

REPORTABLE (62)

ROBERT MARTIN GUMBURA

v

THE STATE

SUPREME COURT OF ZIMBABWE

HARARE, JULY 30, AUGUST 1 & 18 & OCTOBER 16, 2014

T. Magwaliba, for the appellant

E. Mavuto, for the respondent

BAIL APPEAL (In Chambers)

PATEL JA: The appellant is the pastor of his own church based in Marlborough, Harare. He was convicted by the Harare Magistrates Court on 3 February 2014 of four counts of rape and one count of contravening s 26 of the Censorship and Entertainment Control Act [*Cap 10:04*] *i.e.* possession of pornographic material. He was sentenced to a term of 50 years imprisonment with 10 years suspended on condition of good behaviour. He has since appealed to the High Court against his conviction and sentence. That appeal is pending.

The appellant also applied to the High Court as a court of first instance for bail pending appeal. His application was dismissed. He now appeals against that decision in terms of s 121 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The court *a quo* found that the evidence of the complainants in relation to three of the four counts of rape was credible in material respects. The court also found that the complainants' reports of the alleged rapes were voluntarily made and that, although the delays in making those reports were lengthy, the reasons given for those delays were plausible. Moreover, the sentences imposed by the magistrate in respect of the rape counts were appropriate.

As regards the censorship offence, the court *a quo* found that the evidence adduced as to the possession of obscene material was sound and that the appellant had no lawful excuse for his possession of that material. However, the sentence imposed for that offence was probably defective as the magistrate had advanced no reasons for sentence on that count.

In the event, the court *a quo* held that the appellant generally had no prospects of success on appeal and dismissed his application for bail. The court also held that there had been no violation of his constitutional rights to liberty and a fair trial.

The principal ground of appeal herein is that the Magistrates Court did not properly analyse the evidence before it and that, therefore, the case on appeal was arguable. Moreover, this cursory analysis of the evidence violated the appellant's constitutional rights. Additionally, the High Court erred in

disregarding the effect of the magistrate's mistaken references to cases dealing with mentally defective victims of rape. The High Court also erred in finding plausible explanations for the inordinate delays in reporting the alleged offences. Again, the reports were made in circumstances showing a likelihood of their having been made in response to leading, inducing or intimidating questions.

Having regard to all of the foregoing, the central issue for determination in this matter is whether the court *a quo* erred or misdirected itself in finding that there were no prospects of success on appeal from the decision of the Magistrates Court. The test to be applied in this regard is relatively uncomplicated: Is the appeal "reasonably arguable and not manifestly doomed to failure"? See *State v Hudson* 1996 (1) SACR 431 (W).

The main point taken by Mr *Magwaliba* for the appellant is that the learned magistrate did not evaluate the evidence and assess the credibility of witnesses on the rape charges (counts 3, 7, 8 and 9). He thereby erred in accepting the evidence of a single witness without adequate analysis in respect of each count.

Count 3 relates to Precious Kapfumvuti (Precious). Her evidence was that she was raped on several occasions during the period stretching from 2007 to 2013, having succumbed to the appellant's exercise of authority rather than physical force. It is submitted for the appellant that her assertion of having been

subjected to indoctrination cannot be sustained. She understood the nature of the sexual acts that she engaged in and the appellant's influence could not have deprived her of the capacity to give her informed consent. Moreover, her explanation for having reported the alleged rapes at a late stage is totally unreasonable. She could have reported the matter to various people over the years and after she left the appellant's premises in 2013. It is further submitted that her misrepresentation of certain biblical passages that she relied upon while giving evidence in court rendered her veracity questionable. In short, she willingly subjected herself sexually to the appellant as an integral part of worshipping him and then later changed her position after talking to others.

Mr *Mavuto* for the respondent submits that the appellant stood in the position of being a guardian over Precious. She received counselling and religious teachings from him, including the notion that a master could do as he willed with his servant. The subjective effect was that she believed what she was told by the appellant about his authority and that differences between them should not be taken to court for fear of her being placed in the hands of Satan. It is further pointed out that she did report her first rape to a fellow congregant but no assistance was forthcoming. Thereafter, she was always accompanied or guarded either by the appellant's principal wife or by his brothers. She therefore remained silent out of fear and eventually escaped after realising that what the appellant was doing to her was wrong.

Count 7 pertains to Winnie Sakahuhwa (Winnie). Mr *Magwaliba* submits that she was aware of the appellant's reputation before she went to stay with him in December 2011. Nevertheless, she allowed herself to be sexually intimate with him. In effect, she consented to sexual intercourse because of his authority and understood sex with him as being necessary to create a bond between them. Moreover, her account of one of their sexual encounters is physically improbable in terms of their respective bodily positions. She admits to having denied any sexual assault when queried by at least three other people and did not even confide in her mother after police investigations had commenced. Additionally, her mother's evidence does not corroborate that of Winnie and the former could not explain why the latter did not confide in her. Again, Winnie did not make any report to the representatives of Child Line who attended her school for counselling.

For the State, it is submitted that Winnie was warned by the appellant not to make any report because she would then be placed in the hands of Satan. She genuinely believed his teachings. She did not tell her mother anything about her sexual assaults because her mother suffered from hypertension and she did not want her to be overstressed. Furthermore, she did not report her predicament to anyone else because the appellant claimed that the police belonged to him. She only reported the matter to the police after learning of his arrest and realising that he was not invincible.

Counts 8 and 9 relate to Hazvinei Samanyanga (Hazvinei). As is correctly pointed out by Mr *Magwaliba*, the court *a quo* entertained considerable doubt as to the propriety of the appellant's conviction on count 9. The learned judge found that it was possible that she may have been raped on the first occasion (count 8) as her evidence was credible on that score. However, she appears to have acquiesced to sexual intercourse on the subsequent occasions (count 9), having voluntarily returned to the appellant's residence during weekends. Moreover, she spent several months in South Africa before reporting the matter to the police when they contacted her in connection with Precious. These are matters that were not adequately interrogated by the Magistrates Court.

Mr *Mavuto* submits that Hazvinei's evidence on count 9 shows that she was forcibly raped on the first occasion and that the appellant was correctly convicted on that count. He concedes, however, that her conduct in respect of count 9 was inconsistent with the absence of consent, particularly as she continually returned to the appellant's residence of her own accord.

Count 10 pertains to the appellant's unlawful possession of two obscene DVDs. There is no doubt that the appellant was properly convicted on this count. At the hearing of this appeal, Mr *Magwaliba* quite correctly abandoned the technical point raised in his heads of argument as to the propriety of inspecting the material in question after the appellant was arrested. As regards the

concurrent sentence of 4 months imprisonment imposed by the learned magistrate, the court *a quo* highlighted the obvious misdirection of the magistrate in failing to provide any reasons for sentence. In any event, as was accepted by Mr *Magwaliba*, this misdirection has been rendered academic and irrelevant by the fact that the appellant has already served 4 months in prison following his conviction on 31 January 2014.

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 All 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 overemphasised. Moreover, findings of credibility must be considered in the light of proven facts and probabilities.

In the instant case, the learned magistrate convicted the appellant on four out of the total nine counts of rape. He rejected the testimony of three complainants and acquitted the appellant in respect of the five counts pertaining to them. With respect to the three complainants presently under consideration, his assessment of their credibility is not as detailed as might have been expected. Nevertheless, I am not persuaded that any of his critical findings of credibility can be said to be manifestly wrong in light of the proven facts and probabilities

of this case. I am inclined to agree with the State that he correctly analysed the subjective effect of the appellant's behaviour and teachings on the complainants. Admittedly, in so doing, he erroneously cited case authorities revolving around victims of rape who are mentally disordered or incapacitated and their capacity to consent to overtures and acts of sexual intercourse. However, as was correctly noted by the court *a quo*, the magistrate's reference to these cases was designed to show that the complainants were not freely consenting individuals. His misquotation did not go to the root of the convictions and does not, in my view, constitute a fatal misdirection.

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, characterised 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 the point where it operates to vitiate and negate any meaningful consent to sexual abuse and exploitation by their spiritual masters.

Taking a broad conspectus of the facts and probabilities *in casu*, it appears to me that the complainants, having been enmeshed within the overpowering cocoon woven by the appellant, unwittingly succumbed to his sexual advances and predations. Thereafter, constrained by fear and misconception, they remained taciturn for several years and only reported their respective ordeals after appreciating the full nature of their sexual bondage.

To sum up, it must be accepted that there are certain deficiencies in the State case. Nevertheless, I take the view that none of the grounds of appeal raised in this case is entirely sustainable. Apart from the conviction on the second charge pertaining to Hazvinei (count 9) and the sentence imposed in respect of the possession of obscene materials (count 10), I am satisfied that the appellant has no prospects of success on appeal and that his appeal is doomed to failure. In that event, he will remain subject to a prison term totalling 40 years, with a period to be determined suspended on condition of good behaviour.

The above conclusion does not necessarily end the matter. An issue that was raised in the court *a quo* but not addressed in its judgment is the possibility of the appellant absconding in the event of being granted bail. I think it appropriate to deal with this aspect for the sake of completeness.

Mr *Magwaliba* submits that the appellant is unlikely to abscond because he has huge family responsibilities. Moreover, he is prepared to offer his main residence as security for bail. Mr *Mavuto* counters that the appellant will be induced to abscond by the presence of another charge of rape that is pending against him and because of the 40 years sentence imposed in respect of counts 3, 7, 8 and 10. I note that the pending charge arises from the same period but was deferred because the complainant in that matter had fallen pregnant. In any event, the appellant has denied that charge.

As was highlighted in *Manyange v The State* HH 1-2003, there is a clear distinction between the principles governing the grant of bail pending trial and those relating to bail pending appeal. In the former situation, the presumption of innocence, which resides within the constitutionally guaranteed right to liberty, operates in favour of granting bail unless there are positive reasons for refusal. In the latter situation, on the other hand, the presumption of innocence is inoperative because the accused is a convicted and sentenced offender. The accused must go further than showing that he has prospects of success on

appeal. He must establish that there are positive grounds for granting bail and that the grant will not endanger the interests of justice. In this regard, the public perception is an integral factor to be taken into account. Where the grant of bail would result in a public outcry, the courts should be slow to grant bail in order to safeguard the integrity of the justice delivery system. See *Gardner v The State* HH 60-2008.

The possibility of public outrage is something that I am not in a position to assess without any compelling evidence in that regard. What is more significant *in casu* is that the appellant has not proffered any positive grounds for allowing him to proceed on bail. The existence of a huge familial entourage, comprising 11 wives and 32 children, is a condition of his own making and does not really advance his claim to bail. Moreover, he has failed to satisfactorily demonstrate his prospects of success on appeal. Apart from this, there is nothing else to commend his right to liberty. In my view, the prospect of a protracted prison term, coupled with his fresh experience of post-trial incarceration, affords abundant incentive for him to abscond. In all the circumstances, I am amply satisfied that the appellant is not a good candidate for bail.

For all of the foregoing reasons, the appeal must fail and it is accordingly dismissed.

Nyikadzino, Simango & Associates, appellant's legal practitioners

Prosecutor-General's Office, respondent's legal practitioners