

DENNIS MAZARIRA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 2 DECEMBER 2016 & 30 MARCH 2017

Bail Application

K. Ngwenya, Miss G. Ndlovu & G. Muvhiringi, for the applicant
T. Hove for the respondent

TAKUVA J: The applicant was found in his birthday suit inside a 15 year old girl's bedroom. He had sneaked in while complainant was asleep. He proceeded to undress her and had sexual intercourse with her once. Complainant who is an epileptic patient woke up and found applicant on top of her. She ran out leaving the applicant inside her bedroom. She locked the door from outside and alerted her neighbours who came and found applicant inside the room stark naked. After applicant's arrest, complainant was medically examined and the nurse observed a tear on the right side of the labia minora, stretched hymen and that penetration was very likely.

During the trial, the complainant said "He was on top of me. I discovered that accused was on top of me. He had pulled up my skirt up to breast level. Later on I also discovered that my vagina was painful. When I felt some pain his penis was inside my vagina. His penis had been inserted into my vagina.

Q - You tried to push off him (*sic*)

A - I pushed off the suspect who collided against the wall. I discovered that my skin tight had been removed. I struggled to stand up and I collided with bricks which uplifts my father's bed. I collected some towel and went

outside where I properly dressed myself.” See page 33 of the record of proceedings.

Applicant was convicted of rape in contravention of section 65 of the Criminal Law (Codification and Reform) Act Chapter 9:23. He was sentenced to 10 years imprisonment of which 2 years imprisonment was suspended for 5 years on condition of good behaviour. He appealed against both conviction and sentence. This application is for bail pending appeal.

The applicant is a teacher at Simakade Primary School, Victoria Falls. He resides at house number 1056 Chinotimba, Victoria Falls and the complainant’s father is applicant’s tenant at that house. The complainant was staying with her parents at that house at the time the offence was committed.

In this application, applicant averred that he has good prospects of success on appeal for the following reasons:

- “(1) The court *a quo* erred by disregarding inconsistencies in the testimony of the complainant such as the time she had taken her tablets. This made her a “bad” witness.
- (2) The court *a quo* did not exercise caution in analyzing complainant’s testimony despite that she was a child witness.
- (3) The court *a quo* overlooked the fact that complainant did not report to anyone that she had been raped since her aunt was very drunk.
- (4) The court *a quo* erred by concluding that there was penetration when in the medical report the nurse stated that penetration was merely “very likely” leaving room for doubt the benefit of which should have been given to applicant.
- (5) The medical report did not indicate that complainant had bled at the time at all and it showed complainant suffered no injuries despite that complainant told the court that applicant had penetrated her leading to her bleeding there from.

- (6) Complainant did not make a report of rape to the 1st person she could reasonably be expected to make it to, that is the tenants at the house. She instead chose to run to people who were some 500 metres away.
- (7) The court *a quo* shifted the onus onto applicant to prove why he could not be dragged by a 15 year old and finally, that,
- (8) The court *a quo* did not see the tablets or complainant's medical card hence no evidence was presented in court to confirm the effect of the tablets that complainant said she had taken on the day."

The Law

It is trite that in an application for bail pending appeal, the court is enjoined to consider the following factors:

- (a) the prospects of the appeal succeeding
- (b) the likelihood of absconding in light of the sentence imposed
- (c) the liberty of the individual
- (d) the likely delay before the appeal can be heard
- (e) any other relevant factors.

In *S v Williams* 1980 ZLR 466 (AD) it was held that the proper approach with regard to bail pending appeal is to allow liberty to persons where this can be done without danger to the administration of justice. The likelihood of the person absconding and his prospects of success on appeal should be weighed.

See also *S v Dzawo* 1998 (1) ZLR 365; *S v Manyange* 2003 (1) ZLR 21 (H)

In casu the prospects of the appeal succeeding are non-existent for the following reasons;

- (a) the criticism that the complainant's testimony is riddled with inconsistencies has no merit in that the alleged conflict with regard to the time she took her medication does

- not make her an incredible witness at all. She remained consistent in respect of what the intruder did to her and how she discovered that someone had mounted her.
- (b) the cautionary rule is no longer part of our law. In *S v Banana* 2000 (1) ZLR 607 it was held that “the cautionary rule in sexual cases is based on an irrational and outdated perception and has outlived its usefulness. It is no longer warranted to rely on the cautionary rule of practice in sexual cases. Despite the abandonment of the cautionary rule, however, the courts must still consider carefully the nature and circumstances of alleged sexual offences.” *In casu*, it is evident from the court *a quo*'s judgment that it fully considered the circumstances of the offence and also found corroborative evidence of the complainant's testimony.
 - (c) according to the evidence on record, the complainant made a timeous report to Florence, Biggie and Bruce. The trio went to the applicant's house where they found him in complainant's bedroom stark naked. The fact that complainant's aunt was sloshed is neither here nor there.
 - (d) the evidence clearly established legal penetration at the very least. There was no room for any doubt as regards the degree of penetration required to sustain a conviction for rape. It is common cause that the medical report showed that there were tears on the right labia minora and that the hymen was tenuated or stretched.
 - (e) the court *a quo* did not shift the onus to the applicant, all it did was to find that it did not appear reasonably possible that applicant's defence that a 15 year old girl waylaid him on his way to the toilet and dragged him into her bedroom, might be true.
 - (f) there was no evidence that the complainant was an incompetent witness due to mental incapacity.

For these reasons, I find that the applicant's appeal cannot be described as *prima facie* arguable, but is manifestly doomed to failure.

As regards the risk of abscondment John van der Berg in his book titled *Bail A Practitioner's Guide* 3rd ED at pages 215-6 states:

“The court will naturally take into account the increased risk of abscondment in view of the fact that the accused has been convicted and sentenced to a term of imprisonment and is not merely awaiting the sentence of his trial ... Thus the severity of the sentence imposed will be a decisive factor in the court’s exercise of its discretion whether or not to grant bail and to the amount to be considered, for the notional temptation to abscond which confronts every accused person becomes a real consideration once it is known what the accused’s punishment entails.”

Logically, bail will more readily be refused where the sentence imposed is a long term of imprisonment. In the present case, the applicant was sentenced to ten years imprisonment with 2 years suspended for 5 years on good conditions. The effective 8 year sentence is a long term of imprisonment and the likelihood of the accused considering it worthwhile to abscond rather than serve his sentence is real.

Accordingly, the application is dismissed.

Dube & Company, c/o T.J. Mabhikwa & Partners, applicant’s legal practitioners
The Prosecutor General’s Office, respondent’s legal practitioners