

MATIVENGA MOYO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 10 & 23 May 2017

Appeal against refusal of bail pending appeal

W Watungwa, for the appellant
E Mavuto, for the respondent

MWAYERA J: The appellant was convicted and sentenced after a contested trial of rape as defined in s 65 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant was sentenced to 15 years imprisonment of which 2 years imprisonment was suspended for 5 years on the usual conditions of good behaviour. The appellant subsequently noted an appeal against both conviction and sentence. The appellant applied for bail pending appeal before the trial court and the application was dismissed hence the present appeal against refusal of bail.

It is settled in an appeal against refusal for bail pending appeal, the court ought to consider the judgment of the court *a quo* and come up with a determination of whether or not the court *a quo* misdirected itself in refusing to grant bail. See *State v Malunjwa* HB 34/03 where NDOU J as he then was stated as follows

“In an appeal to, the Judge against the Magistrate’s refusal of granting bail, the approach to be adopted by a Judge is whether the Magistrate misdirected himself when he refused to grant bail. The appeal should be directed at the Magistrate’s judgment and the Magistrate’s finding.”

In the present case the judgment of the court *a quo* as filed of record reveals that the court took into account the basic principles which fall for consideration in applications for bail pending appeal against both conviction and sentence. The court considered interests of Administration of Justice as anchored on the societal interest of having a matter prosecuted to its logical conclusion and the right to individual liberty. The court analysed the requirements

of bail pending appeal *vis- a-viz* the evidence which was placed before it leading to conviction and sentence. The decision or finding of the court that the applicant was not a suitable candidate for bail was based on the finding that there were no prospects of success on appeal such that placement of the applicant on bail would prejudice the interest of administration of justice. Moreso given that the said conviction and sentence was viewed as likely to tempt the appellant to abscond. The court took it that appeals were being dealt with expeditiously such that the appellant would not be prejudiced by prosecuting his appeal while serving. The court *a quo* in assessing the application for bail pending appeal was alive to the need to consider the pertinent requirements as laid out in the Criminal Procedure and Evidence Act [Chapter 9:07] and s 70 of the Constitution of Zimbabwe.

Also case law see *State v Benater* 1985 (2) ZLR 205. *S v Williams* 1980 (1) ZLR 466, *S v Tengende and Ors* 1981 (1) ZLR 445 and *S v Dzawo* 1998 (1) ZLR 536. All the cases allude to important factors to be considered were the court is faced with an application for bail pending appeal. These are

1. Prospects of success on appeal
2. Likelihood of abscondment
3. Likely delay before the appeal is heard.
4. Right of an individual to liberty.

Worth noting is the fact that principles that fall for consideration for bail pending trial are different from bail pending appeal. This is for the obvious reason that in the latter the presumption of innocence will have fallen off because of the conviction by a competent court of law. The onus shifts heavily on the appellant to show cause why justice requires that he should be admitted to bail. The court in exercising its discretion to grant or refuse bail must endeavour to strike a balance between the applicant's liberty and the interest of Administration of justice. Where the guilt of the applicant is not in issue and the offence calls for a substantial imprisonment sentence, it would be inappropriate not to infer high likelihood of abscondement given the conviction and lengthy imprisonment are clear factors which can tempt or induce an individual to abscond. Where there is that temptation to abscond in the absence of compelling reasons, it would endanger the interest of administration of justice to admit an individual to bail at the risk of administration of justice.

In casu the court *a quo* was alive to the evidence leading to conviction. Most of the salient factors were common cause. The fact that the applicant had been sexually intimate with the complainant by his own admission was laid bare before the trial court. The trial court

was only to decide whether or not the sexual intercourse was by consent. The complainant voluntarily made a report of rape to a person to whom she was expected to report. The record of proceedings reveals that the complainant did not report the rape to her sister whom she believed had connived with the applicant to rape her under unorthodox customary practices. She instead without delay voluntarily narrated her ordeal to her uncle. The complainant's account was corroborated by her uncle and to an extent by the applicant who did not dispute sexual intercourse but argued it was consensual. The court *a quo* had opportunity to visualise and hear witnesses testify and it was convinced beyond reasonable doubt that the applicant had none consensual sexual intercourse with the complainant and thus convicted the applicant of rape.

It is against this evidence that the court *a quo* which had properly exercised its sentencing jurisdiction considered whether or not there were prospects of success on appeal warranting admission of the applicant to bail pending appeal. The court *a quo* properly considered the requirements cumulatively and came to the conclusion that it was not in the interests of administering of justice to admit the applicant to bail.

The argument by the applicant that he was not legally represented at trial cannot stand on the basis that whereas an accused has a right to legal representation the court cannot force him to be legally represented. A perusal of the record of proceedings does not reveal that the applicant sought for deferment of the matter for him to secure legal representation and that the court stamped on his right by barring him from securing legal representation. Given the procedural manner in which the trial was conducted and decided on merit there is no basis for imputing denial of right to legal representation as painting the appeal with prospects of success were it is apparent on the record, the applicant was not denied the right to legal representation. The applicant did not seek to exercise the right to legal representation and there is nothing on record to show he was barred from exercising such constitutionally provided right.

The applicant further argued that the medical report was not tendered procedurally. The evidence which was adduced before the court in relation to the rape even in the absence of the medical report given the admission of sexual intercourse is intact. The production of the medical report was with the consent of the accused whose rights were explained, understood and waived. If he had insisted on his right the State would not have been allowed to produce the report and it would have made a choice to proceed without the medical report or postpone to allow the accused to exercise his right. The report was procedurally tendered

by consent. Even if one were to assume that the medical report was unprocedurally tendered and expunch the medical affidavit from the record, the complexion of the state case would not change on the basis that sexual intercourse is not in contention. The applicant's case, on appeal does not enjoy prospects of success. The conviction was anchored on overwhelming evidence of non-consensual sexual intercourse given the torn pant which was tendered as an exhibit as evidence before the court. This evidence was cumulatively considered with the timely and voluntary report and corroboration of complainant's evidence. The State witnesses were viewed as credible by the trial court. Given the meticulous assessment of evidence by the trial court, the conviction in this case is unassailable. That coupled with the inevitable imprisonment term imposed by the court *a quo* taints the applicant's appeal with no prospects of success. The conviction was well supported by the evidence and the sentencing discretion was properly exercised thus minimizing prospects of success on appeal.

Accordingly there was no misdirection on the part of the court *a quo* when it refused to admit the appellant to bail.

The appeal against refusal of admission to bail pending appeal is accordingly dismissed.

F Watunga & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners