

ASAH MUCHABVUNGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 22 & 28 January 2016

Bail Application

B. Chidenga for the applicant
T. Mapfuwa for the respondent

ZHOU J: This is an application for bail pending appeal. The applicant, a young man aged 22 years, was charged with and convicted of two counts of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In respect of the first count it was found that on a date sometime in September 2014 and at House Number 5219 Overspill, Epworth, he unlawfully had sexual intercourse with Trish Saunyama without her consent knowing that she had not consented or realising that there was a real risk or possibility that she might not have consented to it. In respect of the second count, the charge was that on 26 September 2015 and at the same house referred to above the applicant unlawfully had sexual intercourse with the same complainant without her consent knowing that she had not consented to it or realising that there was a real risk or possibility that she might not have consented to it. The applicant was sentenced to 24 years imprisonment of which 6 years imprisonment were suspended on condition that within a period of 5 years he did not commit a sexual offence for which upon conviction he would be sentenced to a term of imprisonment without the option of a fine. On 29 October 2015 the applicant filed a notice of appeal challenging both the conviction and sentence. On 12 January 2016 he instituted the application *in casu* seeking admission to bail pending the determination of his appeal. The application is opposed by the respondent.

The principles relating to an application for bail after conviction and sentence are settled in this jurisdiction. In the case of *S v Dzvairo* 2006 (1) ZLR 45 (H) at 60E-61A, Patel J (as he then was) explained those principles in the following terms:

“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 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 heard is considerable, the right to liberty favours the granting of bail.”

See also *S v Tengende* 1981 ZLR 445(S) at 448; *S v Labuschagne* 2003 (1) ZLR 644(S) at 649A-B.

The medical report which was produced in evidence showed that the complainant had indeed been penetrated. Mr *Chidenga* for the applicant took issue with the Court *a quo*’s rejection of the evidence of the applicant’s mother, Sophia Chitambure. There is nothing inherently wrong with the approach embraced by the magistrate. It is an approach that eschews piecemeal reasoning in a matter. The magistrate simply considered the testimony of that witness against all the other evidence which was placed before the Court and came to the conclusion that the fact that the witness did not accept that the complainant had informed her about the first count of rape did not exonerate the applicant when the evidence was considered in its totality. An appeal premised upon the attitude of the learned magistrate to the evidence of that witness has no prospect of upsetting the decision to convict the applicant. That is particularly so given the position of the witness in relation to the applicant. She is the mother of the applicant who was placed by the case in circumstances where she would have to choose between telling the truth and extricating her last born child from conviction and a very long term of imprisonment. The magistrates’ comments simply show that he was alive to those realities which obtained in the case which was before him. His approach does not constitute a positive ground for the applicant to be granted bail.

The magistrate who had the benefit of having the witnesses before him accepted the complainant’s testimony as coherent and consistent. There is nothing to suggest that he

misdirected himself in that respect. He accepted the complainant's evidence as to who she told of the sexual assaults. The complainant did not get assistance from those she reported the offences to at the first available opportunity. The applicant also contests the conclusion of the magistrates court that his *alibi* was an afterthought as it was raised only when he was testifying. The applicant had the opportunity to amend his defence outline after hearing the evidence of the state witnesses as regards that count if indeed he was unable to ascertain the exact dates of the alleged offence prior to that. He did not do that, but merely gave evidence which was not consistent with his defence as outlined in the defence outline. There cannot be any misdirection in the approach to that issue which was taken by the magistrate to warrant a conclusion that the appeal enjoys prospects of success.

As regards the sentence imposed, if the convictions are confirmed then in a custodial sentence would be unavoidable given the circumstances of the case. The length of that custodial sentence is immaterial for the purposes of this application given that it is unlikely that the sentence would be altered to such a short one that would be completed before the appeal is heard. Thus, apart from the weak prospects of success of the appeal the lengthy sentence of imprisonment to which the applicant has been sentenced is a factor which militates against his admission to bail. No compelling factors in respect of the sentence imposed have been advanced to warrant a favourable consideration of the applicant's request for bail.

In all the circumstances of this case, the application for bail pending appeal is without merit. It is accordingly dismissed.

Makiya & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners