**MTHABISI MTHOMBENI**

**VERSUS**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 3 JULY 2012 AND 12 JULY 2012

*W. Nyabadza* for the applicant
*T Makoni* for the respondent

Bail pending appeal

**MAKONESE J:** Applicant was on 22nd May 2012 convicted and sentenced to 20 years imprisonment on two counts of contravening section 65 of the Criminal Law (Codification and reform) Act [Chapter 9:23], of which 2 years were suspended for 5 years on condition applicant does not within this period commit any offence of a sexual nature upon which on conviction applicant will be sentenced to imprisonment without the option of a fine.

The Applicant, a 38 year old male adult was arraigned before a Regional Magistrate at Bulawayo on allegations that on two separate occasions he had raped a 13 year old juvenile who was deaf and dumb sometime in 1999 and 2003. On the first count the rape was alleged to have occurred at the complainant's rural home in Ntabazinduna. The second count occurred in 2003 when the complainant was aged 17 years old and at Njube, in Bulawayo.

Applicant through his legal practitioner, Mr *Nyabadza* has argued that there are good prospects of success in his appeal against both conviction and sentence which he has noted in this court. He submitted that the Applicant is a good candidate for bail pending appeal and that there is no danger that he will abscond if he is admitted to bail pending appeal.

The Respondent, represented by Mr *Makoni*, has opposed the application for bail pending appeal on the grounds that the applicant does not hold any prospects of success in an appeal against conviction and sentence.

The Applicant who was not represented at the trial in the court *a quo* alleged in his defence that the allegations against him were a fabrication and that the allegations only surfaced between 7 to 11 years later in respect of both counts giving rise to the possibility of false incarnation. The Applicant states in his grounds of Appeal and in the Notice of Appeal that the memory of the complainant was not sufficiently tested in order to ascertain the reliability of her recollection of events which had taken place years before the trial. Applicant has also argued that the learned magistrate erred in failing to establish the credentials of the sign language interpreter in order to ascertain her objectivity in the matter in that she may have had an interest to ensure the conviction of the applicant. Applicant has also attacked the medical report, arguing that it was inconclusive.

It is now a well established principle of or law that the onus in establishing that an Applicant is entitled to bail pending appeal fails on the Applicant. The main factors to consider in an appeal against a refusal of bail brought by a convicted person are twofold: First, the likelihood of abscondment. See *Aitken and another v Attorney General* 1992(1) ZLR 249(S). Second, the prospects of success of an appeal in respect of both conviction and sentence. See *S v Williams* 1980 ZLR 466 at page 468, and *S v Mutasa* 1988 (2) ZLR (4) at page 8 and *S v Woods* s-60-93 (not reported).

The learned magistrate in the court *a quo*, in my view carefully assessed and found the complainant to be a credible witness. She found the defence proferred by the applicant to be almost a bare denial. The applicant's defence was that he knew nothing about the allegations and that the accusations of rape were a fabrication by complainant's parents who did not see eye to eye with him. He said that complainant's parents hated him because he owns a homestead and some movable property.

I have carefully perused the record of proceedings and it seems evident that the State was able to prove its case beyond reasonable doubt. The prospects of success against conviction do not really exist. In the event that the conviction is upheld the sentence imposed is well within the range of sentences imposed in rape cases. There is no likelihood of the sentence being substituted with a non-custodial sentence.

The Applicant stands convicted of a very serious offence and the inducement to abscond becomes apparent when one has regard to the lengthy prison sentence which has been imposed. I am not persuaded, therefore that there is no danger or risk that the Applicant will not abscond if admitted to bail pending appeal.

In the result, the application for bail pending appeal is hereby dismissed.

*Messrs Majoko and Majoko*, applicant's legal practitioners
*Criminal Division, Attorney General's Office*, respondent's legal practitioners