

SOUL NDONGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 18 MARCH 2021

Application For Bail Pending Appeal

Ms S.Z Mpfu, for the applicant
Ms N Ngwenya, for the respondent

MABHIKWA J: The applicant in this matter was charged with and convicted of the crimes of firstly contravening section 65 of the Criminal Law (Codification and Reform) Act, Chapter 9:2 – “Rape” and secondly contravening section 67 (1) (a) (i) of the same Act, “Indecent assault.” The applicant was subsequently sentenced by the Regional Magistrate’s Court sitting at Bulawayo to 16 years imprisonment of which 3 years imprisonment were suspended on conditions. Having filed a Notice of appeal against both conviction and sentence, the applicant has filed the current application for bail pending appeal.

The applicant in his bail statement has submitted that he has bright prospects of success on appeal. He has further given his reasons for so submitting. The state has opposed the application and the relief sought by the applicant on the ground that there are no reasonable prospects of success on appeal in the matter.

I must state from the onset that I noticed firstly that the applicant had filed his Bail Statement, Notice of application and a copy of the record of proceedings. There were no Heads of Argument. The state had filed its Heads. I directed that the applicant files his Heads of argument particularly in view of Practice Direction No. 2 of 2021. None have been filed to date. Secondly, having read the applicant’s bail statement, the record of proceedings and the respondent’s heads, I noticed that all had ignored the issue of the possibility of absconding or jeopardising the administration of justice and its interest in the event that

applicant is granted bail pending appeal. I therefore further directed that both the applicant and the state addresses me on that issue, if any, to assist the court to come to a proper decision, particularly in view of Practice Direction 2/21 stated above. Again nothing was done. I will assume therefore in favour of the accused that he has not, from what is on record, shown an inclination to abscond or jeopardise the interests of justice.

The brief important facts of this matter on both sides are as follows; The applicant was, at the time of conviction a member of the Zimbabwe National Army (ZNA) residing at home No. B57 Mzilikazi township in Bulawayo. He is also a self proclaimed prophet, Madzibaba cum Church leader.

The first complainant (Pauline Kukura) claims that the applicant is a family prophet. She first went to him when her father took her to him as she was preparing her June 'A' Level examinations. She was instructed by the applicant to bring to him the stationary that she was going to use during the examinations, which she did. Secondly, she went to see the applicant in the company of her mother. The prophet told her that she had "a curse" which needed to be removed from her body. She says that out of the hearing of the mother, the prophet told her to come back alone on another day so that she would remove the "curse". She had to bring also an amount of \$120-00 bond notes. The prophet emphasized that she should not tell anyone about their meeting. On his part and on that aspect, the applicant claims that the 1st complainant is not being honest. He admits that the family and others were consulting him "for prayers" as a prophet. He says in fact he was himself in love with 1st complainant's sister, one Sharon Kukura who testified as the 3rd state witness. He says he parted with Sharon sometime in June 2020 when she claimed she was pregnant. I must say that the applicant had difficulties in cross-examination trying to explain when he dated Sharon, made her pregnant, ditched her, then dated the 1st complainant who is Sharon's younger sister in the manner he alleges unless if he was sleeping with them during the same period. He however claims he dated them in succession.

The 1st complainant goes on to state that on the day in issue (27 July 2020), she went to the shrine and then to the applicant's house looking for him. She was in the company of her cousin Patience Macheya and her younger brother Tafadzwa. At his home, they found some people queuing outside. A woman was already inside the house kneeling. The

applicant invited them in and asked the other woman to go and wait outside. He briefly prayed and then asked the complainant to remain alone with him. He started asking her about her problems. She told him that she had broken up with her boyfriend. He told her that her problems were being caused by the curse he had earlier spoken about. He offered to remove the “curse” without her paying the \$120-00 that he had earlier asked for. He gave her water to drink. He spread a cloth on the ground and poured water on it. He told her to wipe her face with it. He gave her some more water to drink. He then instructed her to go and sit on his bed. He asked her if she had ever had sexual intercourse with anyone. She said she had had it with her boyfriend. He instructed her to remove her pants, and lift her dress, and started rubbing some ointment or muti onto her breasts and finally her vagina using his finger. He then said the finger will injure her so he would use his penis. She refused but he inserted the penis even when she told him that it was hurting her. She then pushed him away but that is the time he ejaculated inside her. She started crying. She asked him what if she got pregnant. He replied that he did not have sexual intercourse with her, he was just at work. He gave her some tissue paper to wipe herself and a bucket of water to wash. He went out. She simply wiped but did not wash. On his return, he asked her if he had washed. She pretended to have done so. He then told her that all her problems had been washed away. He then prayed and took out a black thing which he put in a dish. He instructed her to go and throw it away.

Second Count (Patience Macheya)

When the appellant was through with Pauline, it is the evidence that he called Patience Macheya in. He told her that she had been bewitched. He told her to lift her skirt up to around the belly. He pulled her skin and claimed to have pulled out a blackish thing that he threw into a dish, but he said she should not see the thing herself. When Pauline had gone out, he stared asking if she had ever had sexual intercourse or had her breasts fondled. She said she had not. It appears from the evidence that the appellant then repeated almost the whole process that he went through with the 1st complainant and right up to fondling the breasts smearing them with ointment and trying to insert his finger into Patience’s vagina. He however discovered that Patience was on her monthly menstrual cycle and abandoned his mission.

The applicant had told both girls not to tell anyone about the incident. However, on their way home, the complainants discussed what applicant had done to them. At home, they told Sharon Kukura. The elders were also told and the matter was reported to the police.

On his part the applicant vehemently denied the allegations. His version was that the girls are conniving to fix him. He says that Pauline and her sister Sharon got infuriated when they discovered that he dated and slept with them both. Sharon at one time allegedly claimed to be pregnant whilst Pauline complained of what would happen if she fell pregnant or contacted H.I.V. I must say that Sharon in fact also vigorously denied ever falling in love having sexual intercourse with applicant as claimed by him. She however admits sending and receiving certain text messages which may imply or be interpreted to mean that there was a love relationship between her and the applicant. The applicant claims that the 1st complainant (Pauline) is in fact the one who told him that she had broken up with her boyfriend because she wanted a religious one who could help her with prayers and money. They fell in love. He says she is the one who at a certain stage told him that from then on, she would be coming to him in the absence of her parents. When he told her that he would be visiting rural Gutu, she said he could not go before “seeing” her and before giving her money. He intended to go to Gutu on 28 July 2020. She said she would find a day when her parents would be busy and then visit him alone. She did so on 27 July 2020 but she was with her two cousins. They found people queuing and a woman already kneeling before him in the room. He asked the woman to go out and let them in. He prayed and asked the cousins to go out whilst he remained with her lover. They fondled and had consensual sexual intercourse. After the sex, Pauline asked what would happen if she fell pregnant. He told her that she was “his wife”. However, Pauline then discovered firstly that he was married already and secondly that he did not have the money he had promised her. He allegedly said that “things were not adding up” and he was taking the little money he had to his wife in Gutu. He in fact had promised Pauline the US\$75-00 Covid 19 allowance for Civil Servants. He says they actually briefly exchanged harsh words but as they opened the door, those outside could not realise the quarrel between them. He accompanied Pauline and her cousins out of the home. He was adamant that Pauline and Sharon must have been angered and set out to fix him by falsely alleging rape.

Applicant was also adamant that he never indecently assaulted the 2nd complainant. He avers that she was simply recruited by her cousins (Sharon and Pauline) in the plot to fix him.

The law on Bail Pending Appeal

The law relating to applications for bail pending appeal has been well laid down. The starting point of course is Part 2 sections 49 and 50 of the Constitution of Zimbabwe, Amendment No. 20 of 2013, as read with section 123(1) of the Criminal Procedure and Evidence Act [Chapter 9:23]. Properly read and understood, the right to one's liberty until proven guilty, in deserving cases, extends to cases where the accused person has been convicted and sentenced but wishes to appeal against the court's decision. Needless to say, those rights have their limitations. The law has also been laid down in a number of decided cases, amongst them: *S v Kilpin* 1978 RLR, 282A; *S vs Williams* 1980 ZLR 466; *S v Manyange* 2003 (1) ZLR 21 (H); *S v Chikumba*.

In *State v Poshai* HH-89-2003, the court pointed out as follows among other considerations, about bail pending appeal cases,

“It is trite that amongst the factors which the court has to take into account when considering whether to admit an applicant to bail pending appeal or not, are the following,

1. The prospects of success on appeal;
2. Whether there is a likelihood that if admitted to bail, he will abscond thereby defeating the course of justice.”

It was stated also in *S v Hudson* 1996 (1) SACR 431 (W) that the appeal should reasonably be arguable and not manifestly doomed to fail from the onset. Where there is room for difference of opinion on the law, facts, evidence and circumstances of the particular case regarding the conviction and/or sentence against the accused, it is safe to hold that there are reasonable prospects of success. Also see *S v Chikwizu* HH-396-17

Indeed it has often been stated that where the likelihood of the applicant absconding and thus defeating the interests of justice is ruled out, or has not been shown to exist, the question of prospects of success is a matter of value judgment and the lesser the chances of success on appeal, the greater the chances of absconding and *vice versa*.

It appears to me also that the question of whether there are prospects of success on appeal or not depends, *inter alia* on the following factors.

- (a) Whether there is room for a difference in opinion on the law, facts, evidence and circumstances of the particular case.
- (b) Whether or not for instance, the appeal suffers from “still birth” and thus devoid of any merit even on the face of it.
- (c) Whether the appeal is free from predictable failure and thus doomed to fail even on the face of it.
- (d) Whether the appeal is one that can be dismissed simply as frivolous and vexatious.

It is a well known tenet of our law also and I am cognizant of the fact that after conviction and sentence, the presumption of the applicant’s innocence no longer applies. *In casu* he faces long imprisonment and has tested prison life. See *State v Manyange* (supra).

Be that as it may, in my view and having considered the facts and evidence on record, it cannot be said that the applicant’s application suffers from a “still birth.” I hold that the applicant has an “arguable” case and there may be room for a difference in opinion on the law, facts, evidence and the circumstances of this case. The appeal cannot be said to be doomed to fail even on the face of it and certainly cannot be described as simply a vexatious and frivolous one. It is in the interests of justice in my view, that the applicant has his day in the appeal court.

Accordingly, I order as follows that;

1. The applicant is hereby admitted to bail pending appeal.
2. He deposits the sum of ZWL\$3 000-00 with the Assistant Registrar, High Court, Bulawayo.
3. He reports at Bulawayo Central Police Station twice a week on Mondays and Thursdays between 0600 and 1800 hours.

Kossam Ncube & Partners, applicant’s legal practitioners
National Prosecuting Authority, state’s legal practitioners