

SHELTON MUSADEMBA

versus

THE STATE

HIGH COURT OF ZIMBABWE

TSANGA J

HARARE, 22 & 28 January 2020

Bail pending trial

E Dera, for the applicant

F Chitanda, for the respondent

TSANGA J: This is an application for bail pending trial in a rape case. The complainant's mother is said to have sent her 10-year-old child to charge a phone at applicant's house and upon arrival the applicant is said to have raped her. The offence came to light when the complainant's mother noticed some greenish discharge when bathing complainant and the matter was then reported.

Applicant is a former policeman. The applicant denies committing the offence and says these are fabricated charges especially as the complainant made two contradictory statements as to who raped her.

Based on the principles to be taken into account in bail applications, he argues that there is no risk of abscondment as he does not have any travelling documents. He is also of fixed abode, owns a house at 8065 Rusike phase 3 Marondera, is a married man with two minor children and is self-employed. He also prepared to reside at a different address being number 62 Biddulph Road, Cranborne, Harare where his sister in law resides.

The state is opposed. The Investigation officer was called in to shed light on the two opposing statements and indeed explained that when the complainant first came to make a statement, she attributed the rape to a bearded man who had taken her to a bush about 100 m from her house and raped her. When she came the second time to the police station following further questioning by her mother and her neighbour, that is when she revealed that she had

in fact been raped by the applicant. The IO further clarified that in third statement the complainant had then revealed that the blame on someone else had come to her from the applicant whilst she herself had merely embellished the description of the assailant.

Against this backdrop, the state as respondent therefore argues that he has already tried to interfere with the witness by urging her to give a false description. It is argued that the offence being serious and likely to attract a lengthy prison term the risk of abscondment is high. The strength of the state case is said to be equally strong given the medical report confirming what the mother observed. Furthermore, the applicant is known to the complainant and there can be no mistaken identity.

The medical report confirms that rape was definite and records a much stretched hymen, vaginal thrush and vaginal thrush on both thighs. Penetration is also said to have been definite.

The issue is taking into consideration the key principles to be considered in granting bail, whether it should be granted to the applicant in this case. The core principles are:

1. Whether applicant will commit similar offences whilst released on bail
2. Whether the applicant will interfere with witnesses or investigations
3. whether or not the applicant will stand trial
4. Whether or not the release of applicant will jeopardise the proper administration of justice.

These grounds must always be understood contextually bearing in mind the different forms of crimes and the implications the nature of the crime may have on each of the above grounds. In rape cases for instance, where rape is generally perpetrated by persons known to the victim, interference with witnesses may be far more difficult to control than in other types of cases.

Granted in this case there is no indication that the accused has a history of committing such crimes but the court must still be concerned with the implicit violence underlying the crime of rape especially when committed against young children who are completely incapable of consenting. Any threats to the child or any utterances to a child designed to conceal disclosure of the offence need to be seriously taken into account in deciding whether bail should be granted.

As stated, the applicant is a former police officer. As such, the argument made that the complainant should have been free to disclose to a victim friendly female police officer when she first reported the crime, tends to misunderstand power dynamics. Whilst always keeping in mind that an applicant is innocent until proven guilty, nonetheless the dynamics need to be fully grasped. Here is a ten-year-old complainant who says she was violated by a person who is a former police man. In the same breath she is still expected to still repose trust in all police officers. This can never be let alone in the mind of ten-year-old child. Indeed, if a stranger had been involved it would boggle the mind why the child would not have reported immediately.

As regards the risk of absconding, the charge is indeed extremely grave and the sentence is likely to be very stiff. The strength of the state case is strong as the child was indeed raped.

Of primary consideration here is inference with witnesses. The primary consideration is whether he will interfere with the witness or persuade her not to testify against him as there are neighbours. In this instance the complainant was told not to report the rape. In her sworn affidavit, the Investigating officer's major concern is that as he is an ex police member who appreciates the gravity of the offence, the likelihood of attempting to influence the witness is high or to try and conceal or destroy evidence. This is said to be more so against the backdrop that has emerged that he tried to get her to falsify the perpetrator. Moreover, according to the IO, the complainant only opened up from the day the applicant was incarcerated. Indeed, the second statement implicating the applicant is noticeably more detailed regarding how exactly the rape occurred. This includes the detail that the applicant had laid out on the bed a blanket with a police emblem at the centre.

In this case the applicant has tried to allay fears of interference by offering to reside at an alternative address in Harare instead of Marondera. Whilst ordinarily this would suffice, I do not think that it would be proper to ignore that he is a former police officer and that even if he does not temper with the witness directly, there are other ways of tempering with the case even if he is not in Marondera. The evidence against him is strong. Moreover, the context of the two opposing statements has been explained. That context is worrisome. In balancing the two competing interests namely the liberty of the individual and the protection of the administration of justice, [See *Attorney General v Phiri* 1987 (2) 33 (H)] the balance in this

case leans in favour of protecting the administration of justice. It is in the interests of justice that the trial takes place to completion whilst he is in custody.

The application for bail pending trial is dismissed.

Mazani & Associates, applicant's legal practitioners
National Prosecuting Authority, State's legal practitioners