

KUDAKWASHE MACHANGARA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 4 & 13 JANUARY 2016

Bail Pending Appeal

Ms Maramba, for the applicant
E Makoto, for the respondent

TAGU J: The applicant, a 19 year old young man was convicted on his own plea of guilty to having sexual intercourse several times and on diverse occasions with a young person aged 15 years until she fell pregnant in contravention of section 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The Regional Magistrate sentenced him to the minimum mandatory sentence of 10 years because he had been found to be HIV positive in terms of s 80 of the same Act. Aggrieved with the sentence he duly noted an appeal to this Honourable Court under case number CA947/15. He now applies for bail pending appeal. The respondent is not opposed to the application.

The applicant's major ground of appeal is that the learned trial magistrate misdirected himself in that he did not fully explain special circumstances to an unrepresented litigant as mandated by the law. Further, they submitted that the explanation given by the Court did not encompass peculiarities concerning the offence and the offender. In particular it was argued that the court *a quo* did not consider the fact of youthfulness as a special circumstance warranting the imposition of some other sentence, and not the minimum mandatory sentence of 10 years.

The respondent seemed to agree with the submissions made by the counsel for the applicant. However, I tend to differ with the view taken by the respondent and am of the view that the concession is not properly made.

The main consideration in an application of this nature is whether or not there are prospects of success on appeal. As was submitted by the State, in *State v Williams* 1980 ZLR 466 AD, also reported in 1981 (1) SA 1170 at 1173 Fieldsend CJ put the test as follows:-

“.....the approach should be to allow liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly the two factors are inter-connected because the less likely are the prospects of success the more inducement there is on the applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail”.

This position is acknowledged by both the applicant and respondent’s counsels. See also *S v Dzawo* 1998 (1) ZLR 536 (S) and *S v Mannyange* 2003 (10 ZLR 21 (H).

In the present case before passing sentence the trial magistrate had this exchange with the applicant:

“Special circumstances explained to accused and understood.
By court to accused – Do you have any such circumstances?
A – I was not aware of my HIV status though I was last tested when I was in school in 2014 and I was negative. I do not know if the complainant who infected me. That is all.
By court to Public Prosecutor – Do these constitute special circumstances?
Public Prosecutor – from my point of view they are not because he alleges he might have been infected by complainant who is negative.”

A perusal of the record shows exh 3 which shows that the complainant was tested on 17 August 2015 and was found to be HIV Negative. Exhibit 4 shows that the applicant was tested on 9 September 2015 and was found to be HIV Positive.

It was on the basis of exh 4 which applicant consented to its production that prompted the trial magistrate to resort to s 80 of the Act in sentencing the applicant. Section 80 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] says –

“Sentence for certain crimes where accused is infected with HIV

- (1) Where a person is convicted of –
 - (a) rape; or
 - (b) aggravated indecent assault; or
 - (c) sexual intercourse or performing an indecent act with a young person, involving any penetration of any part of his or her or another person’s body that incurs a risk of transmission of HIV;
- and it is proved that, at the time of the commission of the crime, the convicted person was infected with HIV, whether or not he or she was aware of his or her infection, he or she shall be sentenced to imprisonment for a period of not less than ten years.

- (2) For the purposes of this section –
 - (a) the presence in a person's body of HIV antibodies or antigens, detected through an appropriate test, shall be prima facie proof that the person concerned is infected with HIV;
 - (b) if it is proved that a person was infected with HIV within thirty days after committing a crime referred to in this section, it shall be presumed, unless the contrary is shown that he or she was infected with HIV when he or she committed the crime"

In *casu*, the applicant started to have sexual intercourse with the minor from 1 October 2014 up to 18 July 2015. He was tested on 9 September 2015. His HIV status was properly detected through an appropriate test. He may have been in the window period at the time he was tested in 2014, if at all he was tested. In the present case his consent to the production of his HIV results is confirmation that he was indeed tested after the commission of the offence.

The question that I paused to both counsels was whether it was necessary for the trial court to deal with issues of special circumstances before imposing the minimum mandatory sentence. I raised the issue because the Criminal Law (Codification and Reform) Act does not provide for the canvassing of special circumstances. The Act is silent on that. The counsel for the respondent conceded that that the Act does not provide for that and submitted that the trial magistrate may have erred in doing so. However, the counsel for the applicant maintained that in every case where a minimum mandatory sentence is to be imposed, the court should deal with special circumstances.

Ms *Maramba* referred the court to the cases of *S v Ziyadhuma* HH303/15, *S v Chaerera* 1988 (2) ZLR 266 (S) and *S v Mutowo* HH 458/88 for the above propositions.

However, having read the cited case authorities I was not persuaded by the counsel for the applicant's submissions that in every case where a mandatory sentence is to be imposed the special circumstances have to be considered. They can only be considered where it is provided for. All the cases are distinguishable from the present case. They are distinguishable in that in all the cited cases the Acts which were contravened all required the trial magistrate to explain and record any special circumstances before the minimum mandatory sentence is imposed. The present Act is silent on that. Once it has been properly proved that an accused was HIV positive at the time of committing the offence a sentence of not less than 10 years imprisonment is automatically imposed.

In the case of *S v Mutowo* (*supra*), a 16 year old juvenile was found in possession of a Carl Walther Waffenbrik P38 pistol with a magazine loaded with 7 rounds of ammunition. The then s 5 of the Firearms Act [*Chapter 308*] provided for a minimum mandatory sentence

of 5 years imprisonment. This sentence could be avoided if special circumstances were found to exist. In that case the accused escaped the minimum mandatory sentence because of his tender age combined with the fact that he had said he wanted to play with the gun and to shoot birds.

In the case of *S v Chaerera (supra)*, the appellant had been convicted of possessing rhinoceros horns. The penalty s115 (4a) of the Parks and Wildlife Act No. 14 of 1975 (as amended by Act No. 35 of 1985) provided for a minimum mandatory sentence of \$15 000-00 or 5 years imprisonment, subject to a finding of special circumstances.

Lastly, in the case of *Lyson Ziyadhuma v The State* HH 303/15 the appellant was convicted for contravening section 114 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] – Stock theft. Section 114 (3) expressly provided that –

“(3) If a person convicted of stock theft involving any bovine or equine animal stolen in the circumstances described in paragraph (a) or (b) of subsection (2) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded by the court, why the penalty provided under paragraph (e) of subsection (2) should not be imposed, the convicted person shall be liable to the penalty provided under paragraph (f) of subsection (2).”

In *casu*, there are no similar provisions hence there was no need for the trial court to deal with issue of special circumstances. If the court erred it erred by dealing with special circumstances, hence will not affect the sentence imposed. For these reasons there are no prospects of success on appeal.

In the result, the application for bail pending appeal is dismissed.

Maposa Ndomene Maramba, applicant’s legal practitioners,
National Prosecuting Authority, respondent’s legal practitioners.