

CHRISTOPHER BEN  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 20 & 31 January 2017

### **Bail pending Appeal**

Applicant in person  
*E Makoto*, for the State

TSANGA J: This is an application for bail pending appeal in a rape case. Accused was convicted and sentenced to 17 years of which 2 years were suspended for 5 years on the usual conditions for rape of a minor child aged 7 years old. He has a pending appeal against both conviction and sentence and seeks bail on the grounds that his matter stands high prospects of success on the grounds that the state failed to prove its case.

The basic principles on bail pending appeal emanate from the starting point that when convicted and sentenced, the presumption of innocence no longer prevails. The onus now falls on accused to show that he should be granted bail. The factors that are considered in deciding whether or not such onus has been discharged include<sup>1</sup>:

- Likelihood of appellant absconding which will depend on the length of sentence passed.
- The prospects of success on appeal. The greater, the likelihood that he will abscond the greater must be the prospects of success before bail should be granted.
- The right to individual liberty.
- Likely delay before an appeal is heard.

In the absence of positive grounds for granting bail, it is generally refused. See *R v Tengende & Ors* 1981 ZLR 445 (S). The basis of applicant's belief in the high prospects of success in this case is that the magistrate erred in disregarding the evidence of one Nyasha Mwanza who had been left in the custody of the child by her mother, when she had travelled to Kariba. In particular, he zeroes in on the fact that the said Nyasha Mwanza disputed the

---

<sup>1</sup> See John Reid Rowland *Criminal Procedure in Zimbabwe* (Harare: Legal Resources Foundation 1997)

fact that the accused had sent her to the shops at the material time that the rape took place. She had also disputed having a love relationship with the accused. He also argues that the state case against him was weak because the police had not interviewed tenants at the house. In addition, he points to the fact that the mother's sister Constance whom the rape was reported to, should have been called as a witness. Furthermore, he argues that there was no analysis of his blood against the fluids found on the child. He also argues that there was no proof that the penetration scars could have been caused by a penis. Moreover, he relies on the fact that the complainant told the court that she did not experience any pain. He says he was convicted on the basis of inconsistencies in evidence and that the primary question to be answered remained whether or not he was the perpetrator.

The State, on the other hand, is opposed to the application and sees no prospects of success on appeal on the basis that the credibility of the findings cannot be faulted. In addition, the state also argues that the evidence that the rape occurred when Nyasha Mwanza had been sent to the shops cannot be faulted. Penetration was confirmed at the hospital and the medical report shows hymen tears. The court also argues that the fact that the complainant, a 7 year old, could not remember minute details such as date and time does not mean her evidence should be discredited. Moreover, the state points out that issues of credibility of witnesses is hardly interfered with by an appeal court. (*S v Soko 118/92* and *S v Mlambo 1994 (2) ZLR 410 (S)*). The state maintains that the appeal court is unlikely to interfere with the court a quo's findings. Moreover, the sentence is said not to induce a sense of shock given the vast age difference between applicant and complainant and that the applicant was in a position of trust *vis a vis* the complainant.

Whilst a bail appeal goes to the heart of a person's liberty, this has to be also weighed against whether such liberty can be granted without endangering the administration of justice. Applicant points to being of fixed abode and that there is no likelihood of him absconding. The rape for which applicant was convicted, involved a seven year old who is not capable of consenting. As stated, the presumption of innocence on his part no longer prevails.

In an application for bail pending appeal, the function of the court is not to determine the merits but to make an assessment of the likelihood of success on appeal. On that score, I see no arguable or viable ground for appeal in this instance as the issues complained of were amply dealt with by the magistrate in the reasons for judgement. The magistrate addressed the issue of the perceived inconsistencies in terms of dates and times and noted that coming from a 7 year old, these could not discredit the complainant. The magistrate did not find the

evidence to be consistent with fabrication or coaching. The magistrate also addressed fully the reasons why the complaint was not made to the mother of the child and also stressed that it was the mother's observations of signs of sexual abuse after the child complained of itching that had led her to take her to the doctor. A reading of the judgment also reveals that the magistrate dealt exhaustively with the medical evidence, in particular the hymen tears and the basis for concluding that penetration had occurred.

The magistrate also considered in detail why nothing turned on the applicant's defence witnesses who included Nyasha Mwanza. The judgment is clear that the reasons for rejecting Nyasha Mwanza's testimony, who was the elder sister to the complainant, was because she, Nyasha Mwanza, had a reason to lie since she was having an adulterous relationship with the applicant. In sum, the magistrate appears to have considered fully the totality of the evidence that led to the lower court being satisfied that the state had managed to discharge the onus against the applicant and for reaching its conclusion that applicant was guilty as charged.

Delays in hearing of appeals are no longer inordinate. The applicant was sentenced to an effective fifteen years imprisonment. Taking into account the observation that there appears to be no arguable issue for appeal, this is not a case where sentence is likely to have been served by the time the appeal is heard. The applicant should therefore prosecute his appeal whilst serving his sentence.

The application for bail pending appeal is accordingly dismissed.

*National Prosecuting Authority, for the State*