

LETFORD TAWANDA MANDIWATA
versus
THE STATE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 11 December 2018 & 18 January 2019

Bail Application

Applicant in person
E Nyazamba, for the respondent

WAMAMBO J: The applicant appeared before me applying for bail pending appeal which application I dismissed. He has now requested my reasons for so doing.

These are the reasons

Applicant was convicted of contravening s 65 of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*]- rape.

What appears to be either common cause or not strongly objected to is as follows:

The female complainant was a juvenile at the time of the commission of the offence.

Complainant is married to appellant's young brother or cousin.

On 24 December 2013 complainant and her husband were doing some chores at their homestead when applicant approached them. They were in fact ferrying bricks from their parents' home to their homestead.

Applicant requested for some tobacco from complainant's husband. Complainant who had changed the position where her husband usually left the tobacco went into the house to obtain the tobacco for applicant.

From this point onwards the evidence is heavily contested from and on both sides.

Complainant testified that when she went into the five bedroomed house to collect tobacco for applicant, he followed her inside and raped her. She gives a graphic account of how the rape occurred including the fact that applicant throttled her during the ordeal.

Complainant also testified that by the time she emerged from the house after the rape and when her husband came from ferrying bricks she reported the rape to him in a tearful state. She later proceeded to her mother's house where she made another report of rape to her in the presence of her husband.

One of the differences in the testimonies is that complainant says when she was raped apart from applicant there was only herself and her husband at the homestead. On the other hand applicant claims that there was the presence of complainant's younger sisters, Action Zvevanhu and/or one Desire.

Applicant claims in his defence outline that he is being implicated in this matter because complainant's husband occupied the family house with his wife to the detriment and disadvantage of other family members. Further that complainant's husband refused other family members the right to plough the family fields and instead brought his in laws to occupy the houses and plough in the family fields.

There is a slight confusion on the real relationship existing between complainant and the applicant. The State outline reflects that the applicant is complainant's husband's brother. Complainant herself and applicant both confirm that applicant is her husband's brother. However complainant's husband testified that applicant is actually his cousin elder brother. Not much would normally turn on this difference. It could for instance be a mistake in interpretation made by the interpreter, or the common mistake that a cousin is actually referred to as a brother, being some form of translation from our indigenous language.

The circumstances of this case seem to suggest that whichever relationship exists between complainant's husband and applicant is a close family relationship of either cousin or brother.

The medical report compiled after the examination of complainant reflects that penetration was definite and further gives out that "evidence of hymenal tears difficult to elucidate following rape in a woman who has recently delivered or sexually active."

The findings do not miss the background that complainant as a sexually active married woman and who had recently given birth.

The applicant in his notice of appeal which is titled "Notice of appeal against conviction and sentence" draws attention to 6 grounds, none of which is against the sentence imposed. For that reason there is effectively no appeal against sentence.

I will thus consider the application only as a matter of bail pending appeal against conviction the notice of appeal reflects 6 grounds of appeal against conviction which I will summarise below:-

- The trial court erred in accepting the complainant's complaint of "sexual intercourse....and its contents" as meeting the requirements of consistence when it materially differed with complainant's evidence.
- The trial court erred when it failed to appreciate that appellant was falsely implicated by complainant and her husband given the State's inconsistent evidence.
- The trial court erred in finding corroborative evidence to complainant's testimony where the "corroborative evidence" was materially contradictory and inconsistent with complainant's evidence.
- The trial court misdirected itself by relying on a medical affidavit when the deponent to the medical affidavit failed to clearly explain his opinion.
- The trial court erred when it dismissed appellant's defence on the basis of appellant's "mere" failure to win the court *a quo*'s faith contrary to how defences are considered in criminal matters.
- The trial court misdirected itself in dismissing appellant's defence on the basis of a stereotype defence without basis that a wife cannot risk her marriage by fabricating serious charges without careful consideration of the nature and the circumstances of the alleged offence."

Clearly bail pending appeal is not just for the taking. I sit to determine the application where there is already a conviction. The presumption of innocence that applies at the pre conviction stages has been overtaken by events or a main event, namely the conviction.

In *Tigere Majani and Another v The State* HH 642/17 CHITAPI J at p 2 said

"In determining an application for bail pending appeal, the court is guided by several considerations. The first one is that the convict no longer enjoys the same rights to be released on bail on reasonable conditions pending appeal as are accorded to an unconvicted trial prisoner under s 50 (6) of the Constitution....."

The convict's rights to bail after conviction does not arise as a fundamental human right as guaranteed in Chapter 4 of the Constitution. The powers of the court to admit a convicted person to bail pending appeal as in this case do not derive from the Constitution but from the Criminal Procedure and Evidence Act [Chapter 9:07]. Section 23 of the said enactment provides for the limited instances wherein the convicted and sentenced person may be admitted to bail by the magistrate or by a judge of this court or the Supreme Court as provided therein. In casu the applicant's application falls under the provisions of s 123 (1) (b) ii. Whenever an application is made to the court or judge and the same is based or grounded in a specific provision of an enactment the applicant especially the represented one should always cite the provision of the law relied upon. This assists the judicial officer to appreciate the basis of the application and the powers which can be exercised in relation to the application."

I undoubtedly agree with the above.

Section 123 (1) (b) (ii) reads as follows:

“123 (1) Subject to this section, a person may be admitted to bail or have his conditions of bail altered-

.....
(b) in the case of a person who has been convicted and sentenced by a magistrate court and who applies for bail

.....
(ii) pending the determination by the High Court of his appeal :or
by a judge of the High Court or by any magistrate within whose area of jurisdiction he is in custody...
.....”

It is of importance to note that the burden of proof in a bail pending appeal application lies on the accused or appellant in terms of s 115C (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] which reads as follows:-

“(2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail-

.....
(b) after he or she has been convicted of the offence, he or she shall bear the burden of showing on a balance of probabilities that it is in the interest of justice for him or her to be released on bail.”

In *Tigere Majani and Another v The State (supra)* CHITAPI J went on to say the following at p 3

“As correctly noted by TSANGA J in *Denis Schiz v S* HH234/17 where bail is sought after sentence, the court considers the prospects of success on appeal and the likelihood of abscondment. The Supreme Court reinforced these principles in *S v Dzawo* 1998 (1) ZLR 536. Other factors relevant to consider are the convict’s rights to liberty and the likely delay before the appeal is disposed of. The delay aspect is relevant because it would amount to an injustice if bail were refused and the applicant serves the entire sentence only for the sentence to be set aside or reduced to levels lower than the period already served”

In considering this application I will apply the principles as enunciated in the above cited cases.

The respondent is of the considered view that an application of the principles enunciated in *S v Banana* 200 (1) ZLR 607 (S) would lead to the impression that complainant is a credible witness whose evidence has sufficient corroboration as provided for in our law.

The respondent deals specifically with the grounds of appeal as they appear on the notice of appeal. Respondent is of the view that the second, third, fifth and sixth grounds are not clear and specific.

According to respondent the fourth ground of appeal is arguable as it relates to an inconclusive medical affidavit necessitating the oral testimony of the Doctor who deposed to the said affidavit.

I have reminded myself that I am only dealing with the application for bail pending appeal and not the appeal itself. I am also mindful that the burden of proof lies on the appellant.

Having read the whole file of the whole proceedings and considering the principles and related case law I have come to the conclusion that the applicant has not proven his case as *per* s 115 C (2) B of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The reasons are as follows:

Upon reading the record my mind was locked on the grounds of appeal as formulated. I firstly find for the purposes of this application that the grounds as formulated appear to be vague and do not for the most part reflect “clear and specific” grounds as is required by the rules.

The starting point is the credibility of complainant. The trial court’s view that complainant is a credible witness is borne by the record of proceedings.

I find that complainant did not only impress as a witness but that her testimony appears to be corroborated by her husband’s testimony on the relevant and important issues. It is of note that complainant was not challenged by applicant in cross examination.

Applicant was happy to ask complainant a few peripheral questions, when she had incriminated him in her testimony.

The complainant as the wife to applicant’s brother placed her in a tricky position. A young married woman who had been raped by the husband’s relative could not possibly find it easy to make a report. The evidence reflects that complainant had to report to her own mother after the rape. The finding that complainant would not risk her marriage by making a false report is but one of the many reasons given for finding complainant’s testimony credible. The finding appears to resonate with the totality of the evidence and the probabilities. The difference in the testimonies as pointed out by the applicant seems not to be already material to the matter. The medical affidavit was to all intents and purposes neutral. Calling the deponent thereof to testify would probably not advance the matter any further for the State or for the defence.

Thus a consideration of the full circumstances of the matter even without recourse to the medical report in my view appears to support the finding reached by the trial court that applicant is guilty of the offence charged.

In the circumstances I find that there are slim prospects of success on appeal.

The application is dismissed.

National Prosecuting Authority, respondent's legal practitioners.