

JUDAH MAGONDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 19 October 2011

Bail Pending Appeal Ruling

J. Koto, the applicant
T. Mapfuwa, the State

MWAYERA J: The application before the court is for bail pending appeal. This application follows the conviction and sentence of the applicant by the Magistrate Court Bindura. The applicant was convicted of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. He was sentenced to 10 years imprisonment of which 4 years imprisonment was suspended for 5 years on usual conditions of good behaviour. The State opposed the application.

The position in handling applications of this nature is fairly settled. The court has to consider the following factors:-

1. The likelihood of abscondment.
2. The prospects of success on appeal,
3. The potential length of delay before the appeal is heard
4. The right of an individual to liberty.

A perusal of the record of proceedings in the court *a quo* clearly shows that the complainant narrated a coherent story of how she met with the accused on 2 June 2010. She was well known to the accused a neighbour who stopped her under the pretext of desire to send her with a message to his wife. She recounted how the armed guard, accused now appellant then dragged her to a place underneath a “Musawu” tree where he ravished her while she was crying and he muffled her mouth using a jacket. From the reading of the record of proceedings and the judgment of the Trial Magistrate the Trial Magistrate properly assessed and analysed the evidence carefully ruling out the possibilities of false incrimination. The complainant’s narration to her employer a person to whom she was expected to report and her narration to the court was coherent and worth believing. There is no possibility of mistaken identity because she was well known to the applicant. The fact that

the complainant was with grass on her head and clothes is consistent with none consensual sexual intercourse. If she had consented she surely ought to have concealed such evidence for there would have been no reason for her to let everyone even the employer know that she had had consensual sexual intercourse with her lover a married man. The applicant's narration and report to the second state witness and her employer and to the police shows consistence in her status.

The report was timeously made and there was no cohesion. It was reported on the same day it occurred to the employer and accused's wife and on the 4th to police. There is nothing weird about the delay considering complainant status a maid being dissuaded from reporting to the police by accused's wife. There are no discrepancies in her testimony warranting the trial court to disbelieve her. The accused's defence on the other hand was just a bare denial, even defence witness called to testify did not assist the accused. This is just but a few examples to show that there are no prospects of success on appeal. In fact a close look at the totality of the record of proceeding in the trial court reveals that the appeal is manifestly doomed to fail. The complainant's evidence was strictly not challenged. The fact that the accused was remanded in custody at the close of state case cannot be viewed as a prospect of success on appeal because the remand in custody is not an illegal or sign of haste dealing with the matter, for it is common knowledge that an accused can have bail granted or have bail revoked at any stage in criminal proceedings depending on whether his being on bail is in the interest of administration of justice. The conviction of the applicant in the court *a quo* is well founded thus negating prospects of success on appeal. The sentence imposed on the accused for rape of the complainant is appropriate and there is no basis to say the trial court improperly exercised its sentencing discretion. It again follows therefore that there are no prospects of success on appeal against the sentence imposed. This brings one to the second point to be considered in applications of this nature the likelihood of abscondment of the applicant.

Having said the applicant was properly convicted of rape and properly sentenced to imprisonment and that there are no prospects of success on appeal the prospects that are there are that of the accused facing an imprisonment term. The prospects of facing imprisonment term can tempt or act as an inducement for the applicant to abscond. Generally appeals take long to be heard but that factor own its on cannot negate the fear of frustrating the ends of justice by abscondment of the applicant moreso when one considers the real and inevitable prison terms be faced.

Accordingly having made a finding that there are no prospects of success on appeal against both conviction and sentence and that the likelihood of accused absconding is high it is not in the interest of justice that the applicant be admitted to bail. The application for bail pending appeal is accordingly dismissed.

A. *Masamha*, respondent's Counsel