

MBAMBELELI MPOFU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 12 NOVEMBER 2021 AND 18 NOVEMBER 2021

Bail Application

MAKONESE J: The applicant is facing a charge of rape in contravention of section 65 1) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The allegations are that during the month of June 2021 and at Hilbrow, South Africa, applicant unlawfully and knowingly had sexual intercourse with the complainant a 15 year old juvenile without her consent. The applicant denies the charge.

Factual Background

The complainant is a female juvenile. She is a Form 3 student at Montrose High School. The applicant is a 46 year old cross boarder transport operator. He is based in Bulawayo. He plies between Bulawayo and Johannesburg, South Africa. Sometime in June 2021 applicant was tasked to transport the complainant from Bulawayo to her relatives in South Africa. Upon arrival in South Africa applicant took the complainant to his place of residence and offered her a place to sleep. Accused person fondled the complainant and had sexual intercourse without her consent and without protection. Complainant later developed a sexually transmitted infection. She reported the matter to her aunt Norah Mathayisa. The report was however, not made timeously. The applicant denies the allegations. In his bail statement, applicant avers that he denies committing the offence and maintains that the charges are baseless and simply meant to fix him. Applicant suggests that whilst in South Africa complainant started engaging in sexual activities. When she discovered that she had contracted a disease, she then sought to cover up the allegations by making false allegations against him.

WHETHER THERE IS A RISK OF ABSCONDMENT

The state alleges that applicant is a cross border transporter. He has foreign connections. He rents a house in South Africa. He can easily abscond from this jurisdiction.

The state alleges that the police at Luveve phoned him under the guise that they wanted to offer him a business contract to transport some goods to South Africa. Accused person was arrested on arrival at the Police Station. The state alleges that the case against the applicant is strong. In the event that accused is convicted, he is likely to be sentenced to a lengthy term of imprisonment. That factor alone will motivate the applicant to abscond and not attend trial.

THE APPLICABLE LAW

In bail applications, it is trite that the applicant does not have to prove his innocence. He is presumed to be innocent until proven guilty. Section 117 of the Criminal Procedure and Evidence Act (Chapter 9:07) provides that the court should consider the following:

- (a) Whether the accused if released on bail will endanger the safety of the public or any particular person or will commit an offence related to in the first Schedule.
- (b) Whether the accused will stand his trial.
- (c) Whether the accused will attempt to influence or intimidate witnesses or to conceal or destroy evidence.
- (d) Whether accused's release will undermine or jeopardize the objectives or proper functioning of the criminal system.

In *Makone v The State* HH 493-07 the court held that:

“The golden thread running through these principles is that bail should be allowed in the interests of individual liberty unless it is not in the interests of justice. Each individual case must be dealt with on its own merits”

In *Dube v The State* HB 206-18, this court expressed the view that an applicant in a bail application has to proffer a defence that is reasonably possibly true. In the present matter applicant has averred that the state case is weak without outlining to the court the nature of his defence. The applicant gave a bare denial to the allegations and was content to state that:

“..... He denies committing the offence and maintains that the charges are baseless and meant to fix him. He suspects that the complainant whilst in South Africa started being sexually active and when it was discovered she tried to cover up by making false allegations against the applicant.”

The state made specific allegations in the outline of the state case to the effect that sometime in June or July 2021 applicant took the complainant to South Africa on her parents' request. On arrival in South Africa applicant is alleged to have raped the complainant. The applicant does not confirm or deny having sex with the complainant. Applicant makes a bare denial of the allegations. In bail applications it is of paramount importance that applicants make a full disclosure of the nature of their defence. This will enable the court to assess whether it is in the interests of justice to admit the applicant to bail pending his trial.

Applicant is a cross border transporter with ties to South Africa. He is unlikely to await his trial whilst on bail due to the serious charges he is facing. If convicted he faces a lengthy prison term. He has not proffered a plausible defence to the allegations.

For these reasons, the application for bail pending trial is hereby dismissed.

Messrs Pundu & Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners