

**PESANAI MADZINGA**

**VERSUS**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 4 JULY 2012 AND 12 JULY 2012

*R Mahachi* for applicant  
*N. Ndlovu* for respondent

Bail pending appeal

**MAKONESE J:** The Applicant appeared before a Magistrate sitting at Western Commonage magistrates' court facing a charge of indecent assault. He pleaded not guilty but was nonetheless convicted and sentenced to a term of 24 months imprisonment of which 6 months were suspended for 5 years on the usual conditions.

The applicant has noted an appeal against sentence only and now appeals for bail pending his appeal.

On the 4<sup>th</sup> of July 2012, the application for bail pending appeal was argued before me and at the end of the hearing I dismissed the application and undertook to give my detailed reasons. These are they.

Section 67(2) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] provides that: for the purposes of determining the sentence to be imposed upon a person who has been convicted of indecent assault, regard should be had to the factors as set out in subsection (2) of section 65 of the said Act in addition to any other factors that will be relevant under the particular circumstances of each case. Some of the factors mentioned in section 65 (2) are:

- (i) the age of the victim
- (ii) the degree of violence used
- (iii) the extent of physical and psychological injury inflicted upon the victim

- (iv) the age of the accused.
- (v) whether or not a weapon was used in the commission of the offence and;
- (vi) the nature of the relationship between the victim and the accused, if any.

In *casu*, the accused was not known to the complainant. The agreed facts are that the accused bumped into the complainant on the day in question along a foot-path where he blocked the complainant's way, got hold of her, unzipped her trousers. Having done that the applicant pulled down the complainant's panties and started fondling her vagina. He only stopped when he realized that there were three women approaching the scene. The complainant was aged 12 years and the applicant was aged 36 years. He was old enough to be her father. The applicant's behaviour was morally reprehensible in that it shows a total disregard for the law and the rights of minor children and people of the female sex. The applicant is a family man and such conduct was not expected of him. He displayed a brazen and daring disregard for the complainant's right to privacy and dignity. The incident took place along a foot-path that was used by many residents of the area, before sunset, but the applicant just could not control his lust towards a young girl and took the opportunity to molest her. The applicant could have gone on to rape the complainant had he not been interrupted.

In the matter of *S v Zulu* 2003(1) ZLR at page 534, JUSTICE NDOU mentioned in passing that:

*"If the matter had been properly prosecuted and if it was proven that in addition to fondling the breasts, the appellant lifted her skirt and touched her legs. I would have no hesitation in imposing a custodial sentence."*

In the present case, the applicant did not touch complainant's legs but fondled her vagina after opening the zip of her trousers and lowering her trousers. This makes applicant's conduct disgusting.

In the case of *S v Ncube* HB 110/04 where a 38 year old man was sentenced to 15 months imprisonment, 3 of which were suspended for having seized a 3 year old girl and fondled her breasts then tried to drag her to a bedroom to have sexual intercourse with her, this court on review, held that the sentence imposed on the accused was lenient as his moral

blameworthiness was high and the court intimated that a sentence in the region of three to four years with part suspended would have been appropriate.

From the foregoing analysis I hold the view that the sentence imposed was appropriate under the circumstances and there was no misdirection on the part of the learned magistrate in the court *a quo*.

The applicant's legal practitioner, Mr *Mahachi* argued that the sentence of 24 months imprisonment fell within the community service grid and that the magistrate misdirected himself when he failed to consider community service before imposing a custodial sentence. I respectively disagree. The mere fact that the sentence imposed falls within the community service grid does not automatically qualify a convicted person to a non-custodial sentence. The court still has to consider the seriousness of the offence amongst many other factors provided for under the Act. In this case the imposition of community service against sexual predators such as applicant would trivialise the offence and lead to a miscarriage of justice.

In considering an application for bail pending appeal the main factors taken into account are:

- (a) the prospect of success on appeal , and
- (b) the interests of justice, i.e. will the admission of applicant to bail not jeopardize the interests through abscondment – see *S v Hudson* 1999(2) SACR 431; *S v Williams* 1980 ZLR 466; *S v Kilpin* 1978 RLR 282.

In the above cases the principle that has been established is that the principles governing the granting of bail after conviction were different to those governing the granting of bail before conviction. Once a person has been convicted the presumption of innocence falls away.

In *casu*, the applicant stands convicted of a serious offence. He has noted an appeal against sentence only. The prospects of success on appeal are almost non-existent. There are no reasonable prospects of an appeal court interfering with the sentence. The applicant must not be granted a bail pending appeal only to be re-arrested later to resume serving his

sentence. The risk of abscondment becomes real and pronounced where the prospects of success do not exist.

In balancing the interests of the applicant, and the administration of justice, the court must not jeopardize the smooth administration of justice by granting bail pending appeal where an appeal has no prospects of success.

For these reasons the application for bail pending appeal was refused.

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