AUSTIN JAYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 & 30 December 2015

Bail Pending Appeal

I Goto, for the applicant
E Makoto, for the respondent

TAGU J: The applicant, a 38 year old man, was convicted by a Regional Magistrates court sitting at Harare on a charge of contravening section 65 of the Criminal Law (Codification and Reform Act) [*Chapter 9.23*]. The allegations were that he had sexual intercourse with a juvenile girl aged 11 years. She was in grade 4 at the time. The applicant is a brother -in- law to the complainant. He grabbed the complainant, lifted her up and took her to the bedroom. In the bedroom he placed her on the bed. He forcibly removed her short trousers and pant. He unzipped his trousers and took his penis and forcibly inserted it into her vagina. She screamed in pain and no one heard her. He withdrew his penis from the complainant's vagina and ejaculated some whitish fluids on her thighs. She wiped off herself with her pant and put it on the washing line to dry. She then immediately reported the abuse to her friend one Mitchell Shilling a 9 year old girl. Mitchel Shilling in turn reported to her mother who happened to be complainant's teacher. A report was made to the police. The complainant was examined by a Registered General Nurse and the medical report shows no visible evidence of penetration. The applicant was convicted on the strength of the complainant's evidence and was sentenced to 16 years imprisonment of which 4 years imprisonment was suspended for 5 years on condition of good behaviour.

Dissatisfied by the conviction and sentence the applicant noted his appeal to this court. Meanwhile, the applicant filed this application for bail pending appeal. The application is opposed by the state.

The principles applicable in an application of this nature have been stated since time immemorial in a number of cases such as *The State* v *Kilpin* 1978 RLR 282 (AD), *The State* v *Williams* 1980 ZLR 466 (AD), *The State* v *Bennet* 1976 (3) SA 652 (C), *S* v *Dzvairo* 2006 (1) ZLR 45 (H), *S* v *Dzawo* 1998 (1) ZLR 536 and *S* v *Manyange* 2003 (1) ZLR 21 (H).

The major considerations are prospects of success on appeal, likelihood of abscondment and an individual's right to freedom. In *casu*, the counsel for the applicant stressed two points. The applicant submitted that he has high prospects of success on appeal on the basis that the court erred by convicting the applicant on the basis of legal penetration. He further stressed that there was a risk in relying on the evidence of young persons.

In my view, this is a classic case of legal penetration since the medical report showed no evidence of actual penetration. The question is did the court *a quo* err in relying on the evidence of legal penetration to ground success on appeal? In his reasons for judgment the trial magistrate said-

> "He took off her skirt and the pair of pants and lay her on her back on the bed. He shoved his penis into her private part. After a while, he had withdrawn his penis from that position and ejaculated onto her thighs. The experience had been painful to the complainant. She had cried but had not been heard……The pain which the complainant said that she endured, must have been as a result of the attempt to penetrate the vagina with a much bigger penis or maybe, the accused person was not so keen on effectively penetrate that's why he ejaculated on her thighs. It was more of a deliberate move. The ejaculation did not take place on the vagina itself."

In her evidence in chief and during cross examination by the defence counsel the complainant had this to say-

> "He placed me on the bed. I was moving and he then lifted up (my) legs and spread them apart. He then placed his thing (he uses to urinate} on my private parts. I then started to cry". She was asked where he put it and her response was-"The genitalia, the part I use to urinate..... that is when I started to feel pain… at the place where he had placed his thing….he stretched out my leg and that is when he started hitting me with his thing on my thigh and he left some mucus like , whitish substance on my thigh". She was asked if she sustained any injuries and her response was-"I did not check that even when I'm at school and I did not check when I was at home but I feel pain on my private parts and I had to walk with my legs apart."

Mr *Goto* for the applicant submitted that the applicant merely rubbed his penis on the complainant's vagina without inserting hence legal penetration does not apply.

The questions to be asked are (1) what was the cause of the pain in her genitalia if it was not the penis? (2) Does her explanation amount to legal penetration given the medical report compiled by a Registered General Nurse? To answer these questions one need to look at the definition of legal penetration. What constitutes legal penetration has been decided in a

number of cases. I will look at a few case authorities that dealt with the issue of legal penetration.

In *S* v *Sabawu* 1992 (2) ZLR 314 at 316 it was stated that-

> "It is trite position that for the purpose of the crime of rape, penetration is effected if the male organ is in the slightest degree within the female body. It is not necessary to prove that the hymen was ruptured".

In the case of *S* v *Torongo* SC206/96 at p 7 of the cyclostyled judgment it was held that-

> "As far as the law is concerned placing the male organ at the orifice of the female organ, resulting in the slightest penetration constitutes rape".

In the case of Surprise *Ncube* v *The State* HB 55/15 the appeal court made a finding that although there was no medical evidence of penetration the appellant had raped the complainant a 7 year old girl who had stated that she felt pain on her genitals.

In *S* v *M*hanje 2000 (2)ZLR 20 (H) it was held that-

> "The medical perception of what constitutes penetration does not coincide with legal penetration. For rape to take place, it is not necessary that there should be full penetration. The slightest degree of penetration will suffice."

In *casu* the complainant explained how the applicant placed his urinating organ into her urinating organ after he spread her legs apart. She felt pain in her genitalia. He further stroked her vagina and ended up ejaculating on her thighs. She later had problems in walking such that she was walking with her legs apart. Her situation is similar to the facts in the case of *S* v *Tobias Munkuli* HC-B-115/92.

In the case of Tobias Munkuli (*supra)* the accused abused two young girls aged 6 years and 4 years and 11 months respectively. What the accused did on the 6 year old girl was to take out his penis and rubbed his penis against her private parts. She had no pant on. He moved to where the younger girl was and again rubbed his penis against her private parts. He repeated the same on another day. The younger girl later complained to her mother that her private parts were painful. The mother checked but did not notice anything. She washed her and rubbed some solution. The father of the girls asked the accused about the pain experienced by the children. The accused admitted rubbing his penis on the private parts of the children. A medical report was obtained but showed no penetration or damage was effected. The accused was convicted of indecent assault. On review it was held that the accused should have been convicted of rape on the basis of legal penetration regard being had to what Gubby JA (as he then was) said in *Dube* v *S* SC 39/86 that:

> "All that is required to constitute the offence of rape is that the male organ is in the slightest degree within the female's body, and it is not necessary in every case of a virgin that the hymen be ruptured. See Hunt South African Criminal Law and Procedure Vol. 2. 2nd Edition at p. 440. It was this legal position that I think Dr Jaure understandably failed to appreciate. He in all probability, came to the conclusion that penetration had not been effected because the hymen was intact."

See also *S* v *Never Vundla Khupe and Elton Moyo* HC-B-30/93; *Thomas Amuvet Nyamimba* v *The State* HH 204/02.

In my view the magistrate cannot be faulted for convicting the applicant on the basis of legal penetration. For these reasons the applicant's prospects of success on appeal are nil.

As regards the other issue relating to the evidence of young persons, admittedly the complainant and Mitchelle Shilling were young persons but they corroborated each other. Mitchelle Shilling noted that the complainant had been crying. She enquired as to what was the problem with her friend. She was then told of the abuse. Despite the fact that Mitchell Shilling was younger than the complainant she knew what applicant had done to complainant was rape. She cannot be faulted for telling complainant that what applicant did constituted rape. In my view there is no basis for attacking the evidence of young children here. The requirements set out in the cases of *S* v *Banana* 2000 (1) ZLR 607 (S) and *S* v *Chamunorwa and another* 2001 (2) ZLR 404 (H) were satisfied.

The other point raised by the counsel for the applicant was that there was no risk of abscondment if granted bail. The position of the applicant is that he is no longer presumed innocent. He has been convicted. He has also tasted the rigors of prison life. This coupled with weak prospects of success on appeal makes him unsuitable for bail pending appeal.

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

Muunganirwa & Company, applicant's legal practitioners
The Prosecutor-General's office, respondent's legal practitioners.