RIDO MPOFU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 10 APRIL AND 29 JUNE 2023

Bail Application

Sithole, for the applicant
R. M Guveya, for the respondent

TAKUVA J: This is an application for bail pending appeal in terms of Rule 90 (4) (e) of the High Court of Zimbabwe (Bail) Rules, 2021.

The applicant was arraigned before a Regional Magistrate's Court sitting at Bulawayo facing a charge of contravening section 65 of the Criminal Law Codification and Reform Act Chapter 9:23. He was convicted and sentenced to 15 years imprisonment of which 3 years were wholly suspended for 5 years on condition accused does not within that period commit any offence of a sexual nature.

The State alleged that on a date unknown to the prosecutor but during the period extending from 2019 to 2020, and at house number 729 Jacaranda, Gwanda, the accused person had sexual intercourse with Precious Mpunzi, a female juvenile, without her consent.

Dissatisfied with his conviction and sentence, the applicant noted an appeal with this court under case No. HCA 32/22. The grounds of appeal are that:-

> "1. The court *a quo* erred in arriving at a conclusion that the state had proved its case beyond reasonable doubt when in fact the state case had not been proven beyond a reasonable doubt, more particularly in that:

The complainant's report of her alleged sexual assault by the appellant came after the lapse of an unreasonably long period of time (3 years) and the complainant had no reasonable and consistent explanation for her failure to report the alleged sexual attacks to about twelve (12) persons she resided with over the relevant period or to school authorities or to her own grandmother or to the police timeously.

2. The court *a quo* erred in arriving at a finding that the complainant's evidence was credible and satisfactory when:-

   (a) The complainant had reported having been raped thrice (3 times) by the appellant, when, as it turned out at trial that complainant changed positions to state that she was raped once.

   (b) The complainant had two (2) statements in relation to her alleged sexual attacks by the appellant recorded from her, the first one recorded at Esigodini, and a subsequent statement recorded at Mbalabala in which, in the first of such statements, the complainant made no mention of her having been raped by the appellant, but only in a subsequent statement did the complainant allege that the appellant had raped her.

   (c) The complainant in the second of such of her statements had mentioned that the appellant had raped her three (3) times, such that the appellant was duly charged with three (3) counts of rape, but at trial, the complainant insisted that she had only been raped by the appellant once, the rest of the attack having been assaults of an indecent nature only.

   (d) The complainant lacked consistency in her evidence in that same introduced new evidence hitherto not mentioned in any of her two (2) statements given to the police.

   (e) The complainant's reports were solicited from her, and prompted by her grandmother.

3. The court *a quo* erred in failing to detect and address the complainant and her grandmother's motive to falsely incriminate the appellant given the grandmother's self-confessed bitterness occasioned by the fact that appellant and his wife were denying her access or reasonable access to or custody of her grandchildren inclusive of the complainant.

4. The court *a quo* misdirected itself by arriving at a conclusion that the appellant was guilty of the offence charged in circumstances where the appellant's defence to the charges was reasonable and probably true and therefore in circumstances where the appellant should have been acquitted of the charges."

Appellant also appealed against sentence in that the court *a quo* ignored the appellant's advanced age of 71 years and meted out a sentence so severe as to induce a sense of shock.

Such a sentence has the effect of breaking him with a remote chance of the appellant serving out his sentence and coming out of jail alive.

The application was opposed by the respondent on the following grounds;

"(a) the applicant has failed to show that he has prospects of success on appeal.

(b) the presumption of innocence no longer applies and bail is no longer a right.

(c) applicant has not proved any misdirected on the part of the court *a quo's* reasoning in arriving at the judgment and sentence passed."

THE LAW

Section 123 (1) (b) (ii) of the Criminal Procedure and Evidence Act (Chapter 9:07) (the Act) empowers the court to admit a convicted person to bail pending the determination of his appeal by the High Court. Further, section 115 (C) (2) (b) provides that where an accused person who is in custody in respect of an offence applies to be admitted to bail after having been convicted of the offence, he shall bear the burden of showing on a balance of probabilities that it is in the interests of justice for him to be released on bail.

In S v *Hudson* 1996 (1) SACR 43 C (W) the court stated that the question is not whether the appeal will succeed. The standard is much lower. It is whether the appeal is free from predictable failure. If that conclusion is reached, the applicant should be entitled to relief.

The guiding principles in an application of this nature were clearly outlined in *S* v *Dzawo* 1998 (1) ZLR 536 at 539 as follows:-

(i) Whether there are prospects of success on appeal.

(ii) The right of an individual to liberty taking into account the delay that may be encountered in finalizing appeals. These were the main factors enunciated in the earlier cases of:

S v *Kilpin,* 1978 RLR 282 (AD)

S v *Williams* 1980 ZLR 466

S v *Benatar* (2) ZLR 205 (HC)

In such matters, the applicant must satisfy the court that he has prospects of success on appeal and that the granting of bail will not jeopardise the interests of the administration of justice. The prospects of success on appeal must be balanced against the interests of the administration of justice.

The factors that courts generally take into account are the following;

a. the appellant's prospects of success

b. the likelihood of appellant absconding

c. the length of the sentence currently being served

d. the delay before the appeal could be heard; and

e. the liberty of the individual

In *Chikumba* v *The State* HH 724-15, the court stated that if the applicant has some fighting chance on appeal, then all the other relevant factors being neutral, the applicant must be entitled to relief.

It is trite that the test for bail pending appeal requires no more than an arguable case on appeal, one which was not manifestly doomed to failure. Such a threshold is not difficult to cross.

In *S* v *Bruintjies* 2003 (2) SACR 575 (SCA), the court held that:-

> "The prospect of success may be such (an exceptional) circumstances, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters, together with all other negative factors, will be cast into the scale with factors favourable to the accused, such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on. If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail." (my emphasis)

APPLICATION OF THE LAW TO THE FACTS

(a) **PROSPECTS OF SUCCESS ON APPEAL**

To the extent that there was a substantial delay in reporting this matter (i.e from 2017 to 2020 – a period of 3 years) coupled with material inconsistencies in complainant's statements to the police which ultimately contradicted her *viva voce* evidence in court, I am of the view that the appellant has an arguable case on appeal. Further, I am fortified in this view that the court *a quo* failed to detect and adequately deal with the possibility of collusion between complainant and her grandmother who had a motive to falsely incriminate the appellant given the grandmother's self-confessed bitterness. This bitterness was driven by the accusation that appellant and his wife were denying her access to or custody of her grandchildren inclusive of the complainant. On the evidence, there is bad blood between Josephine and the appellant.

What is also apparent from the evidence is that complainant had no reasonable, consistent and credible explanation for her failure to report the alleged sexual attacks to school authorities, or to her own grandmother or to police timeously. A three (3) year delay in these circumstances is unreasonably too long a period in my view. There remains also a cloud of uncertainty on the shift from being raped once and three (3) times. It certainly cannot be explained on the complainant's inability to distinguish between indecent assault and rape.

In the circumstances, I find that the appellant's appeal against conviction is not manifestly doomed to failure. Therefore, appellant has good prospects of success on appeal against conviction.

As regards the appeal against sentence, I take the view that appellant has good prospects arising from the court *a quo's* failure to accord due weight to appellant's advanced age. At the time of sentence, appellant was seventy one (71) years old. It is trite that advanced age, just like youthfulness is a weighty mitigating factor. Unfortunately in this regard, the court *a quo* said;

> "So despite the advanced age of the accused and his ill health he needs not to be treated differently from the High Court precedents on rape charges."

THE LIKELIHOOD OF APPELLANT ABSCONDING

On this point, respondent submitted that since the appellant has been convicted and sentenced, he is not as of right entitled to his liberty. It was also submitted that it is not enough for a convicted appellant to only offer reporting conditions as a guard measure against the risk of abscondment. Firstly, it was submitted that the appellant must prove that the interests of justice and the integrity of the justice delivery system will not be prejudiced if he is released on bail pending appeal.

The appellant is aged 71 years residing at 729 Jacaranda, Gwanda. He is a farmer and miner in Gwanda. Appellant is married and is in poor health. The court *a quo* found that as former Mayor of Gwanda, the appellant is "a community leader" who should lead by example and also "looking after less privileged in his town." (my emphasis) Before his conviction, appellant was on bail pending trial and he did not breach his bail conditions. Accordingly there is no likelihood of appellant absconding if granted bail pending appeal.

Appeals take quite a considerable time to be set down and determined due to the huge volume and other factors.

Taking into account the totality of the evidence led against the appellant at trial, I am of the view that applicant is entitled to be released on bail pending appeal.

In the result it is ordered that;

1. The applicant be and is hereby admitted to bail pending the determination of his appeal filed under case No. HCA 32/22.

2. Applicant be and is hereby ordered to deposit a sum of RTGS $500 000-00 with the Assistant Registrar of the High Court in Bulawayo.

3. Applicant be and is hereby ordered to report twice a week every Monday and Friday between 0600 hours and 1800 hours at Gwanda Police Station Gwanda until the matter is finalised.

4. Applicant be and is hereby ordered to reside at 729 Jacaranda, Gwanda until the matter is finalised.

Ncube Attorneys, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners