

MUCHANETA MAKUYANA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 12 July 2018

Bail Pending Trial

M Mandingwa, for the applicant
J Matsikidze, for the respondent

MWAYERA J: On 12 July 2018 after considering written and oral submissions by both counsel, I gave an extempore judgment dismissing the application for bail pending trial.

The written reasons for my disposition are captioned herein.

The applicant is facing allegations of rape as defined in s 65 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 12 June 2018 at Muumbe Village the applicant who is a cousin to the complainant entered into the spare bedroom in which complainant was. The applicant produced a knife and forced the complainant on the ground, following which he took off complainant's skirt and pant. The applicant then forcefully had sexual intercourse with the complainant without the complainant's consent. The applicant approached this court seeking for bail pending trial which application was opposed by the State.

Our law in applications for bail pending trial is fairly settled. The court is enjoined to strike a balance between the right to individual liberty enshrined in the Zimbabwean Constitution Amendment (No. 20) Act 2013 (hereinafter referred to as the Constitution) which anchored on the presumption of innocence till proven guilty by a competent court of law on one hand, and the interests of administration of justice which is premised on the societal interests of ensuring that a matter is prosecuted to its logical conclusion. In terms of s 50 (1) (d) of the Constitution any person arrested has a right to his liberty unless there are compelling reasons militating against his admission to bail.

Section 50 1 (d) is instructive, it reads:

“Any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial unless there are compelling reasons justifying their continued detention.”

The court in seeking to balance the right to individual liberty on one hand and interests of administration of justice has to consider among others factors outlined in s 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which among others include

1. Whether or not the release of applicant on bail will endanger the safety of the public or any person,
2. Whether or not the applicant will stand his trial
3. Whether or not the applicant will influence or intimidate witnesses
4. Whether or not the release on bail of the applicant will undermine or jeopardise the proper functioning of the criminal justice system, including the bail system.

In the circumstances of this case, the applicant and complainant are not only related but stay at the same homestead. The applicant is facing serious allegations of rape in aggravatory circumstances, where a knife is alleged to have been used. I am alive to the fact that the seriousness of the allegations or offence on its own is not enough ground warranting deprivation of the applicant's right to liberty as spelt in some cases like *S v Hussey* 1991 (2) ZLR 187. See also *Tavonga Shava v The State* HMA 8/16. I must however, emphasise that sight should not be lost of the fact that the seriousness of allegations is a relevant factor for consideration and ought to be considered with other relevant factors when one seeks to decide whether or not there are compelling reasons warranting denial of bail.

In applications for bail it would be improper to consider factors which fall for consideration as guidelines in determining whether or not to grant bail individually. The factors have to be cumulatively considered, together with circumstances of the alleged commission of the offence. In this case the applicant, an adult cousin to the complainant is alleged to have raped the complainant a 13 year old juvenile. The applicant is alleged to have used a knife to threaten and then rape. Such circumstances of alleged rape in aggravatory circumstances in relation to a juvenile complainant who naturally is vulnerable taints the offence as serious. Further given the fact that a report was timeously made and that the complainant is well known to the applicant ruling out mistaken identity gives the state case the complexion of not only being serious charges but strong state case given medical evidence and relatives who got report. The likely sentence in the event of conviction is a lengthy imprisonment term. These factors can easily weigh on the applicant and act as a temptation and inducement to abscondment. Once there is such likelihood of abscondment then there is a real risk to the administration of justice

see *Albert Issau Mutendenedzwa v The State* HH 102/16. In the present case, there is further risk to the administration of justice brought about by the closeness of the applicant and the complainant who are not only relatives but stay together at the same house. Such a scenario is a recipe for direct and indirect interference. The complainant can freeze upon seeing applicant out of prison and will not be free to testify thus threatening the societal interests of having the matter prosecuted to finality. The possibility of the applicant imposing himself on the complainant so that she does not testify is reasonably apprehensible. See *Tibello Tlou v The State* HH 22/18. Further the possibility of the applicant and all other relatives conniving to domestically resolve an otherwise criminal allegation is not farfetched. Given this apprehension on likely interference the suggestion of an alternative address for the applicant will not cure the fear of direct and indirect interference. With the current complains on sexual abuse, the community at large is alive to the sentences that attach in the event of conviction thus the temptation to settle the matter at home is high. The temptation to resolve the matter domestically is likely and this would jeopardise the interests of administration of justice.

Upon considering the circumstances of this matter and considering the factors that fall for analysis in applications of this nature there are too many risks to the administration of justice if the applicant is admitted to bail. In other words it is my considered view that upon weighing the interests of administration of justice and the right to individual liberty, in this case there are compelling reasons why the applicant should not be admitted to bail. For purpose of ensuring that the matter is prosecuted to its logical conclusion the interests of justice demand that the applicant should not be admitted to bail.

Accordingly the bail application is dismissed.

Mhungu & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners