

MASALA MATHE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 2 AUGUST 2019 AND 21 OCTOBER 2021

Bail Application

B Ncube, for the applicant
K Jaravaza, for the respondent

TAKUVA J: This is an application for bail pending appeal. The applicant was convicted and sentenced of rape as defined in section 65(1)(b) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). He was sentenced to 20 years imprisonment of which 3 years imprisonment were suspended on the usual conditions. Dissatisfied with both the conviction and sentence he noted an appeal with this court under case No. HCA 57/19. The applicant now applies for bail pending appeal.

It was the state's allegation that the applicant had sexual intercourse with Linety Dube a female juvenile aged 14 years on numerous occasions between May 2018 and December 2018 without her consent. The applicant was the complainant's teacher and the classroom was the scene of crime.

The applicant contended that his prospects of success on appeal are bright and that there are positive grounds that entitle him to be released on bail. It was further submitted that he harbours no intention to abscond from the jurisdiction of the court pending the finalisation of his appeal. Finally, it was argued that the applicant has a fighting chance on appeal and if bail pending appeal is not granted the appeal would be rendered merely academic.

The respondent opposed that application on the grounds that there are no prospects of success on appeal against both conviction and sentence.

In an application for bail pending appeal, the presumption of innocence no longer exists. The approach is that positive grounds should be established for one to be admitted to bail. In

the absence of such positive grounds, the proper approach to bail pending appeal is that it should be refused. See *Criminal Procedure In Zimbabwe*, S. Reid Roland at pages 6-7, *S v Tengende and Ors* 1981 ZLR 448 (S).

It should be noted that the guiding principles for bail pending trial and those for bail pending appeal differ. The guiding principles for bail pending appeal are (i) the prospects of success on appeal, (ii) the likelihood of abscondment, (iii) the right of an individual to liberty and (iv) the potential delay before the hearing of the appeal – See *S v Williams* 1980 ZLR 46 and *S v Dzawo* 1998(1) ZLR 536.

As regards prospects of success on appeal it is clear from the record that the following facts are common cause;

- (a) that the applicant is a teacher who taught the complainant at Koodvale Primary School.
- (b) that the complainant did not report the rape but allegations arose after she was discovered to be pregnant.

The only issue to be answered was whether it was the applicant who had sexually abused the complainant. A proper assessment of complainant's evidence shows that the complainant was a credible witness. Applicant strongly submitted that the 2nd witness was not told by the complainant that she had been raped. Therefore, the complainant failed to report the rape timeously i.e at the earliest opportunity in all the circumstances. See *R v Petros* 1967 RLR 35 G at G-H, *S v Henry* 1996 (2) ZLR 231 (H) and *S v Sibanda* 1994 (1) ZLR 394 (SC).

What should be noted is that the respondent readily accepted that the complaint of rape was not made timeously. However it was argued that this was attributable to the complainant's tender age of 14 years at the time and also her lack of sophistication as a rural girl. There was also evidence that the applicant threatened to assault the complainant if she made a report to anyone. The applicant as the class teacher would be with the complainant almost on a daily basis during the school term. Therefore it is reasonable to infer that the complainant was afraid to make such a report.

Further, the complainant made the report not as a result of threats or duress. The evidence on record is that the complainant's mother realised that the complainant had skipped

her periods. She then engaged Melina Dube an elderly person to talk to the complainant. Melina Dube examined the complainant's breasts and concluded that she was pregnant whereupon she enquired who was responsible for her pregnancy. The following exchange took place during cross-examination;

Q - When the complainant got into the house she feared that she is to be assaulted?

A - I never threatened the complainant, I encouraged her to be free and tell me who was responsible for the pregnancy.

From the above, it cannot be concluded that the questions were of a leading or threatening nature. Quite evidently, the complainant freely and voluntarily divulged the person who had impregnated her. This information was given to a neutral and elderly person. In the result I conclude that there are no prospects of success on appeal against conviction.

As regards sentence it is trite that sentence is in the domain of the trial court and the appeal court will only interfere with the sentence imposed by the court *a quo* where such sentence is manifestly excessive so as to induce a sense of shock. See *S v Ramushu* SC 25-93, *S v Nhumwa* SC 40-88.

In the present matter, the applicant has even argued that the sentence was too harsh. He did not suggest that the sentence was incompetent or out of line with similar decided cases. Rape is a serious offence which violates the dignity of the victim and results in physical and emotional trauma. *In casu* the applicant abused a child who was aged 14 years who at the time was his student. Appellant was in *loco parentis vis a-vis* the complainant. He impregnated her and in the process ruining her development in all the facets of life. Quite evidently, the aggravating features far outweigh the mitigatory circumstances.

For these reasons there are no prospects of success on appeal against sentence.

Accordingly, the application for bail pending appeal is hereby dismissed with no order as to costs.