

AGAINST CHIRWANEMHUKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 9 & 13 April 2015

Bail Application

M Chuma, for the applicant
D. H Chesa, for the respondent

TSANGA J: The applicant, aged 35, faces four counts of rape of a 14 year old. He has applied for bail pending trial. He was arrested on 16 March 2015. The complainant is a neighbour who stays with her grandmother. The brief facts surrounding the counts stem from an initial encounter some time in December 2014 in which the accused threatened to stab complainant with a knife if she did not comply with his demands. He is said to have taken the complainant and her young sister to his house to be with his children on that day in the absence of their grandmother. Subsequent counts of rape in January, February, and March of 2015 are said to have occurred when he would go to the complainant's house to demand sex knowing that her grandmother was not present. On all four occasions the complainant told the grandmother of these incidents.

He denies all allegation and emphasises his innocence until proven guilty. He also says there is no evidence yet to prove his commission of the crime. For this, his counsel *Ms Chuma*, relies largely on what she says was the victim's failure to show credible evidence of having been raped such as trauma or physical injury.¹ The applicant also states that he will not interfere with witnesses or intimidate the complainant. He states that the fact that the crime he faces is a serious one should not in itself be the basis for refusing him bail. The most

¹ This demand that rape victims should fit a particular stereotype is one that I had occasion to discuss and caution against in the case of *Pedzisai Musumhiri v State HH 404/14*.

significant factor which he asks the court to focus on is whether he will attend the trial which he says he will.

His proposal in terms of bail conditions is to pay US \$50.00 as his bail and to continue to reside at No. 1569. Belapezi in Epworth Harare where he was staying or alternatively at 15621 in Sunningdale 2 Harare. He also proposes to report once every week to the police, although he makes no mention of which police station he would report to.

The State is opposed to bail on the basis that the accused has merely submitted a bare denial in his defence as opposed to one which would enable the court to make a properly informed decision as to whether to use its discretion in his favour by granting him bail. The State also argues that because of the likely custodial sentence that the accused faces, he is likely to abscond. Presumably as a result of our porous borders, it regards the fact that he does not have travel documents as immaterial to this reality. The State also says that the investigations are complete and that the evidence is overwhelming against him.

Section 117 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] makes pre-trial bail an entitlement unless it is in the interests of justice that a person be detained in custody. Whether or not bail is granted accordingly rests on the foundational principle of ‘interests of justice’. As to when it is in the interests of justice that a person be detained, the applicable parameters are fully elaborated under s117 (2) (a) and (b) as follows:

“(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established-

- (a) Where there is a likelihood that the accused, if he or she were released on bail, will-
- (i) endanger the safety of the public or any particular person or will commit an offence referred to in the first schedule
 - (ii) not stand his or her trial or appear to receive sentence; or
 - iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence ; or
 - iv) undermine or jeopardise the objective or proper functioning of the criminal justice system, including the bail system

or

(b) where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine public peace or security”.

Section 117 (3) (a) to (e) then sets out more fully the factors to be taken into account in deciding whether any of the above mentioned grounds have been established. Those that are of special significance in determining whether bail should be granted in a rape case for

example include the degree of violence used in the commission of the offence; or any threat of violence that may have been made by the accused to any person.² While the accused is indeed presumed innocent until proven guilty, this court cannot make a bail decision oblivious of all of the factual circumstances that have been placed before it. Thus, the fact that the state outline records the threat to stab the 14 year old with a knife in getting her to comply with the accused's demands for sex, is obviously a factor which suggests that he poses some risk to the complainant in particular, if he is released on bail. Threats to use force or the actual use of force are serious considerations and are a constant source of fear for any complainant of sexual assault. Moreover the age difference between the victim and alleged perpetrator in this case, is one which allows for him to potentially exercise undue pressure on the minor as seems to be also indicated in the state outline by the manner in which the alleged rapes are supposed to have been carried out.

Also of significance in the factors to be considered, is whether the accused is familiar with any witnesses and whether any witness has made a statement.³ In this case the accused and witnesses are neighbours and statements have been given. Needless to say rape complainants have every reason to fear the release of an alleged perpetrator back in their midst. Moreover the crime has a fundamental impact on the physical safety as well as psychological well-being of a complainant and her family. It is for such reasons that the consideration of bail in cases of sexual assault needs to strike a careful balance between the rights of the accused pre-trial and the rights of the complainant.

Due to the nature of the crime of rape and due to the fact that even those who may not be direct victims generally live in fear of sexual assault, to be considered also is whether the offence and the circumstances under which it was committed is likely to induce a sense of shock or outrage in the community where the offence was committed. Also to be taken into account is whether the sense of peace and security among members of the public will be undermined or jeopardised by the release of the accused. Accordingly, whether the release of the accused will undermine or jeopardise public confidence in the administration of justice is a factor to be borne in mind.⁴

There is less and less public tolerance for what seems to be a growing problem of sexual violation of young females by adult men. He cannot be released back to where he was

² See 117 (3) (a) (i) & (ii).

³ See s117 (3) (c) (i) (ii) & (iii).

⁴ See s117 (e) (i) (ii) (iv) and (v) in particular.

residing as the purported victim is his neighbour living with her grandmother. It is also the constitutional duty of this court to give meaning to the right to be free from all forms of violence, from both public and private sources in accordance with s 52 of the Constitution which deals with personal security. This court would not be acting in accordance with its duty to protect where it takes a lax attitude towards reducing any chance of that freedom being violated particularly where a complainant is vulnerable.

Where a victim is a boy or a girl under the age of 16 as in this case, the accused is generally detained in custody until dealt with in accordance with the law unless he or she can adduce evidence of special circumstances which in the interest of justice, permit his or her release ⁵. The accused's primary argument for bail is that he did not commit the crime as he was away on those days. The state says investigations are complete and the evidence is strong which seems to imply that this claim did not check out.

Although the accused has submitted an alternative address which would allay some of the fears expressed herein, no effort was made to furnish this court with any details as to who he would be residing with and a supporting affidavit from such person as to their willingness to have him there.

In considering whether or not to grant bail, the court is also enjoined in s 117 (4)(b) to take into account the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail. Since State counsel has advised that the investigations are complete and that the matter is ready for trial, the accused does not have long to wait in light of this court's concerns regarding granting him bail, having considered his application against a backdrop of factors relevant to rape.

Accordingly, the application for bail pending trial is dismissed.

Masawi & Partners, applicant's legal practitioners
The Attorney-General's Office, respondent's legal practitioners

⁵ See s117 (6) which places this condition on serious crimes referred to in Part 1 of the Third Schedule. Among the serious crimes that are covered under this part are murder, rape and aggravated indecent assault, robbery and kidnapping to mention a few.