JOHNSON MURIMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE 7 July 2003 and 14 January 2004

Bail Application

Mr *G.C. Chikumbirike,* for the applicant
Ms *V. Shava,* for the respondent

HUNGWE J: This application for bail pending an appeal against both conviction and sentence was placed before me a day before the date of hearing. On the hearing day, a record of proceedings in the Magistrate's Court was placed before me. Notwithstanding the lack compliance with the rules I granted the indulgence for the matter to be heard.

The accused was charged with rape and had pleaded not guilty. After a trial he was convicted. He was sentenced on 21 May 2003 to undergo 7 years imprisonment 2 of which were suspended on condition of good behaviour. He seeks to be admitted to bail in terms of section 123(1)(b)(iii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Section 123 of the Act makes provision for the power to admit to bail pending appeal or review. Generally where a person is convicted or sentenced in the High Court, an application for bail pending appeal or leave to appeal, or pending an application for an extension of time within which to note an appeal, must be determined by a Judge of the Supreme Court or of the High Court (section 123(1)(a)).

Where the accused has been convicted and sentenced by the Magistrate's Court, an application for bail pending automatic review or appeal or leave to appeal or pending an application for the extension of time within which to note an appeal may be determined by a Judge of the Supreme Court

or of the High Court or by a magistrate (section 123(1)(b)). It follows therefore that where as is the case here, the Magistrate's Court has not refused bail an accused could approach that Court, or this Court or even the Supreme Court for bail pending review, appeal or an application for the extension of the time within which to note an appeal or leave to appeal. It certainly does not preclude the hearing of such an application in the Magistrate Court. Indeed it is standard practice for applicants in the position of the present applicant to first seek a determination of the question of bail before the same magistrate who has presided over the trial in which applicant was convicted. He has been seized with the facts before. It may seem obvious that on the basis that he convicted the applicant, he is less likely to grant an application for bail pending an appeal against his judgment. That may be so in that he may in a way be asked to review his judgment or concede any errors he may have made. It is precisely for these reasons that where a trial court refuses to grant bail pending appeal, its reason for such refusal tend to narrow down the issues for determination when a higher court reconsiders the question.

The applicant has not exercised this option. The reasons advanced for this are clearly a result of an erroneous interpretation of the provisions of section 123(1)(b)(iii). This however in my view does not non-suit the applicant.

Applicant contends in his application that there are reasonable prospects for success on appeal.

Counsel for the applicant correctly observed in his argument that the conviction of the appellant was based on the evidence of the complainant identifying the applicant as the rapist.

As HOLMES JA states in *S v Mtetwa* 1972 (3) SA 766 at 768A-C:

> "Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of

> his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, built, gait and dress; the result of identification parades, if any, and of course, the evidence by or on behalf of the accused. This list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighted one against the other, in the light of the totality of the evidence, and the probabilities."

See such cases as *R v Masemang* 1950 (2) SA 448 (AD), *R v Dladla & Other* 1962 (1) SA 307 (AD) at p 210C and *S v Mehlape* 1963 (2) SA 29 (AD).

The trial magistrate was aware that she was dealing with evidence of identification. That evidence among other factors point to the fact that the rape occurred in the morning in broad daylight. Complainant had talked to her assailant prior to the rape. They had agreed to proceed to a plot to conclude the sale of her wares. She was raped on their way there. She had given a description to a third party on the day and assured police that same day that although she did not know her assailant by name, she was sure she could positively identify him by sight.

Indeed when she saw her appellant the next day on her way to the doctor in the company of her sister, she pointed him out. She had only pointed him out. The pointing out evoked a curious reaction from the applicant. He took to his heels. Why? he tried to scale prefabricated walls without success. That tends to corroborate her story. These are factors which the trial magistrate correctly considered sufficiently corroborative of the other evidence placed before her.

In view of this it cannot be said that by convicting the applicant, she misdirected herself.

In order to move the Court to grant him bail, different principles apply as the presumption of innocence no longer exists.

In the absence of positive grounds for granting bail, the proper approach to bail is that it should be refused especially when the accused's guilty is not in issue and a substantial prison term is the usual sentence for the

offence. See *S v Kilpin* 1978 RLR 282 (A) and *S v Tengende & Others* 1981 ZLR 445 (S).

The onus is on the applicant to show that he should be admitted to bail (*S v Williams* 1980 ZLR 466 at 468). The difficulty of discharging that onus will depend on two main factors namely the likelihood of abscondment and the prospects of success on appeal. The greater the likelihood that the accused will abscond, the brighter must be the prospects of success before bail could be granted.

Other factors to be considered will be the right of the individual to liberty and the likely delay before an appeal can be heard (*S v Tengende (supra), S v Benatar* 1988 (2) ZLR 205 (H), *S v Nyathi Juta* SC 1/1994).

Applying the above principles, I am unable to say that applicant's prospects of success are as bright as he has painted them to be. He knows that he will have to serve 5 years in gaol. That is a fairly lengthy sentence. It is sufficient motivation for him to abscond. There was no reference to the stage of preparation of the intended notice of appeal. This application was argued on the basis that the applicant intends to appeal against both conviction and sentence. Clearly the period within which appellant was to have filed that notice has expired. For the purpose of this application, I am satisfied that there is no prospect of success on appeal

In the premises the application is dismissed.

Chikumbirike & Associates, applicant's legal practitioners.
Attorney-General's Office, respondent's legal practitioners.