

TICCHARWA ELLIOT MAZIVISA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 8, 11 & 17 November 2016

Bail appeal

Mrs *R. Mabwe*, with her, Mr *C. Maboke*, for the appellant

Mr *T. Chikwati*, for the respondent

MAFUSIRE J: This was an appeal against the decision of the Regional Magistrate's Court, Masvingo, dismissing the appellant's application for bail pending appeal.

The appellant, a 65 year old male, was charged with indecent assault and rape. The allegations on indecent assault were that he had, without her consent, fondled the complainant's breasts, fondled her private parts and had got her to stroke his erect penis. On rape, the allegation was that the appellant had had vaginal intercourse with the complainant without her consent.

After a full trial, the appellant was convicted of both counts. For indecent assault he was sentenced to 4 months imprisonment. For rape he was sentenced to 16 years imprisonment of which 2 years were suspended on condition of good behaviour. The sentence on indecent assault was ordered to run concurrently with that for rape. The effective sentence was 14 years imprisonment.

The appellant appealed to this court against both conviction and sentence. Pending the hearing of the appeal, he applied for bail before the Regional Magistrate. The application was dismissed on the ground that there was no prospect of his appeal succeeding and that given the lengthy custodial sentence, the risk of the appellant absconding was high. The Regional Magistrate also mentioned that there would be no delay in the prosecution of the appeal given that this court is now fully functional at Masvingo¹ [i.e. as opposed to the olden days when the court sat at Masvingo only on circuit]. The application for bail pending appeal was dismissed.

¹ With effect from 1 September 2016

The appellant appealed. I heard argument on 11 November 2016 and reserved judgment. This now is my judgment.

The State case against the appellant in the court *a quo*, as told by the complainant and her sister, was this. The appellant's family, his wife in particular, operated a tuck-shop within, or near some primary school premises. The complainant, a single mother of one, allegedly 18 years old at the time, and 19 by the time of the trial, had been recruited from her village to assist in the running of the tuck-shop. She also doubled up as a domestic maid. She started work on 24 December 2015. The appellant would drive her to and from work. There was some conflict as to the distance between the home and the tuck-shop. The State said about two kilometres. The defence said around three hundred and fifty metres.

The complainant had scarcely been two weeks in the job when the accused started making passes at her. Among other things, he made love proposals by word of mouth and through telephone text messages. The complainant turned him down. On 2 and 3 January 2016 he allegedly committed the acts of indecent assault aforesaid. This was inside the tuck-shop.

The complainant claimed she informed a passer-by, a lady customer who had come to buy something from the tuck-shop. But she could not remember who that lady was. And apparently nothing came of that report.

On 7 January 2016 the appellant allegedly raped the complainant. Again this was inside the tuck-shop. The complainant phoned her sister in the evening. The following day her parents came and took her back home. The appellant was subsequently arrested.

The appellant denied the charges. Basically, his defence, through himself and his wife, was that he never committed the unlawful acts. He claimed the tuck-shop had been closed on the material days allegedly because the period in question had been a school vacation when business would be low. He denied he would drive the complainant to and from work as the short distances did not warrant it. He claimed he had been at home on the days the indecent assaults had occurred. On the day the rape had allegedly occurred, he claimed he had been away at some business centre where he had spent the day playing snooker and drinking with friends.

In this appeal, the appellant says the Regional Magistrate misdirected himself in a number of respects. It is argued that, in dismissing the appellant's application for bail pending appeal, the court *a quo* took a too fastidious view of the correctness of its judgment and found that the appeal had no prospects of success. In the process, it ignored numerous other relevant factors.

The magistrate was criticised for misdirecting himself in the following respects, in my own words as I understood the arguments:

- [i] that he did not take into account that the appellant is a rural old man who has no passport;
- [ii] that before his conviction, the appellant had been on bail pending trial for eight months and had not absconded;
- [iii] that it had been unsafe to convict because there were serious contradictions in the State's evidence, particularly in relation to the rape charge;
- [iv] that it seemed improbable that the appellant would take a risk of getting caught by someone passing by to rape the complainant in the tuck-shop which was at a school to which members of the public had access;
- [v] that the disparity in the ages of the complainant, at 19 years, and the appellant, at 65 years, was such as to cast doubt on the truthfulness of the complainant's allegations, especially in the absence of any evidence as to the comparative physiques of the two;
- [vi] that there was a delay in the complainant making a report which then casts doubt as to the veracity of her story;
- [vii] that it was incredible that the complainant would report the indecent assault only to a random passer-by who not only could not be traced afterwards, but also whom she herself could not even remember or identify;
- [viii] that an effective 14 years in jail for a 65 year old man is more than a death penalty which makes the whole sentence irrational;
- [ix] that with no empirical evidence with regards the impact the presence of the High Court at Masvingo on a full time basis will have in relation to the rate of disposal of cases, the court *a quo* fell into error by taking such a factor into account.

The above list was by no means exhaustive. It is not intended to deal individually with each and every one of the points. The substance and mainstay of the appeal against the refusal of bail was that the appeal against conviction has high prospects of success in that the State's evidence was poor and riddled with inconsistencies. It was argued that the State had multiple versions of how the rape had allegedly occurred. In one, the appellant had allegedly used both hands to pin down the complainant. This was incredible as it would not explain how the appellant would have been able to displace the complainant's "G-string" to access her vagina.

The other was that the accused had felled the complainant to the ground, pinned her hands, and had mounted and entered her from the back. This was a version that had only come out during questioning by the court well after the evidence-in-chief and cross-examination.

Yet another one was that the accused had grabbed the complainant and felled her to the ground, flipped her skirt and had raped her. It was said she had not reacted because the appellant had allegedly been pinning her hand. This was criticised on the basis that it did not explain why the complainant would not have screamed to attract the attention of possible passers-by or neighbours, particularly given that the tuck-shop was in the open and next to some teacher's house.

It was also said to be the State's version that the complainant's pant had been removed to knee level. This was criticised on the basis that the complainant would not have readily been able to part her legs, or explain why she would not just have closed them given that the appellant's hands had allegedly been busy holding her down.

The appellant sought an order allowing the appeal and admitting him to bail in the sum of \$100, coupled with some reporting conditions and an order to remain staying at some fixed place of abode.

An appeal against the refusal of bail by a magistrate's court is made in terms of s 121[6] of the Criminal Procedure and Evidence Act, *Cap 9:07*. This section makes the same bail factors as listed in s 117[2] to [6] of that Act applicable.

The appellant is now a convicted person. Among other things, the presumption of innocence has fallen away. Also gone with that is the constitutionally guaranteed right to liberty. Among other things, the appellant no longer has a right to bail.

At this stage the predominant consideration is whether or not there is a real likelihood of the appellant absconding his appeal if released on bail. In assessing that risk, the prospects of

success of the appeal against conviction and/or sentence have overriding importance. The assumption is that the greater the prospects of success of appeal, the lesser the inducement of absconding, and *vice versa*. Every case depends on its own set of facts. But in all situations the accused needs not prove good prospects of success of the appeal beyond any reasonable doubt. All he needs do is to show that the appeal is free from predictable failure: see *S v Hudson*² and *Peter Chikumba v State*³.

The State opposes the appeal. It has argued that, among other things, this court, not sitting as a court of first instance, but as an appellate court, can interfere with the magistrate's decision only if there was misdirection. Only then can this court be at large to substitute its own discretion for that of the magistrate.

There seems to have been some conflicting decisions on the proper approach in bail appeals. The question has been, in considering a bail appeal from the magistrate's court, does the High Court treat the appeal as an appeal in the wider sense, meaning that it can exercise and substitute its own discretion on the same facts as were presented to the magistrate? Or does the High Court treat the appeal in the narrow sense, exercising and substituting its own discretion only after finding misdirection on the part of the magistrate?

In *S v Ruturi* [1]⁴, the first of the *Ruturi* cases, MAKARAU J, as she then was, construing certain *dicta* in *Aitken & Anor v Attorney-General*⁵, and also finding support in a passage in John Reid Rowland's book *Criminal Procedure in Zimbabwe*, held that in considering the appeal, the High Court treats the appeal as an appeal in the wider sense. It does not necessarily have find misdirection on the part of the magistrate's court first before exercising and substituting its own discretion.

It seems the learned judge's stance aforesaid is not without support. In his book "*BAIL – A Practitioner's Guide*", 3rd ed., the South African author, John van der Berg, says⁶:

"It is submitted, however, that the view, which once prevailed to the effect that a bail appeal should fail unless it was shown that the lower court had acted unreasonably or had failed to apply its mind to the application, is no longer valid. It is submitted that the accused has an unfettered right of appeal in its full sense, and that the High Court has an overriding discretion whereby it is free to substitute its views for those of the lower court."

² 1996 [1] SACR 431 [W]

³ HH 724-15

⁴ 2003 [1] ZLR 259 [H]

⁵ 1992 [1] ZLR 249 [S]

⁶ At p 232

The learned author quotes a passage in *S v Mohamed*⁷ to the effect that a bail appeal to a superior court against a decision of a magistrate's court is an appeal in the wider sense. It is a complete re-hearing and re-adjudication by the superior court of the merits of the application. The superior court can, in the exercise of its own discretion, make such order as to it seems just.

However, in *S v Ruturi* [2]⁸, the second of the *Ruturi* cases, CHINHENGO J, citing the same authorities as MAKARAU J, and more, came to the opposite conclusion. The learned judge held that in an appeal against the grant or refusal of bail by a magistrate, the High Court can interfere with the magistrate's decision only if there was an irregularity or misdirection, or if the magistrate exercised his or her discretion so unreasonably or improperly as to vitiate the decision.

In *S v Malunjwa*⁹, in a bail appeal against the decision of the magistrate's court, NDOU J took the same stance as CHINHENGO J in the second *Ruturi* matter above. The learned judge, at p 277B, said the approach was whether the magistrate had misdirected herself when she had refused the appellant bail. He said the appeal had been argued before him as if he was sitting as a court of first instance. The judge said it was the finding of the court *a quo* that the appellant had to attack.

In my view, it must be in very negligible instances where in a bail appeal the court, sitting as an appellate court, finds no misdirection, or impropriety in the proceedings of the court *a quo*, but nonetheless, goes on to exercise and substitute its own discretion in the matter. It must always be remembered that the discretion of a court is exercised judiciously and not whimsically. Thus, it is my considered view that in a bail appeal, it is unavoidable that the focus necessarily ought to be on the decision of the court *a quo* first, which may then be substituted with that of the appeal court, only if there has been misdirection by the lower court.

In casu, the Regional Magistrate, in the course of his judgment refusing bail, set out what he considered to be the correct approach. He said:

“To properly determine an application for bail pending appeal, the court's approach must be put in the balance on the one hand the likelihood of the applicant absconding and on the other hand the broader

⁷ 1977 [2] SA 531 [A], at p 542A – B

⁸ 2003 [1] ZLR 537 [H]

⁹ 2003 [1] ZLR 275 [H]

interest[s] of justice. The main factor, in my view, in determining whether or not to grant bail pending appeal are the prospects of success. There is no formula on the prospects of success, what however should be clear is that an applicant must show that he has a reasonable prospect of success on appeal. It is not enough for the applicant to make out a reasonably arguable case *S v Mutasa* 1988 [2] ZLR sc @ P 4.”

The case of *S v Mutasa*¹⁰ that the magistrate relied upon to determine the standard of proof was completely inapposite. That was a grievous error. That case was an application for leave to appeal against the decision of the High Court that, among other things, had refused the leave. The Supreme Court held that before such an application could be granted, it was necessary for the applicant to show a reasonable or good prospect of success on appeal, and not just to make out a reasonably arguable case. The Supreme Court expressly declined to follow *S v Tengende & Ors*¹¹ where the approach had been said be, not how good the prospects of success must be before leave would be granted, but how poor they must be before leave was refused. In other words, the test was whether the applicant had made out a reasonably arguable case. It was acknowledged in *Tengende* that for an appellant to be required to show reasonable prospects of success would be putting the matter too high.

In *Mutasa*, what the appellant, a butcher, was fighting to have overturned on appeal, was a sentence of a fine that was coupled with an order of forfeiture of his unmarked and ungraded meat that had been found in his butchery in contravention of the law. Such a situation is far removed from a bail application which necessarily entails considerations of a person’s fundamental right to liberty. In a bail matter, in assessing the prospects of success of the appeal against either conviction or sentence or both, the standard of proof is much lower. As said earlier, the standard is whether the appeal is free from predictable failure. If the appellant has a reasonably arguable case, what I referred to in *Chikumba, supra*, as “*some fighting chance*”, then all else being equal, bail should be granted.

I consider that in the present matter, the adoption by the court *a quo* of a wrong scale to weigh the appellant’s prospects of success on appeal was a profound misdirection on a fundamental aspect. It is like a person calibrating his directional compass incorrectly and still expects to trudge in the right direction and to arrive at the correct destination. Thus, having found misdirection on the part of the lower court, this court is now at large to look at the matter afresh and to exercise its own discretion.

¹⁰ 1988 [2] ZLR 4 [SC]

¹¹ 1981 ZLR 445

The court *a quo* seemed to have accepted that the complainant's evidence was riddled with inconsistencies. The appellant makes the same point in this appeal and devotes much effort in trying to highlight those inconsistencies. On its part, the State also seems to concede that the complainant had indeed been inconsistent in her evidence. It also concedes that the magistrate, in the light of *Chikumba* above, misdirected himself by making a finding that there is no formula on prospects of success when in fact there is.

However, despite the concessions, the State has forcefully argued that the magistrate did not reach a wrong conclusion. It is argued that he comprehensively analysed the evidence and gave compelling reasons for accepting the evidence for the prosecution.

In substance, the analysis of the evidence and the conclusion of the court *a quo* was that the discrepancies or inconsistencies in the complainant's evidence did not go to the root of the matter. It said, in spite of them, the evidence led by the State had a consistent thread running through. On the whole, it found the complainant credible. It concluded that the offences had been proved.

I agree with the argument of the State and the final conclusion of the court *a quo*. Despite the use of a faulty compass, the court arrived at the correct destination. The alleged inconsistencies in the evidence of the complainant were mainly in relation to how exactly the rape had occurred. Exactly in what position had been the parties' arms and legs during the rape? Exactly in what position had the complainant's pant or "G-string" been during the rape? And so on and so forth.

The appellant has also attempted to cast doubt on the veracity of certain details of the applicant's testimony, such as the alleged improbability that she could have been raped in a tuck-shop that was in such a public place; or the improbability that she could have reported the indecent assault to a complete stranger; or the improbability that after the rape she had told no one immediately, only making some ill-defined communication to her sister later on in the evening.

Mrs *Mabwe*, for the appellant, further pointed out that according to the medical report, the complainant was in fact, not 19 years of age, but actually 29. This particular detail, which was only being highlighted for the first time at the hearing, was obviously meant to augment the argument that the complainant had prior sexual experience as she actually had a child. But this discrepancy was of no consequence. The court *a quo* noted that the medical report had been of little value, except for the doctor's comment to the effect that the complainant had seemed

depressed. The court also noted that at some stage during her testimony, the complainant had broken down. However, this was a small part of its reason for convicting.

When one looks holistically at the evidence placed before the court *a quo*, one is left in no doubt that, despite those alleged inconsistencies, there was cogent evidence of rape. As the court said, the thread consistently runs through. There are numerous angles from which to look at it. The appellant could not suggest any plausible reason why the complainant, someone whom he did not know before, and someone who was hardly two weeks in employment, would just implicate him. He said his wife had had a tiff with the complainant. She had allegedly chided the complainant for secretly charging her cell phone. However, as the State argued, it is improbable that the complainant would cry rape and seek to fix the appellant instead of his wife, who in fact, was her actual employer.

The rape occurred on 7 January 2016. The complainant's village was some thirty kilometres away. But by the following day, 8 January 2016, her parents had come to take her away. That shows the complainant had made a report about the rape fairly immediately. As a matter of fact, she had reported to her sister. It was the sister who had then set the chain of events in motion. The sister gave evidence. She corroborated the fact that the complainant had reported to her.

The appellant's defence lacked substance. At the hearing he merely adopted his defence outline and waited for cross-examination. He said, among other things, the tuck-shop had been closed on all the days material to the case. He said 2 January 2016 had been a public holiday and that that was why the tuck-shop had been closed. But it is curious that a retail outlet like a tuck-shop, even though such a minuscule one, would close on the very day business was likely to be brisk. The appellant said on 7 January 2016 the tuck-shop had been closed for stock taking. That, in fact, would have reduced the chances of disturbance.

The appellant admitted exchanging telephone messages with the complainant. That supported the complainant's version.

The evidence of the appellant's wife had very little weight, if any. She seemed to have been coached. She would say exactly what the appellant had said, for example, about him having gone to the growth point to play snooker with friends.

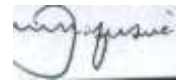
The appellant has criticised the court *a quo* for allegedly having ignored other relevant factors, like the age of the accused in light of the sentence passed, the fact that he had stood his

trial in spite of having been out on bail, and the fact that he has no travel documents or any prospects of re-inventing himself outside the country.

It seems true that the court *a quo* did not deal with these aspects. But, again they were not so cogent as would influence the court otherwise. The sentence passed might be reduced on appeal. But the conviction is unlikely to be overturned. And even if the sentence is reduced, it is likely that the remaining portion will still be a lengthy custodial sentence. Therefore, balancing all the factors, it seems that the broader interests of justice will best be served by the appellant remaining in prison despite the pending appeal.

In the circumstances, the appeal is hereby dismissed.

17 November 2016

A handwritten signature in blue ink, appearing to read 'Ruvengo Maboke', is written over a horizontal line.

Ruvengo, Maboke & Company, legal practitioners for the appellant
National Prosecuting Authority, legal practitioners for the respondent