

THOMAS DEVAN MUZABAZI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 2 December 2016

Bail pending appeal

Applicant in person
E Makoto, for the respondent

CHITAPI J: I dismissed the applicant's application for bail pending trial on 2 December, 2016. I reserved my reasons for my order. These are they.

The applicant is a convicted prisoner. He was convicted by the regional magistrate sitting at Kadoma on charges of attempted rape and indecent assault. The verdict of attempted rape was returned as a competent verdict on the crime of rape as defined in section 65 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The indecent assault charge was preferred against the accused as defined in s 67 of the same Act. The applicant was convicted after a contested trial and on 18 February, 2016 was sentenced on the first count of attempted rape to 5 years imprisonment. On the second count of indecent assault he was sentenced to 1 year imprisonment. Of the aggregate 6 years imprisonment on both counts, 2 years imprisonment was suspended for 5 years on condition that the applicant does not commit any offence of a sexual nature for which if convicted, he is sentenced to imprisonment without the option of a fine. The accused was a self-actor at his trial.

On 2 March, 2016 the applicant noted an appeal both conviction and sentence through his legal practitioners whom he engaged presumably for that purpose, Gambe & Partners. I have stated that the applicant engaged the legal practitioners for purposes of noting the appeal and perhaps prosecuting it because in this application for bail pending appeal, the applicant is

again self-acting. The appeal was accepted by the Clerk of Court and the registrar. The same is pending under case No CA 133/16.

The State opposed the application for bail pending appeal. In its bail response the State argued that there were no prospects of success on appeal on the conviction for attempted rape as there was overwhelming evidence against the applicant. It was also submitted that the sentence imposed on the applicant did not induce a sense of shock.

In considering applications of this nature, the court is guided by the provisions of s 115 C (2) (b) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. The sections provides as follows:

“115 C Compelling reasons for denying bail and burden of proof in bail proceedings.

- (1)
- (2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail-
 - (a)
 - (i)
 - (ii)
 - A
 - B
 - (b) After he or she has been convicted of the offence, he or she shall bear the burden of showing on a balance of probabilities that it is in the interests of justice for him or her to be released on bail.”

Interests of justice will be served by granting bail pending appeal to an applicant who is able to demonstrate on a balance of probabilities that such applicant’s proposed appeal has prospects of success and that if such prospects of success have been demonstrated to be present, the interests of justice will not be jeopardized by admitting the applicant to bail. The old cases of *S v Kilpin* 1978 RLR 282 (A); *S v Williams* 1980 ZLR 466, *S v Benator* 1985 (2) ZLR 205 H have stood the test of time in guiding the courts in appreciating the principles to follow when dealing with applications for bail pending appeal, see *S v Dzawo* 1998 (1) ZLR 536 (S).

A reading of the decided cases and relevant statutes being in the main the Criminal Procedure and Evidence Act lead to a simple guide which a court should follow. The prospects of success is the most important consideration in an application for bail pending appeal. Where an applicant has demonstrated bright prospects of success, a court will be inclined to admit the applicant to bail pending appeal. The court will do so to protect the applicant’s rights to liberty which would otherwise be prejudiced if the appeal succeeds yet the applicant has served the sentence. The interests or administration of justice will be

unlikely to be endangered by the admission to bail of an applicant who has demonstrated bright prospects of success because such a convict is unlikely to abscond but would rather present him or herself to the court to clear himself or herself of the conviction and or sentence. In the judgment of the Chief Justice in *S v Kilpin (supra)* it was pointed out that a court may well consider that the brighter the prospects of success, the lesser the likelihood of the applicant to abscond and vice versa. The approach and reasoning in as much as it binds me also commends itself as well grounded and logical.

The facts of the case alleged against the applicant were briefly that he was 61 years when he allegedly committed the offence. He is the complainant's uncle and the complainant was a female juvenile doing grade 6. The complainant stayed with the applicant and his wife at the applicant's plot in Kadoma. The applicant is alleged on some day in June, 2014 to have sneaked into the complainant's blanket at night whilst the latter was asleep. He mounted the complainant. The complainant woke up to find the applicant lying on top of her with his erect penis on her vagina. The applicant allegedly threatened to chase away the complainant from the homestead if she ever reported the matter. When the applicant had left, the complainant discovered that the applicant had ejaculated on her thighs. After the incident the applicant would occasionally give the complainant various amounts of money to buy her non revelation of the incident. The complainant revealed the offence in August, 2015 after she was confronted by her aunt, a sister to the applicant's wife after discovering cosmetics in the complainant's bag. The complainant then revealed the incident and that the applicant had been giving her money which she then used to purchase the cosmetics.

After the revelation by the complainant, the aunt and the complainant reported the case to the police following which the complainant was medically examined with the doctor reporting that there was no visible evidence of penetration. In the second count, the applicant was alleged to have sneaked into the complainant's blankets in July, 2015 whilst the complainant was asleep. The complainant woke up to find the applicant on top of her wrapping himself with a baby towel. The complainant did not scream for fear of the applicant. The applicant left the complainant having realized that the complainant had seen him.

In his defence outline, the applicant admitted to having stayed with the complainant until August, 2015. He denied the allegations against him on both counts and alleged a frame up by his mother in law. He alleged that the mother in law took the complainant to her aunt (the one to whom the complainant revealed the offences) and asked her to look after the

complainant as a ploy to have the aunt access a monthly payment of US\$140-00 which was maintenance money for the complainant.

The record of proceedings shows that the applicant consented to the production of the medical affidavit compiled following an examination by the doctor. No evidence of sexual abuse was noted by the doctor. The medical affidavit has little or no evidential value and the court did not rely on it. In convicting the applicant, the magistrate was impressed by the evidence of the complainant. The complainant's account was also confirmed by the complainant's aunt hence lending consistency to the story. The magistrate dealt with the evidence of the complainant and the aunt in detail. He warned himself that he was dealing with the evidence of a young person and had to approach the complainant's evidence with caution. The magistrate stated that he adopted a cautious approach because he was mindful of the tendency of young children not to appreciate the importance of telling the truth and the seriousness of the allegations they make coupled with the fact that they may fantasize and be easily influenced.

A reading of the complainant's evidence shows that she gave a consistent account of events and a clear narration of when the sexual assaults upon her took place, not in terms of actual dates but in relation to events which took place and the applicant's conduct. In the first account the applicant's wife was not at home on the night in question having gone to church. She demonstrated what the applicant did to her using some dolls.

I did not however find evidence of exactly how the applicant perpetrated the alleged sexual assaults. The magistrate did not explain in detail the demonstration which the applicant did with the dolls. The allegations in the State outline that the applicant slept or mounted the complainant do not appear from the complainant's testimony. The complainant did not see the applicant's genitalia. However on both counts the complainant testified that the applicant sneaked into her blankets and when she came to, he was lying beside. However the applicant would have already ejaculated and there was evidence of semen on the complainant's thighs and some wetness on her genitalia. The complainant also gave evidence of the applicant having fondled her breasts and buttocks and also of waking up without her pants on.

In his judgment the magistrate disbelieved the applicant's denial that he sexually assaulted the complainant. There is however an aspect of the magistrate's judgment which is difficult to pass off without question. In his judgment, the magistrate with respect to the first count ruled that the applicant formulated an intention to rape the complainant because he

sneaked into her blankets on two occasions. He further held that the applicant reached the complainant's vagina though he did not penetrate it. The magistrate also reasoned that the accused ended up ejaculating on the complainants' vagina and concluded that this supported a finding of attempted rape.

I have already indicated that I did not find in the record evidence of how the alleged sexual acts were perpetrated. It is therefore my view that it is arguable whether or not the only reasonable inference which one can draw from the facts on count 1 is that the applicant committed the offence of attempted rape as opposed to other competent verdicts like aggravated indecent assault or indecent assault as defined in ss 66 or 67 respectively of the Criminal Law (Codification and Reform) Act. There are therefore prospects of success in relation to the conviction on the first count.

Having made the above finding on prospects of success, I still considered that my observation did not really assist the applicant because he would still be guilty of a serious offence if the verdict was altered from attempted rape to aggravated indecent assault. Aggravated indecent assault attracts the same sentence as rape. Indecent assault would however attract a much lesser sentence of imprisonment of up to 2 years or a fine not exceeding level 7 or both imprisonment and a fine. The question becomes whether in view of the fact that in my findings, if the applicant were he to be convicted on a lesser charge, he would still be liable to a prison term, it would be a proper exercise of my discretion to admit the applicant to bail pending appeal. It appears to me that the justice of the case would be saved by leaning in favour of the liberty of the applicant because even if the appeal court would agree to alter the conviction I cannot prescribe for it what sentence it would substitute or whether it would substitute it at all. I however noted from the reasons for sentence that the state in the trial had suggested that community service be imposed on the applicant, a submission which was shot down by the learned magistrate who felt that such a sentence would be wholly inappropriate. I cannot however in the circumstances hold that the applicant cannot put up a forceful argument for a reduced sentence. I have to try and protect the applicant from the risk of serving a sentence which may be reduced on appeal yet he would have served it.

Having made a finding on the prospects of success as aforesaid I am however hamstrung by the fact that the notice of appeal filed by the applicant is fundamentally defective. The notice of appeal does not comply with the provisions of r 22 of the Supreme

Court (Magistrates Court) (Communal Rules) SI 504/1979. The notice of appeal filed by the applicants' legal practitioners is couched as follows;

“NOTICE OF APPEAL

TAKE NOTICE THAT Appellant hereby appeals against his conviction and sentence by the learned Magistrate sitting at KADOMA whose judgment was handed down on 17th February 2016 and the sentence was handed down on 18th February 2016.

GROUND OF APPEAL (COUNT 1 & 2)

A. AGAINST CONVICTION

1. The learned magistrate misdirected herself as a matter of fact and law in finding that there was sufficient evidence to substantiate a conviction of rape.
2. The magistrate misdirected herself as a matter of fact and law in finding that penetration was effected upon the complainant.

B. AGAINST SENTENCE (COUNT 1)

3. The learned magistrate misdirected herself in failing to consider all mitigatory factors applicable, in circumstances surrounding omissions of the offence and accused's personal circumstances resulting in her imposing a sentence which was too harsh and which induces a sense of shock.

WHEREFORE, Appellant prays for the conviction to be quashed and the sentence to be set aside.

Dated at Harare this 1st day of March 2016

GAMBE AND PARTNERS”

In my judgment, when a court is seized with an application for bail pending appeal it must be satisfied that there is in fact a valid appeal which has been filed. Where there is no valid notice of appeal filed, then it is a misnomer to admit an applicant to bail pending an appeal which is not in existence or invalid. The mere filing of the notice of appeal as was done in this case does not necessarily validate the appeal. The notice was timeously filed but lacks the fundamentals of a proper or valid notice of appeal.

Rule 22 (1) requires the appellant to set ‘out clearly and specifically the grounds of appeal’ among other requirements like giving an address for purposes of service. Starting with the address for service, the notice of appeal does not state the address for service. The address given on the signature portion is not to be construed as the address for service as envisaged in the rule unless it is so stated in the notice. This however is an omission which can be overlooked. The problem really lies with the grounds of appeal which are so generalised as to be meaningless. The grounds of appeal should specify the points on which

issue is taken with the judgment. To state that the magistrate misdirected himself “as a matter of fact and law in finding that there was sufficient evidence to substantiate a conviction for rape” is devoid of substance as to be meaningless. How such a ground of appeal will inform the state/respondent or even the trial magistrate of what exactly the appellant seeks to attack is anyone’s guess. To make matters worse, the court *a quo* did not convict the applicant of rape. The same applies to the second ground of appeal attacking the magistrate for making a finding that penetration was effected. The magistrate did not make such a finding and in fact ruled that there was no evidence of penetration. Similarly, the ground of appeal against sentence is too generalised. To simply state that the magistrate did not consider all mitigatory circumstances and personal circumstances of the appellant is totally inadequate. The circumstances allegedly not taken into account should be listed so that both the state/respondent and the magistrate can answer to the criticism.

The law is clear that if a notice of appeal does not comply with r 22 (1) it is a nullity. If as in this case the purported grounds of appeal are senseless or meaningless, this renders the notice invalid. The notice of appeal being invalid means that there is no appeal pending. Further, being a nullity, the notice of appeal cannot be remedied through amendment. A nullity means there is nothing and one cannot remedy nothing. See *S v Jack* 1990 (2) ZLR 166 (SC), *S v McNab* 1986 (2) ZLR 280. In *Collins Dzinoreva v S*, HH 780/15, HUNGWE J following on the dicta in the above cases and others which he cited ruled that where a notice of appeal is defective and therefore a nullity, there will in fact be no appeal before the court. Although HUNGWE J went on to give the appellant the benefit and dealt with the matter on the merits in what I would say was more in the manner of review, the same cannot be said of the notice of appeal *in casu* which tells a lie about what the magistrate did. It is clear that the legal practitioner who noted the appeal just adopted a perfunctory approach and composed grounds of appeal from his imagination. The legal practitioner did not read the record nor the magistrate’s judgment.

This is a clear case in which the legal practitioner did a disservice to his client and such conduct deserves censure as it amounts to unprofessional and unethical conduct.

A legal practitioner should not distort facts let alone in circumstances where the facts relate to recorded proceedings to which the legal practitioner would easily have access. To just dream up grounds of appeal and file them in pursuance of an appeal is conduct which is remiss and not expected from a legal practitioner. The legal profession is a noble profession

and it is such conduct on the part of legal practitioners which brings the profession into disrepute.

It was therefore principally for the reason that there was no valid appeal before the court for which bail pending appeal could be granted that I dismissed the application notwithstanding my observations that my perusal of the record raised certain issues on which I have expressed my view. The issues relate to prospects of success.

Lastly, having expressed the view that the legal practitioner's conduct in misinforming the court regarding the magistrates judgment deserved censure as appears from the notice of appeal in case no. CA 133/16, it is only proper that a copy of this judgment is brought to the attention of the secretary of the Law Society so that the society informs its members of the serious view which the courts take of legal practitioners who conduct themselves in the manner that the legal practitioner who represented the applicant in drafting the notice of appeal did in this matter with the resultant prejudice which has been caused to the applicant.

The Registrar is ordered to avail a copy of this judgment on the Secretary of the Law Society.

National Prosecuting Authority, respondent's legal practitioners