DAVISON MUTIZWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 1 June & 16 July 2018

Bail Pending Appeal

P Mufunda, for applicant
E Nyazamba / E Makoto, for the State

TSANGA J: The applicant, aged 44, was convicted of rape and sentenced to 16 years imprisonment with five years suspended on the usual conditions. The accused was said to have given a lift to a then 19 year complainant who was coming from a party on the evening of 25 December 2016. She was with her child. The lift had been solicited for her by a relative who had accompanied her to the road at night to find transport. When the accused drove by she had embarked at the behest of her relative who knew the accused. The rape was found to have occurred when they got to a specified street where the accused had locked the doors and asked for sex as payment. He had forcibly laid her on the seat and had had sex with her without her consent. She had reported to her husband after a few days, who had noted that she was depressed and not herself. Whilst acknowledging having given her a lift, the accused had denied having had sexual intercourse with her. A full trial had found him guilty. The Magistrate had found her a credible witness and was equally satisfied with the evidence of the husband to whom the matter had been reported.

Dissatisfied with conviction and sentence, the accused noted an appeal which is yet to be heard. The grounds of appeal are as indicated below. He applied for bail pending appeal.

AD CONVICTION

1. The court *a quo* erred and misdirected itself by convicting the appellant when none of the requirements for admissibility in sexual offences was satisfied.
2. The court *a quo* erred in finding the appellant guilty when the complainant's evidence was marred with gross inconsistencies.

3. The trial Magistrate erred by failing to realise that the evidence led from the complainant's husband actually corroborated that of the appellant.
4. The court *a quo* misdirected itself by failing to realise that the State's case had not been proven beyond reasonable doubt as required in criminal cases.

AD SENTENCE

5. The court *a quo* grossly misdirected itself in passing a sentence which is too excessive and severe as to induce a sense of shock.
6. The court *a quo* grossly misdirected itself in coming up with a sentence which is far out of line with decided cases of a similar nature.

The State was opposed to the application on the basis that the appeal grounds were not clear and specific. It highlighted the difficulty of assessing the prospects of success on grounds that are not clear or specific. The need for appeal grounds to be lucid has been highlighted in cases such as *S* v *Ncube* 1990 (2) ZLR 303 (SC).

The State noted in its response follows:

- "The 1st ground of appeal tend (sic) to relate to requirements of admissibility. It is not specific whether it is the admissibility of the complainant or all the evidence adduced by the State.
- The 2nd ground of appeal does not direct the honourable court to the specific inconsistencies that are contained in the complainant's testimony.
- The 3rd ground of appeal does not specify in clear terms how the evidence from complainant's husband corroborated that of the applicant.
- The 4th ground of appeal is too broad and couched in general terms which make it not compliant with Rule 22 of the Supreme Court (Magistrates Courts Criminal Appeals Rules) 1979."

The appeal against sentence was also said to be without merit as it did not allege any error of law or fact in the sentencing.

However, despite the reservations on the clarity of the appeal grounds, the State addressed the application on its merits. Drawing on the record, it highlighted the voluntariness of the report to her husband and the fact that the delay in telling him was occasioned by the fact that she did not want the issue of rape to affect her wedding which was planned in the coming months. The State also relied on the case of *S* v *Musamhiri* 2014 (2) ZLR 232 to emphasise the point that rape victims cannot be expected to adhere to a predetermined script of how they should respond to rape as there are cultural and social considerations that heavily come into play.

The principles that are taken into account in an application for bail pending appeal are well summarised as follows in the a case of *S* v *Dzvairo & Ors* 2006 (1) ZLR 45

> "Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases – notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice, and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospect of success on appeal is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail."

Suffice to add that as highlighted in the case of *Taurai Chikwizu* v *The State* HH 396 /17, in terms of s 115 C (2) (b) of the Criminal Procedure and Evidence Act, **whether it is in the interests of justice** for bail to be granted after conviction is now an important yardstick to satisfy and the onus is on the accused to discharge this on a balance of probabilities.

I found the prospects of success in this matter dim. Particularly damning to the finding that his prospects of success were dim was that the record clearly shows that the magistrate analysed the factual findings exhaustively in arriving at her finding of guilt.

Furthermore, at the end of the trial, in mitigation the applicant himself had admitted to the court that he was deeply remorseful for his conduct on that day and on the night in question and sought the court's mercy. Besides the fact that he was a first offender and a family man this is how his counsel had put his situation in mitigation upon being found guilty:

> "The accused will submit that he will forever regret his actions and he is now prepared to change and be a law abiding citizen."

In sentencing him the record also shows that the court took cognisance of these remarks as follows:

> "Accused showed remorse and contrition during mitigation and told the court that he was deeply remorseful of his conduct on the day in question. This show of contrition is highly mitigatory."

It would clearly not have been in the interest of justice to release on bail someone who from the record was not only found factually to have committed the offence but who also clearly in the final analysis admitted to the offence and who merely has had a change of heart. He is likely to abscond knowing fully well that he faces a very lengthy term of imprisonment where the appeal is likely to be dismissed.

Having had a change of heart about his remorsefulness or regrets for the events of that night, the gist of applicant's complaints hinge on issues of credibility of facts which issues lie with the province of the trial court. It is unlikely that the findings of credibility will be reversed by the appeal court. See *Chimbwanda* v *Chimbwanda* SC 28/02. Furthermore, in dismissing his appeal for bail, my decision was based on the fact that it is not for the court hearing the bail application pending appeal to go into a full scale analysis of the evidence that he now complains of. That will be done by the properly constituted appeal court. As persuasively highlighted in the South African case of *Keobakile Fanuel Babuile & Ors* v *The State* Case No: CC32/2014:

> "In evaluating the prospects of success it is not the function of this Court to analyse the evidence in the Court a quo in great detail. If the evidence is extensively analysed it would become a dress rehearsal for the appeal to follow: cf S v Viljoen 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 561g-i. Findings made at this stage might also create an untenable situation for the court hearing the appeal on the merits".

Suffice it note that the some of the inconsistencies that were complained of at the bail hearing such as the initial confusion in the identification of the accused had logical explanations as to what had transpired.

The conviction is unlikely to be overturned. As regards sentence, my conclusion was that even if his sentence were to be reduced, the accused would still most likely serve a lengthy term of imprisonment. The administration of justice would be hampered in this case were he to be given his liberty when the conviction seems more than likely to be upheld. There is also unlikely to be a substantial delay in hearing his appeal as the record has been transcribed.

Therefore against a backdrop of the presumption of innocence no longer prevailing; a sentence that is likely to make the applicant abscond; there being no prospects of success of the appeal, the application for bail pending appeal was dismissed. Appeal cases are no longer taking a lengthy period of time. There was no reason why, if so inclined, applicant cannot proceed with his appeal in this matter whilst serving his sentence.

Chengeta Law Chambers, Applicant's Legal Practitioners
National Prosecuting Authority, Respondents Legal Practitioners