SHINGIRAI WATCH
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 18 DECEMBER 2018

Bail pending appeal

Applicant in person
R Chikosha, for the respondent

TSANGA J: This was an application for bail pending appeal. The applicant was convicted in 2015 of two counts of rape of an 11 year old girl to whom he was related as an uncle. He received a sentence of 15 years for each count, with five years suspended on the usual conditions, making his effective sentence 25 years. He successfully applied for condonation of late noting of appeal in August 2018. He then applied for bail pending appeal. I denied him bail on the 5th of November 2018 on account that there were no prospects of success on appeal regarding his conviction but that there might be so on sentence only even though he would still have to serve a lengthy jail term. The commendation was that he prosecutes his appeal whilst serving his sentence. He has requested the fuller reasons for dismissing his application in writing. These are they.

The factors to be considered in an application for bail pending appeal are trite: They include the prospects of success on appeal; the likelihood of abscondment; the right to individual liberty and the potential of delay before the appeal is heard.

The State acknowledged fully in their response to the application that nothing could be taken from the state witnesses' evidence as regards the abuse of the complainant and that her abuse was indeed confirmed by the medical report. However, the state was not opposed to the granting of bail on the grounds that as a self-actor, he was not sufficiently assisted by the magistrate and that he did not appear to appreciate the proceedings.

This was not borne out by the record. Page 29 shows that the purpose of cross examination was explained and understood by the accused. The fact that the accused himself chose to ask the witness only two questions does not mean that he did not understand the proceedings. In fact, the state's concession that nothing could be taken from the evidence of the state witnesses would explain why he had virtually few questions to put to them. He appeared to be only interested in why she had not reported the first incidence of rape and she reiterated her evidence that he had threatened her with a knife. He did not dispute this. It is hard to see how an appeal court will find fault with the magistrate for applicant's own failure to cross examine any further if he had nothing to ask.

The second ground upon which the state had consented to bail pending appeal was that the applicant raised a new defence which the magistrate did not take into account. Again, a reading of the record and the magistrate's judgment makes it quite clear that he addressed the issue at length of the defence that the accused purported to raise after all the witnesses had left the stand. Granted, where an accused is a self-actor, it is fathomable that his defence may not contain the actual meat of his defence. See *S* v *Pandehuni* 1982 (2) ZLR (2) 133 (S) Nonetheless his defence must be clear in terms of the aspects that he intends to canvass. In this instance, his defence at the start of the trial was that the complainant had come with her grandmother to pick okra and they had gone away. In early January, the complainant had come with her sister and brother and he had warned them not to step on his plants and that this was the last time he saw the complainant before he proceeded to Kitsiyatota. He had then returned to hear the allegations against him. That was the essence of his defence.

When it came to giving evidence, his defence was that there was a family grudge involving a deceased child of the complainant's mother some years back for which he was blamed and that it was these allegations that were behind the accusations. This was a completely new defence which he had not mentioned nor cross examined the witnesses on when they were on the stand. It is again hard to see from a reading of the record and the magistrate's analysis, why he should be faulted for having disregarded it when it was clearly raised when the witnesses for the state had been excused. Failure to put out a defence gives the impression of a crafted defence especially when it is disclosed after the witnesses have left the witness stand.

The state also said that the magistrate did not give reasons for sentence. He did and the issue simply boils down to stylistic approaches since a reading of the record makes the

following clear: that the sentence he imposed was because the applicant raped the complainant on two different occasions; he used a knife; he was related to complainant; he was 42 years old; and the magistrate was satisfied with the credibility of her evidence. He also considered the accused's conduct to be disgraceful.

The accused also raised in his reasons for appeal the issue of the medical report having not been shown to him prior to the trial. He did not complain about the medical report during the trial. A reading of the record shows that the medical report was admitted by consent. The record also does not show that the medical report was ever an issue for the accused. Again, it seems to me unlikely that the appeal court would set aside his conviction on the basis of the medical report which was clearly not queried in the record and confirmed that the complainant's testimony that she had in fact been raped.

The issue of the likelihood to abscond, in view of the sentence imposed is always an important consideration in an application for bail pending appeal. The accused was convicted of raping a minor. In all but the most exceptional cases bail will be denied where one has actually been convicted of a Third Schedule offence of raping a minor where bail in general pending trial is to be accorded in exceptional circumstances.

The likelihood to abscond and the prospects of success are generally examined together. With virtually no prospects of success on the conviction itself, the sentence that the accused would have to serve remains high even though it must be said in this instance the accused's sentence may indeed be reduced. For example, in *S* v *Nyathi* 2003 (1) 587 (H) the accused who was the complainant's father had received a 30 year sentence for multiple counts of rape on his 16 year old daughter. The 30 year sentence was deemed excessive and reduced to 18 years. See also sentencing considerations in rape cases expressed in *S* v *Ndlovu 2012 (1) ZLR 393 (H).* In this instance he would still remain with a lengthy sentence and as such his likelihood of absconding if bail were to be given is high. The issue of personal liberty does not rank highly where the presumption of innocence no longer prevails and where there are no prospects of success on conviction.

It was for these reasons that the court denied the applicant bail pending appeal and concluded that he must prosecute his appeal whilst serving his sentence.

National Prosecuting Authority: Respondent's Legal Practitioners