Judgment No. HB 23/05
Case No. HC B 16/05

FANUEL MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 25 FEBRUARY 2005 AND 14 APRIL 2005

S Sibanda for applicant
T Mkwananzi for the respondent

Bail Application pending trial

CHEDA J: On 6 July 2004, it is alleged that applicant who was 33 years of age raped complainant who was aged 14 years. It is further alleged that he raped her three times in the bush. After this incident applicant is alleged to have absconded to South Africa and only returned on 9 November 2004 whereupon he was arrested following a tip off to the police Nkayi.

Applicant now applies for bail pending trial which is opposed by respondent on the grounds that he is likely to abscond and or interfere with state witnesses.

Interference with state witnesses

Respondent has further argued that applicant may interfere with investigations. This argument has to be considered against the background of the length of period from the time the offence was committed up to the time of applicant's arrest. There has been a period of four months from the commission of the offence to the time of his apprehension. The complainant and other relevant witnesses have been interviewed and statements duly recorded from them. Therefore in my view, there will be no reasons to continue to incarcerate him on the basis of interference in the

absence of any tangible evidence that he has done so during his free movement after the commission of the offence.

Investigating officers should bear in mind that the presumption of innocence of a suspect operates in his favour throughout the investigations and they should not therefore continue to unnecessarily hold a suspect for considerable periods of time without just cause. I can not set a time limit for that purpose but each case will depend on its complexity or otherwise.

In *casu*, respondent has not shown how or in what form the interference will take. It remains a bare allegation as it were. This ground alone, therefore, is not enough to justify applicant's denial to the admission of bail. The mere suspicion that applicant might interfere with witnesses should not be used as reason to deny him bail, bearing in mind his constitutional right to liberty.

Abscondment

Respondent further argued that applicant may abscond if granted bail, thus, failing to stand trial. Attendance in court is the ultimate in our criminal justice system. It is the duty of the courts to ensure that any person required to do so must attend court in order to answer the allegations against him fairly. Section 116(7) of the Criminal Procedure and Evidence Act [Chapter 9:07] reads:

> "Subject to subsection (4) of section 13 of the constitution, in any case in which the Judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person to bail if he considers it likely that if such person were admitted to bail he would –
> (a) not stand his trial or appear to undergo the preparatory examination or to receive sentence;
> (b) …
> (c) …"

The presumption of innocence is an integral part of our criminal procedural system. Therefore, courts should, in the absence of any evidence to the contrary lean in favour of the admittance of suspects to bail. It is every person's constitutional right to be able to move around freely. In *McCarthy* v *Rex* 1906 TS 657 at 659 INNES CJ stated-

> "The court is always desirous that an accused should be allowed bail if it is clear that the interests of justice will not be prejudiced thereby more particularly if it thinks upon the facts before it that he will appear to stand his trial in due course." See also *S* v *Smith & Ano* 1969(4) SA 177

In determining whether an applicant is likely to stand trial the court is obliged to take into serious considerations the facts before it and weigh them against the interest of the suspect.

In *casu* applicant left for South Africa immediately after the commission of the offence and only sneaked back after 4 months. He was only arrested after a tip off to the police by the members of the local community. It is noteworthy that his sojourn to South Africa was illegal as he did not possess travel documents. It was submitted before me that, he in fact, is in the habit of doing so having done so on several occasions. This fact was conceded to by Mr *Sibanda* his counsel. Mr *Sibanda's* attitude in this regard must be commended as it exhibits his professionalism. In determining whether applicant is likely to abscond the following guidelines have to be adopted. The list is however inexhaustive.

1. the nature of the charge and the severity of the penalty which is likely to be imposed in the event of a conviction.
2. The strength of the state case
3. The ability to flee to a foreign country, and

4. His past immediate conduct prior to his arrest.

1. **The nature of the charge and the severity of the penalty**

Rape is a very serious offence. It attracts a prison term of up to 15 years. If convicted applicant would be imprisoned for a considerable long period. The type of sentence is in my view enough incentive to encourage him to abscond in order to avoid the deprivation of his liberty. The more serious the charge the more severe the sentence is likely to be, hence the incentive to abscond becomes greater.

2. **The strength of the state case**

Where the state case is *prima facie* strong, a conviction is almost guaranteed. With this knowledge, applicant is most unlikely to wait for trial whose conclusion would be against him. In *casu* applicant admits sleeping with complainant but avers that it was by consent. It is clear therefore that respondent has a strong case against him in my view.

3. **The ability to flee to a foreign country**

The rationale of granting bail to an accused is to allow him freedom while awaiting his attendance in court. Where an accused has previously demonstrated his capability of leaving the country at leisure without valid travel documents or no documents at all it will be futile for the court to release him on bail, moreso, after he has been arrested and placed on remand. While before the arrest it would not have occurred to him how serious the allegations are, surely, his perception would be different after his arrest. This therefore would no doubt propel him to travel to South Africa or to any neighbouring country using the same means and is likely not to come back to stand trial.

4. **Applicant's past immediate conduct**

Applicant's past conduct, namely his unlawful numerous visits to South Africa, no doubt militate against him. His immediate past conduct can therefore not be ignored. See *S* v *Thornhill* (2) 1998(1) SACR 177.

In light of the above, it is my view that applicant is not the proper candidate for release on bail, for to do so will be defeating and frustrating the otherwise smooth running of the proper administration of justice.

The application is therefore dismissed.

Messrs Adv. S K M Sibanda & Partners applicant's legal practitioners
Criminal Division, Attorney-General's Office respondent's legal practitioners