

NKANYISO HLABANGANA

And

DALUBUHLE MNKANDLA

And

EMMANUEL SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 12 NOVEMBER 2021 & 31 MARCH 2022

Bail Pending Appeal

T. Khumalo for the applicants

T. M. Nyathi for the respondent

TAKUVA J: This is an application for bail pending appeal.

The applicants appeared before a Regional Magistrate sitting at Gwanda on three counts of rape in contravention of section 65 (1) of the Criminal Law (Codification and Reform) Act Chapter 9:23. They pleaded not guilty but were all convicted and each was sentenced to fifteen (15) years imprisonment of which 3 years imprisonment were suspended on condition the accused does not within that period commit an offence of a sexual nature as an element which upon conviction will be sentenced to imprisonment without the option of a fine.

Aggrieved by the conviction and sentence they filed a notice of appeal and ten (10) grounds of appeal which are neither concise nor precise. They resemble heads of argument. I will attempt to synthesise them in this judgment. They are the following:

1. The court *a quo* erred and misdirected itself at law and “in general” in finding that the state had proved its case beyond reasonable doubt which it had dismally failed to do.
2. The court *a quo* erred and misdirected itself in placing undue reliance on the complainant’s evidence after it had “affirmatively” found her to have given contradictory evidence. The court underplayed the contradictions.
3. The court *a quo* erred and misdirected itself at law in dismissing the 1st and 2nd appellant’s defence of alibi despite it being clear that the state had failed to disprove it.
4. The court *a quo* erred and misdirected itself at law by holding that the appellants should have “proved and substantiated their alibi”.
5. The court *a quo* misdirected itself in making a finding that the investigating officer’s failure to take the 1st and 2nd applicants to the mining site was immaterial
6. The court *a quo* erred in rejecting the 1st and 2nd appellants’ explanation that they could not have walked to the gold panning site and return on the same day.
7. The court *a quo* erred and misdirected itself at law by dismissing “out of hand” 3rd appellant’s explanation that he would not have allowed the

1st and 2nd appellants, his nephews to have sexual intercourse with the complainant “before” him.

8. The court *a quo* erred and misdirected itself at law in placing “heavy reliance” on and “blindly accepting” the testimony of the Investigating Officer despite “clear evidence” that his testimony was false.
9. The court *a quo* erred in “manufacturing evidence” in support of the state case relating to the evidence of the defence witness. (Abandoned during the hearing)
10. The court *a quo* erred and misdirected itself in dismissing out of hand the evidence of the defence witness Abednico Sibanda which corroborated the 3rd appellant’s testimony in all material aspects.

There is only one ground of appeal against sentence namely that the court *a quo* erred and misdirected itself at law in pronouncing “a sentence which induces shock such that no reasonable court applying its senses would have arrived at it. Applicants prayed for their conviction and sentence to be set aside.

The Facts

The broader allegations against the applicants were that on the 3rd of November 2020 at approximately 19:00 hours, the complainant was on her way home from Esihlangeni Business Centre when she met the 1st and 2nd applicants near the 3rd applicant’s homestead. The 1st applicant proposed love to the

complainant who turned him down. Instead of letting the matter to end there, the 1st applicant ordered the complainant to enter the 3rd applicant's house but she refused causing the 1st applicant to grab complainant by her hand and pulled her into the 3rd applicant's house.

Once inside the house, the 1st applicant placed the complainant on a bed, undressed her and had protected sexual intercourse with the complainant without her consent. The 2nd and 3rd applicants then took turns to rape the complainant. The three applicants forced the complainant to remain at 3rd applicant's homestead until at around 23:00 hours when they allowed her to leave. Before complainant left, the 3 threatened complainant with death if she dared reveal her ordeal to anyone.

Upon her arrival home, complainant revealed the matter to her young sisters Priscilla Tshuma and Sibonginkosi Ndlovu. The former informed their brother Elvis Tshuma who made a report at Esihlangeni Police base leading to the arrest of all the applicants on rape charges. They all denied the offences with 1st and 2nd applicants raising the defence of alibi. They averred that they were not at the village but were camping at a mining site known as "Kogogo". The 3rd applicant indicated that as much as he was with the complainant on the alleged date and time, it was simply because she had sought shelter from the rain. When

the rain stopped complainant went to her residence whilst he proceeded to a funeral which was close by.

The matter proceeded to trial resulting in all applicants being found guilty as charged. They were each sentenced to an effective prison term of 12 years.

Bail Pending Appeal – Principles

The power to admit to bail pending appeal or review is provided for in section 123 (1) (b) (ii) of the Criminal Procedure and Evidence Act Chapter 9:07.

The section states;

- “(1) Subject to this section, a person may be admitted to bail or have his conditions of bail altered –
- (a) ...
 - (b) in the case of a person who has been convicted and sentenced by a Magistrates’ Court and who applies for bail –
 - (i) ...
 - (ii) Pending the determination by the High Court of his appeal;
or
 - (iii) ...
by a judge of the High Court or by any magistrate within whose area of jurisdiction he is in custody ...”

While discussing the principles governing bail pending appeal or review John van der Berg in his book titled *Bail A Practitioners Guide* Third Edition at pages 215 – 216 states;

“The primary consideration in an application for bail pending appeal or review is whether the accused will serve his sentence if released on bail and should his appeal or review fails; the risks of the accused interfering with the investigation or influencing witnesses will have fallen away. The court will naturally take into account the increased risk of abscondment in

view of the fact that the accused has been convicted and sentenced to a term of imprisonment and is not merely awaiting the outcome of his trial. Also, a stark change of circumstances is the fact that the presumption of innocence has, by this stage, ceased operating in the accused's favour. Thus the severity of the sentence imposed will be a decisive factor in the court's exercise of its discretion whether or not to grant bail and as to the amount of bail to be considered, for the notional temptation to abscond which confronts every accused person becomes a real consideration once it is known what the accused's punishment entails ... In considering a bail application at this stage of the proceedings the trial court should carefully weigh the likelihood of the accused considering it worthwhile to abscond rather than serve his sentence. It follows that bail will more readily be refused where the sentence imposed is a long term of imprisonment.

In view of the above principles, it is submitted that those considerations which militated against a court lightly granting bail to an accused awaiting trial on what was formerly a capital charge will be magnified many times over once the accused has been convicted of such an offence." (my emphasis)

Prospects of success on appeal play an important role in the determination of whether or not bail ought to be granted and if granted what amount ought to be fixed – see *S v Williams* 1980 ZLR 466 (A) where the court elaborated this;

“Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too lightly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail maybe refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as *R v Milne & E R Leigh* (4) 950 (4) SA 601 (W) and *R v Mtembu* 1961 (3) SA 468 (D) stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are interconnected because the less likely the

prospects of success are the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail. (my emphasis). See also *S v Kilpall* 1978 RLR 282 (A); *Kwenda & Anor v The State* HH-37-10.

The seriousness of the offence and the seriousness of the penalty imposed are other relevant factors including whether the administration of justice will be prejudiced if bail is granted. In serious offences that normally attract a substantial prison sentence, there will be a pronounced risk that the convicted person will flee from justice if released, especially if he has no reasonable chance of successfully appealing against the conviction. Even where there is a reasonable prospect of success on appeal against conviction, the convicted person may not be inclined to take the chance of the appeal succeeding but may take flight instead if he is released pending appeal. As regards prejudice to the administration of justice if bail pending appeal is granted, it was held in *S v Mudze Ngerere* that an accused (who had been convicted of rape) must satisfy the court on a balance of probabilities that it is in the interest of justice that he be released on bail pending appeal. Also, the court should take into account the facts set out in sections 117 and 117A of the Criminal Procedure and Evidence Act. See also Professor G. Feltoe, *Magistrates' Handbook*, Revised August 2021.

Finally the legal principles were summed up in *S v Hudson* 1996 (1) SACR 43 (W) where the court stated that where a convicted person applies for bail pending appeal and there is no reason to be concerned about whether or not he

will abscond, the question is not whether there is a reasonable prospect of success on appeal. If the appeal is reasonably arguable and not manifestly doomed to failure the lack of merit in the appeal should not be the cause of a refusal of bail. Furthermore, if the conclusion that the appeal is manifestly doomed to failure can be reached only after what is tantamount to or approximates a full hearing the appeal should ordinarily for purposes of considering bail be treated as an appeal which is arguable. The question is not whether the appeal “will succeed” but on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment. See *Bekezela Bhebhe & 2 Ors v The State* HB-157-20.

Application of the law to the facts

(a) Prejudice to the administration of justice

The applicants stand convicted of rape. They are serving a 12 year term of imprisonment. Applicants raped complainant as a gang. According to a psychiatrist’s report the complainant is a mentally challenged woman. All the applicants were aware of this fact as they live in the same area. The complainant was pregnant at the time of the rape. All these factors make the offence very serious hence the imposition of such a lengthy prison sentence.

It is common cause that the 1st and 2nd applicants are illegal gold panners with no families. They are youthful offenders with no attachment to a particular place except where gold is rumoured to exist. In light of these factors, I find that

the likelihood of applicants absconding if granted bail pending appeal is very high.

(b) Prospects of success on appeal

It is common cause that the applicants and the complainant were known to each other prior to the commission of the offence. It is also common cause that the complainant and the third applicant were at 3rd applicant's home.

In assessing the prospects of success the court must examine the evidence led, the findings made by the court *a quo*, the defences advanced and the granting of appeal in order to see if the appeal is reasonably arguable and not manifestly doomed to failure. In other words whether the appeal is free from predictable failure.

The 1st and 2nd applicants relied on the defence of an alibi in that they alleged that they were not at the crime scene at the time the crime was committed. They claimed to have been at an illegal mining site known as Kogogo some kilometres from that homestead and the crime scene. Upon being asked by the Investigating Officer to supply further particulars especially the names of their colleagues for purposes of investigating the defence, they could not do so. Also, the applicants failed to provide reliable evidence on the period they were camped at Kogogo. On the evidence the period raised from 2 days to two weeks. While there is no onus upon the applicants to prove their alibi/defence, an accused who

raises the defence of alibi must of necessity fully disclose its details to enable the state to fully investigate it. See *S v Chimusoro and Another* HH-699-15; *S v Magomba* HB-24-10.

An alibi is a statement of defence to the effect that a person accused of a crime was at a specific place different from the crime scene at the time the crime was being committed. The court *a quo* rejected the applicants' evidence due to numerous contradictions in the defence case regarding their whereabouts and how long they had been away from home prior to the commission of the crime. Further, the court *a quo* made a finding that the failure by the Investigating Officer to take the 1st and 2nd applicants to Kogogo was not fatal to the state case in that in the absence of names or even nicknames of those people in applicants' company or those they interacted with, the trip would not have been fruitful. I agree with the court *a quo*'s finding that applicants refusal to co-operate in that regard amounted to frustrating the process of investigating the alibi defence. An alibi is proven by a person who swears to have been in the accused's company on the date, time and place at the time the offence was committed.

For these reasons the 1st, 3rd, 4th and 5th grounds of appeal do not even attempt to reveal an arguable case on appeal. Based on those grounds the appeal is manifestly doomed to failure.

As regards the 2nd ground of appeal the criticism is that the court erred by making credibility findings in favour of the complainant a witness it had earlier found to have given contradicting evidence. The ground is in my view a misrepresentation of the court *a quo*'s actual findings on the complainant's credibility. I could not find anywhere in its judgment that a finding that complainant had given contradictory evidence on any aspect of her evidence. In concluding that the complainant was a credible witness, the court said the following;

“The complainant clearly narrated how the events unfolded. That it was the 1st accused right up to the 3rd who sexually abused her. She told the court that she did not want what they were doing to her and she advised then but they continued nonetheless. They took turns in sexually abusing her and thereafter threatened her if she divulged. The court has already made a finding in favour of her credibility. This is further buttressed by the fact that she made the report at the earliest opportunity availed to her and to the person to whom she was expected to report. Such was not solicited nor triggered by a certain event. An enquiry was made as to why she delayed and she straight away narrated her ordeal. She had not consented to the sexual acts perpetrated on her. Their conduct was unlawful ...”

Earlier while commenting on the complainant's credibility, the court said; “... It even goes further to indicate the credibility of the complainant. What she told the sister is exactly what she told the 3rd applicant that she had passed through her grandmother's place. The failure by the complainant to know if she was pregnant or not cannot be used to impugn her credibility. The doctor clearly stated in the psychiatrist report which forms part of the record that she was not mentally

capable to know if she was pregnant or not. It can be discerned from the state witnesses that the accused persons were in the vicinity of the crime, their presence at the village cannot be disputed. The evidence on record clearly disproves their defence of alibi.” (my emphasis)

Quite evidently, this ground is based on nothing and since its womb is empty, it can never give birth to an arguable case on appeal. It’s a fallacy. Ground number 6 seems to be based on hearsay evidence not relevant to the essential elements while ground of appeal number 7 amounts to 3rd applicant’s opinion. Both grounds do not reveal an arguable case on appeal. Ground of appeal number 10 suggests that when 3rd applicant was with the complainant at his home (a fact he readily admitted) Abednico Sibanda was with them which is clearly not the case. When Abednico testified that he was in the company of the 3rd applicant throughout the night he was not being truthful. I am of the view that the court a quo acted properly in dismissing the evidence of Abednico Sibanda.

In the circumstances, I take the view that all applicants do not enjoy any prospects of success on appeal. They clearly have no fighting chance on appeal. The application for bail pending appeal has no merit.

Accordingly the application is dismissed.

Mlweli Ndlovu & Associates, applicants’ legal practitioners
National Prosecuting Authority, respondent’s legal practitioners