NEVOUS KUDARAWANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE 22 & 31 July 2015

Bail application

D Sheshe, for the applicant
F Kachidza, for the respondent

ZHOU J: The applicant was charged with and convicted by the Magistrates Court at Chinhoyi of three counts of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 60 years imprisonment, of which 5 years imprisonment was suspended for five years on condition that he does not within that period commit any offence involving sexual violence and for which upon conviction he is sentenced to imprisonment without the option of a fine. The applicant appealed to this court against both conviction and sentence. On 14 July 2015 the applicant instituted the instant application for admission to bail pending determination of his appeal against the judgment of the Magistrates Court. The application is opposed by the respondent.

The approach of the courts in an application for bail pending appeal is settled and the principles differ from those which apply where bail is being sought before conviction. In the case of *S* v *Tengende*1981 ZLR 445(S) at 448, Baron JA said:

> "But bail pending appeal involves a new and important factor; the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused."

See also *S* v *Labuschagne*2003 (1) ZLR 644(S) at 649A-B.

In *S* v *Dzvairo* 2006 (1) ZLR 45 (H) at 60 E – 61 A, PATEL J lucidly recited the relevant principles as follows:

> "Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice, and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospect of success on appeal is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heards is considerable, the right to liberty favours the granting of bail."

See also *S v Dzawo*1998 (1) ZLR 536(S) at 539 E-F.

At the trial the applicant was jointly charged with his wife Mativenga Manzvimbo who was acquitted after the full trial by the Magistrates Court. In his notice of appeal the applicant largely attacks the Magistrates' reliance on the evidence of the complainant in circumstances where, according to him, the complaint of rape was not made timeously and voluntarily. The applicant is husband to the complainant's paternal aunt. The rape took place at a time when the complainant was at the residence of the applicant. The offence came to light when the complainant went to her father's residence, and she disclosed the sexual assault to her grandmother after it was noticed that she was pregnant. She was thirteen years old when the sexual assault took place. The learned Magistrate quite correctly accepted the explanation as regards the manner in which the offence was disclosed. The applicant and his wife who would have been the closest person to be informed by the complainant were evidently collaborating. The wife wanted the complainant to be a second wife of the applicant. His wife was aware of the rape. Who else would the complainant have been expected to report to if an aunt was so actively involved? The applicant had denied ever having sexual intercourse with the complainant in his defence outline only to admit the intercourse when he was giving evidence. The learned Magistrate correctly, in my view, found that the complainant was a credible witness and properly rejected the applicant's claim that he had consensual sexual intercourse with the complainant once after the dates to which the charges relate. The evidence against the applicant is overwhelming. Even his own admission is an admission to committing an offence for which he could still be convicted. But that is irrelevant given that the court a quo found that the intercourse was not by consent of the complainant. I do not believe that the applicant's appeal in relation to the conviction

has any prospect of success. The sentence imposed may be on the harsher side. The fact remains, however, that even if the sentence is reduced on appeal the applicant will still be sentenced to a long term of imprisonment which is unlikely to be less than 20 years. Given the seriousness of the offence and the period of imprisonment which has been imposed, this is a matter in which this Court would not admit the applicant to bail even if he had shown prospects of success in the appeal. However, as I have already noted, I do not believe that the appeal has prospects of success.

In the circumstances, I find no merit in the application for bail pending appeal. The application is accordingly dismissed.

Chadyiwa & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners