on condition of future good behaviour.

The applicant would have none of it. He appealed against both conviction and sentence which appeal is yet to be determined by this court. He has now filed an application for bail pending appeal arguing that his appeal enjoys very bright prospects of success because the trial court erred in its assessment of the evidence as a result of which it convicted him when it should have acquitted him. The sentence imposed is also shockingly excessive given that he is a first offender and that the court overemphasized the aggravating features of the case.

The state case is that the 17 year old complainant had been brought from far a field in Rusape to Bulawayo because she was believed to be afflicted by spirits which were giving her problems. Her parents are members of the Zionist Church in which the applicant was Bishop and his brother Lovemore was a pastor. They took her to the duo for spiritual help. The two were purportedly praying for her to recover from the affliction of evil spirits. If what she told the court is anything to go by they did very little of that but more of abusing her in a very disgusting and unimaginable manner.

The complainant testified that she used to be assigned to wash the clothes of the applicant and his brother Lovemore at their house and she respected him as her father. Her ordeal all started when her father and Lovemore took her to the mountain where she was to spend 7 days receiving spiritual healing by Lovemore. When her father left her there with that predator, he preyed on her and raped her twice. After the rape he told her that if she ever tried to tell her parents about the attack, all the evil things he was removing from her would return and re-enter her.

The rape by Lovemore by the mountain occurred in March 2016. On a certain evening in April 2016 when her father had gone to work, he is a security guard working at night, and her mother had delayed returning home, the applicant came and called her to his house ostensibly to perform chores at his house. Upon arrival at the applicants' house, a person she respected as a father figure, certain apparently dubious individuals who always hung around that house-cum-church quickly left the house. Once alone with the complainant the applicant grabbed her by the hand and dragged her into the bedroom where he raped her twice. She says she failed to resist as she feared him. He threatened her with the return of the evil spirits he was removing from her if she reported the rape to her parents.

Although her mother came looking for her while she was detained in the bedroom the applicant and his hangerlings told her that they had not seen her. She was detained there throughout the night after the applicant had exchanged roles with his brother Lovemore who raped her four times during that night. The following morning they telephoned his father pretending that they had “found” her in the neighbourhood and instructed her to tell her father that she wanted to stay at the house.

On another occasion it was a Sunday when her mother sent her to the applicant’s house to ask for matches from him. Upon arrival the applicant took her to the bedroom, pushed her onto the bed and raped her three times. Again he warned her not to report the rape saying if she did the evil spirits he was removing from her would re-enter her body.

It was only when the complainant discovered that she was pregnant in May 2016 that she reported to her mother that the applicant and Lovemore had raped her. She did not know who between the two of them caused the pregnancy. The matter was reported to the police leading to the arrest of the applicant. Before he could be arrested Lovemore approached her mother asking for forgiveness. When none was granted he absconded and is now a fugitive from justice. Before the complainant testified in court, the applicant and his wife approached the complainant’s parents offering to pay them whatever amount of money they would demand if the complainant recanted her story in court in order to influence his acquittal. They were rebuffed.

The applicant denied ever having sexual intercourse with the complainant. He did not even suggest that it was consensual although he admitted making an approach to the complainant’s parents trying to influence her to lie.

The trial court assessed the evidence of the complainant and her mother and concluded that:

“The court noted that complainant is a very credible witness who remembered most important details of her ordeal at the hands of the two pastoral brothers. The accused failed to shift her on even the slightest point. She gave her evidence well and was convincing. Her evidence was corroborated by her mother’s. The fact of the mother coming to the accused’s house looking for complainant is a fact that would not be known by complainant if she had not been in that house---. What the court finds to have been proven is that the complainant and her family believed she had a spiritual problem. The accused encouraged that view. Eventually complainant became dependant on the two predatory brother (s) who then started taking advantage of her and raped her in turn.”

Mr Mcijo for the applicant submitted that the appeal has prospects of success because the report of the rape was made very late and the state did not show that there was any force used against the complainant. The first problem *Mr Mcijo* had to contend with is the fact that it has never been the applicant's case that he had consensual sex with the complainant. His was an outright denial of any contact with the complainant. Faced with the irrefutable evidence that indeed the two had sexual intercourse, *Mr Mcijo* urged me to find that the sexual intercourse was consensual because the complainant did not resist, did not scream and did not report the alleged attack immediately after it occurred.

In my view the reason for the delay in reporting was explained to the satisfaction of the court. The applicant had an over bearing influence on the complainant. She feared him and genuinely believed the threats. If she had not fallen pregnant the abuse would have gone unpunished. The trial court believed her explanation.

The appeal court is unlikely to interfere with findings on credibility. As stated by PATEL JA in *S v Gumbura, supra* at 543C;

“As regards the credibility of witnesses, the general rule is that an appellate court should ordinarily be loth to disturb findings which depend on credibility. However, as was observed in *Santam BPK v Biddulph* [2004] 2 A11 SA 23 (SCA), a court of appeal will interfere where such findings are plainly wrong. Thus, the advantages which a trial court enjoys should not be overemphasized. Moreover, findings of credibility must be considered in the light of proven facts and probabilities.”

I am unable though to fault the trial court's findings on credibility.

Mr Mcijo also submitted that the prospects of success also lie in the fact that the trial court dwelt too much on spiritual beliefs as if such beliefs can vitiate consent. In my view it is precisely the complainant's beliefs that left her vulnerable and exposed to the predatory instincts of the applicant. Put in another way the applicant was able to instil fear in her and therefore prevent her from reporting or exposing the attack to anyone until it could no longer be concealed. These courts have in the past accepted that indoctrination and indeed religious dogma have the effect of paralyzing believers into submission making them helpless in the face of sexual abuse.

PATEL JA succinctly put it in *S v Gumbura, supra* at 543G, 544 A-B.

“In the court *a quo*, the learned judge elaborated ‘the subjective nature of religious dogma’ in more cogent terms. To paraphrase and summarise his findings, the complainants were subjected

to frequent indoctrination in the notions of total separation and submission to authority. They were not allowed to fraternise with their relatives and were conditioned to believe that matters of church should not be discussed with outsiders. The appellant displayed a pattern of predatory behaviour, characterized by rampant sexual perversion, manipulating and luring the complainants to accept and endure his deceptively benign patriarchal authority. As was eloquently observed by JUSTICE DOUGLAS in *United States v Ballard* 322 US 78 (1944) - quoted by both of the courts below- religious doctrines and beliefs cannot be subjected to the rigours of legal proof. I would take this sentiment further to opine, in the circumstances presented by this case, that the quasi-mystical force of religious dogma might overwhelm its conscripts and devotees to point where it operates to vitiate and negate any meaningful consent to sexual abuse and exploitation by their spiritual masters.”

Here is a young girl who was brought under the spell of two dubious religious strongman by their parents genuinely believing that she was bound by evil spirits bothering her. She had been made to believe that these religious leaders had the power to cleanse her of such evil. The two of them encouraged those beliefs and the sense of vulnerability in her little mind. She was that way indoctrinated thereby being “enmeshed within the over powering cocoon woven” by the applicant.

She could only succumb to his sexual abuse and was constantly reminded that revealing the abuse could only result in the evil which the applicant was removing from her returning to haunt her. In my view those proven facts vitiated consent.

The trial court appreciated the complainant’s circumstances and found the applicant guilty. He could not be allowed to get away with his perverse sexual exploits on a vulnerable young girl. I am satisfied that the applicant enjoys no prospects of success on appeal. Regarding sentence, whichever way one looks at the matter, his moral blameworthiness having taken undue advantage of the trust bestowed to him by the complainant and his family to take turns with his brother to abuse the girl until she fell pregnant and is unable to tell who is responsible for the pregnancy, is sky high. He will therefore serve a lengthy term of imprisonment. He might as well get on with it now.

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

Liberty Mcijo and Associates, appellant’s legal practitioners
National prosecuting Authority, respondent’s legal practitioners