CHENJERAI MAIROSI

versus

THE STATE

HIGH COURT OF ZIMBABWE

CHITAPI J

HARARE, 28 April 2021

**Bail pending appeal**

Applicant in person

*V Mtake*, for the respondent

CHITAPI J: This application was first filed on 13 December 2017 wherein the applicant seeks admission to bail pending appeal. The application was either withdrawn or struck off the roll several times on account of the applicant’s failure to file the record of proceedings. It suffices to record that after all the delays in the hearing of the bail application, it turned out that the application could not be heard anyway because on 21 September 2020 after I had requested for the appeal record CA 648/16 for perusal and to confirm that the applicant’s appeal was still pending given the time of its noting in 2016, I noted that the registrar had dismissed the appeal on account of the applicant’s failure to pay costs of preparation of the record. In order to assist the unrepresented applicant, he was allowed to apply for leave to note a fresh appeal. Mrs *Mtake* for the respondent agreed to such a course. The applicant subsequently applied for the leave to note a fresh appeal. Leave was granted and the applicant noted the appeal with his grounds of appeal remaining the same as in the lapsed appeal. It was more of a reinstatement of the appeal. The application for bail pending appeal was then argued and I give the reasons for and the judgment herein.

The applicant was convicted of five counts of aggravated indecent assault as defined in s 66(1)(a)(ii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and three counts of indecent assault as defined in s 67(1)(b) of the same enactment. On the aggravated assault charges which I will outline later the applicant was convicted on counts 1, 4, 5, 6 and 7. He was sentenced to 10 years imprisonment on each of those counts making a total of 50 years imprisonment. On the indecent assault convictions these were counts 8, 9 and 10. They were taken as one for purposes of sentence and the applicant was sentenced to a globular sentence of 2 years. The total sentence which applicant was sentenced to following his conviction was therefore 52 years imprisonment.

The applicant was initially charged on ten counts, all being for the offence of aggravated indecent assault. I will only outline the charges on which he was convicted. In all the counts on which the applicant was convicted of either aggravated indecent assault or indecent assault, the complainants were young male juveniles whom it was alleged, the applicant had anal sex with without their consent. All acts of anal sex with the complainants took place at the applicant’s residence at 14144 Brundish Chinhoyi. The applicant was 38 years old at the time. The offences were alleged to have been committed between April 2016 and June 2016. The complainant was then employed as a security guard by one of the security companies in Chinhoyi. The applicant appears to have fraternized with the juvenile boys who would go to the applicant’s house for various reasons. The applicant would then engage in forced anal sex with the boys.

In count 1, the complainant was aged 9 years old and attending school at a local primary school where he was a grade 3 pupil. The complainant visited the applicant in the company of a friend on 27 June 2016. The applicant sent the friend to nearby shops. The applicant remained with the complainant whom he handcuffed and tied his mouth with a tie before inserting his penis into the complainant’s anus thereby indecently assaulting or sodomising the complainant. The applicant gave the complainant some money after the event and on several occasions thereafter to buy the complainant’s silence.

In count 4, the complainant was an 11-year-old male juvenile who was attending grade 7 at a local primary school. The offence was committed on 6 June 2016. It was alleged that the complainant and her friend met up with the applicant who gave them applicant’s bicycle to ride it. When the complainant and the friend returned the bicycle to the applicant’s house, he invited the two inside his house where he tied them with a chain before showing them pornographic videos and having forced anal sex with the complainant. The applicant then threatened to kill the complainant and his friend if they reported the incident to anyone. The applicant gave the complainant 50cents to buy his silence. The complainant revealed his ordeal to his parents following news of the arrest of the applicant.

In count 5, the complainant was an 8-year male juvenile attending grade 1 at a local school. The exact date of the incident was not disclosed but the incident occurred in 2016. The complainant was playing with his friend when the applicant hired the complainant into the applicant’s house. The applicant took the complainant to the applicant’s bed where the applicant had anal sex with the complainant before buying the complainant’s silence with a payment of 10 cents to buy jiggies chips. The complainant went back to play with other juveniles after the act. The complainant made a report of the incident to his parents following the arrest of the applicant.

In count 6, the complainant was a 10-year-old male juvenile and was attending grade 4 at a local primary school. On 23 July 2016, the applicant allegedly invited the complainant to the applicant’s house. Upon the complainant’s arrival, the applicant forcibly got hold of the complainant and laid the complainant on the bed in his stomach. The applicant had forced anal sexual intercourse with the complainant.

In count 7, the complainant was 10 years old and was a grade 5 pupil; at a local primary school. On 5 June 2016, the complainant together with two of his friends visited the applicant at his house. The applicant sent the two friends of the complainant to the grinding mill leaving the complainant alone with the applicant. The applicant locked his door and thereafter got hold of the complainant whom the applicant sodomized by inserting his penis into the complainant’s anus. The applicant gave the complainant 50cents to buy the complainants silence. The complainant revealed his ordeal to his parents after the applicant had been arrest.

In regard to the five counts enumerated above, medical evidence produced in court was conclusive that penetration of the anus was definite. The applicant did not deny the contents of the medical reports. He suggested that the juveniles could have been abused indecently by other persons. The issue for determination in these counts was then, whether it was the applicant who sexually abused the complainants by having anal sex with them as they alleged. The regional magistrate properly identified the issue for determination.

In count 8, the complainant was a 12-year-old male juvenile attending a local primary school. The complainant in the company of his friend visited the applicant at the applicant’s house sometime in 2016. The applicant sent the complainants’ friend to the shops whilst the complainant remained behind watching television in the applicant’s house. The applicant allegedly grabbed the complainant from behind, dragged the complainant to the applicant’s bed where the applicant removed the complainant’s shorts and underwear before inserting his penis into the complainant’s anus and sexually abused the complainant. The applicant gave the complainant $1.00 buy to buy the latter’s silence on the incident.

In count 9, the complainant was a male adult aged 9 years old and was doing grade 3 at a local primary school. On a date unknown but in the period extending from January to April 2016 the applicant was alleged to have invited the complainant to the applicant’s house. The complainant visited the applicant in the company of his friend. When the friend left the house to visit the toilet, the applicant played a pornographic video for the complainant to watch. The applicant then asked the complainant to lie on his bank. He then removed the complainant’s trousers and inserted his penis into the complainant’s anus and had anal sex with the complainant. The matter surfaced following the arrest of the applicant, where after the complainant then revealed what had been done to him by the applicant.

In count 10, the complainant was a male juvenile aged 12 years old and doing grade 7 at a local primary school. It was alleged that in June 2016 on a specific date unknown, the complainant in the company of a friend visited the applicant at this house. The applicant then sent away complainant’s friend to go and buy airtime and a C.D disc to play and view. The complainant remained in the house playing a game on the applicant’s cell phone. The applicant grabbed the complainant and removed the complainant’s trousers and pants. The applicant then inserted his penis into the complainant anus. The applicant was disturbed from further sodomising the complainant upon the return of the complainant’s friend from the shops. The complainant revealed the sexual abuse to his parents following the arrest of the applicant.

In counts 8, 9 and 10, medical reports were inconclusive on whether or not penetration was effected with the doctor commenting that “evidence of penetration not visible.” The regional magistrate made a positive finding that in the absence of proof beyond a reasonable doubt, it was not safe to convict the applicant of aggravated in decent assault. Competent verdicts of guilty to indecent assault were retained on those three counts. It was these three counts which as noted were taken as one for purposes of sentence and the applicant was sentenced to 2 years imprisonment.

The record shows that the regional magistrate made positive credibility findings of the evidence of the complainant and other state witnesses. The regional magistrate made a finding that the applicant used the same *modus operandi* of either inviting the complainants to his house or taking advantage of them when they visited him uninvited. The evidence shows that the applicant was popular with the male juveniles for his generosity since he would allow them to watch television at his house, use his cell phone handset to play games and he would also allow them to use his bicycle. The evidence however showed that far from being a Good Samaritan the applicant was a villain out to sexually abuse the young men.

The regional magistrate noted that he had to treat the complainant’s evidence with caution. He noted that even though the cautionary rule had been discarded as a pre-requisite to assessing evidence in sexual offences, it was still necessary to handle sexual offences with “extreme care and due diligence”. It was on the basis of that that approach that relying on the judgment of *S* v *Banana* 2000 (1) ZLR 607 (s) and *S* v *Ernest* *Muparanyiki* HH 80/2021, the regional magistrate acquitted the applicant on three of the counts and reduced the verdict to indecent assault in relation to three of the counts. The regional magistrate was therefore property directed on the law on the approach to assessing evidence in sexual offences. The regional magistrate dealt with the evidence against the applicant count by count. It was his finding that the applicant had admitted to giving the children money and the applicant stated that he did so on the children’s request.

I have considered the grounds of appeal noted by the applicant. Significantly there is no direct challenge to the conviction of the applicant in count 7. In regard to this count therefore, only the generalized grounds applicable to all counts can be said to constitute the challenge in count 7. These are grounds of appeal 2 and 3. In the second ground of appeal the applicant generally attacked the judgment of the regional magistrate on the basis that the regional magistrate failed to give due weight to the “negative evidence” of the arresting police. It is not clear as to why the witness evidence is said to be negative. This witness followed up on a report made to him by his son who reported that the applicant was abusing male boys and gave names of one of the boys. The witness questioned the boy in question. The boy confirmed the abuse. The witness approached the applicant and questioned him before arresting him. Upon news of the applicant’s arrest, more complaints poured in. It was proper to invite complainants to report to station using lawful media of communication. The cases would ultimately be decided on the sufficiency of evidence rather than how the complainants disclosed the abuse. This ground of appeal lacks merit.

In ground 3, it was averred in regard to all the counts that the regional magistrate failed to consider the “open possibility” that the complainants given their young ages were” merely suggestible and imaginative as the handcuffs; neck tie or pornographic material was not produced. The ground is just too wide because it is not in respect of all counts that evidence was led that handcuffs, neck tie or pornographic material was an element or organ of use. Therefore, it would be necessary to point out in respect of which counts the criticism is made. This notwithstanding, the reading of the record shows that the regional magistrate was alive to the need to exercise extreme caution and diligence and was further aware and properly directed that the complainants were young boys and that caution had to be applied. The ground of appeal is unlikely to succeed on appeal. There is really no appeal directed specifically at ground 7. That being, it stands that the conviction thereof for which the applicant was sentenced to 10 years imprisonment stands.

In regard to count one, the applicant’s ground of appeal was that the regional magistrate wrongly convicted the applicant without considering that the complainant may have merely been testifying to what was suggested by the arresting detail who asked the complainant to narrate what the applicant had done to him. There is no merit in this ground. The arresting detail did not suggest to the complainant that such and such act had been committed on the complainant by the applicant. In any event, medical evidence was conclusive that there was evidence of penetration per annum, on the examination of the complainant. The complaint’s evidence was corroborated. The ground of appeal has no prospects of success.

In regard to counts 4, 5 and 6 the grounds of appeal basically attack the regional magistrate’s finding in count 4 that the medical report was sufficient to infer penetration yet the report referred to penetration being probable. It was averred that the complainant did not testify that the applicant effected penetration. I do not find it necessary to unnecessarily deal with this ground at length for the simple reason that the applicant would even if he argued the ground of appeal successfully be guilty of indecent assault. In counts 5 and 6, the criticism made in the grounds of appeal was the involuntary nature of the complaints of sexual abuse. Again, the regional magistrate was alive to how the reports had been made in these counts. There was no misdirection of law, fact or both committed by the regional magistrate in these counts.

The grounds of appeal purport to be thirteen by numbering. A closer perusal of the grounds reveals that the applicant’s main challenge to the judgment appealed against is that the regional magistrate erred in accepting the evidence of the complainants as it was unreliable for a variety of reasons. An attack was also made generally on the medical reports on which it was recorded that penetration was “definite, very likely or probable’. A careful examination of the judgment and record shows that the regional magistrate was impressed by the demeanour of the complainants. An appeal court does not lightly interfere with credibility and demeanour findings made by the trial court. In the response to the notice of appeal, the regional magistrate commented as follow “AD CONVICTION

1. All the complainants gave their evidence convincingly and were not suggestible. There is nothing in the evidence which goes on to show that they were influenced to frame up the allegations.

Ad sentence

The sentence is in line with decided cases when considering the accused’s’ age against the complainant’s’ ages. If I erred, I erred on the side of lenience.”

It is also clear from the judgment that the magistrate dealt with the evidence on each count and where there was doubt, the applicant was acquitted. Where medical evidence was not conclusive in regard to penetration, the applicant was given the benefit of doubt and the lesser competent verdict of indecent assault was returned. The applicant did not have a probable defence. He knew the complainants and did not deny interaction with them. The called them friends. He did not challenge the medical reports. The reports were properly produced. What he denied was the allegation that he sodomized the complainants. This was an issue of both fact and law. The regional magistrate made credibility findings on the reliability of the complainant’s evidence. The applicant suggested that the complainants could have been sexually abused by other unknown persons. The complainant suggested that the complainants lied against him at the instigation of police who threatened with assault if they did not implicate him. The regional magistrate was satisfied that it was the applicant who sexually abused the juveniles.

In terms of the provisions of s 115C(2)(b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], the applicant bears the burden of showing on a balance of probabilities, that it is in the interests of justice to release him or her on bail after conviction. In *S* v *Tengende* 1981 ZLR 445 (5), it was held that in applications for bail pending appeal, bail must be refused in the absence of positive grounds to grant it. See *S* v *Dzvairo* C 2006 (1) ZLR 45 H where PATEL J stated that it was necessary for the applicant to show that the noted appeal has reasonable prospects of success. It was also held that even where prospects of success had been demonstrated, bail could still be refused in serious cases. The risk of abscondment always looms large because the appellant will have been sentenced to a long sentence. The applicant would be unlikely to wait to serve that sentence where the appeal is doomed to a predictable dismissal.

The prospects of success appear to me to be non-existent or negligible. The alleged misdirections by the regional magistrate are not apparent from the judgment and the evidence. The only prospect of success on appeal pertains to sentence. A sentence of 52 years in totality is unconscionable and does not really serve any practical purpose. The applicant is unlikely to live to over 80 years which age he will attain in prison if the 52 years are added to his age which was 34 years then. A lesser total effective sentence is likely to be imposed on appeal when it is considered that the Supreme Court has considered a total affective sentence of 25 years to be the outer limit which may be imposed in relation to an effective sentence which may be imposed on one accuse in a single trial. Even in *S* v Gumbura a decision of this court where Gumbura faced several counts of rape, a sentence of 25 years with 5 suspended was imposed on appeal down from 40 years imposed by the trial court.

However, the applicant must still serve a substantial period of incarceration. There is no practical purpose to be served by releasing the applicant on bail when the appeal against conviction is doomed to predictable failure and the appeal against sentence will not likely be reduced to a non-custodial sentence. In the premises the applicant has failed to show that it is in the interests of justice to grant him bail pending appeal. His bail pending appeal application is dismissed.

*National Prosecuting Authority*, respondent’s legal practitioners