

BRAVE JINGURA
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 23 DECEMBER 2014 AND 12 FEBRUARY 2015

Bail Application

Mr L. Ncube for the appellant
Mr W. Mabhaudhi for the state

MOYO J: The appellant was convicted of the offence of rape and was sentenced to 15 years imprisonment by the Regional court sitting at Gweru. Three years of the sentence was suspended on the usual conditions leaving the appellant with 12 years effective.

The appellant noted an appeal to this court upon dissatisfaction with both conviction and sentence. He also applied for bail pending appeal and the trial magistrate refused same.

The argument advanced on behalf of the appellant is that he has reasonable prospects of success on appeal and that the learned magistrate misdirected himself when he found that there were none. Looking at the notice of appeal only two grounds are advanced *ad conviction* and they are:

firstly that: the learned magistrate erred in failing to consider that the complainant may have been motivated to make a false report of rape by her desire to hide the incestuous relationship.

How the magistrate was supposed to arrive at this conclusion is not shown. Unless if the magistrate was to speculate. There's no basis for such a finding on the court record. For the reason that complainant was related to the accused does not mean that then they had consensual sexual intercourse.

The second ground is that the learned magistrate erred in disregarding the fact that the report of rape was instigated by the complainant's mother when the complainant had in fact intended to withdraw the complaint of rape against the appellant but was induced not to do so by the mother.

There is nowhere in the record where, this contention is supported. Firstly, the complainant reported the rape to her aunt the following day, and the mother who lives in the rural areas, and had no money for transport, then came months later. The mother was advised of the complaint by the aunt when she arrived from the rural areas. There is nowhere in the court record where any "instigation", by the complainant's mother is shown. There is also nowhere in the court record where the complainant's mother induced the complainant not to withdraw charges. Both grounds of appeal and conviction are totally unfounded as they are not based on the facts before the court.

It is for this reason that this court finds that there are no reasonable prospects of success on appeal against conviction in this matter as clearly what is alleged on the notice of appeal is not supported by the contents of the court record. The principles to be considered in such matters have been amply dealt with in the case of *S v S Tengende and others* 1981 ZLR 445.

As for an effective sentence of 12 years for rape, it is in line with other decided cases so there aren't prospects of success against sentence either. The interests of justice cannot be served by the release of the accused on bail pending appeal as the risk of abscondment is very high in such a case. The offence of rape is a serious offence and it attracts a lengthy prison term as the one that accused was sentenced to. The court in such cases must balance the interests of justice with the accused's liberty. The accused has already been convicted and therefore the presumption of innocence no longer applies in his favour. Neither does the principle that courts should lean towards liberty except if there are compelling reasons to decide otherwise.

Bail pending appeal being a discretionary decision, I have not found any basis upon which I should exercise my discretion in appellant's favour.

In my view the appellant has failed to show that the interests of justice will not be endangered if he is allowed bail pending appeal.

Judgment No. HB 20/15
Case No: HCB 176/14
Xref HCA 220/14 & Reg 111/14

The appeal against the refusal of bail pending appeal by the trial magistrate is accordingly dismissed.

Jumo, Mashoko and partners, applicant's legal practitioners
National prosecuting Authority, respondent's legal practitioners