

TAURAI MANYOWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 1 December & 6 March 2014

Bail Pending Appeal

Applicant In person
E. Makoto, for the State

TSANGA J: This application was for bail pending appeal. I dismissed the application and herein I give my full reasons for so doing. The Applicant was convicted on 12 June 2012 of 4 counts of unlawful entry into premises in aggravating circumstances as defined in s 131(2) of the Criminal Law (Codification Reform Act) [*Cap 9: 23*]. In addition, he was also convicted of one count of rape as defined in s 65 of this same Act.

For the above offences, he received a total sentence of 29 years and 3 months in prison. Of this, 25 months was suspended on condition that he pays restitution to the complainants. A further 6 months was also suspended on the usual conditions. Therefore the effective term in prison which was granted by the trial magistrate amounts to 26 years and 7 months. To put this effective sentence into perspective, 6 years and 7 months of this relates to the four counts of unlawful entry for which he was found guilty. The remaining 20 years arose from the rape conviction. He has appealed against both conviction and sentence on all counts. He sought bail pending appeal having been granted condonation of late filing of his notice of appeal.

The brief facts upon which he was found guilty were that the applicant, together with two other accused persons, one of whom is yet to be apprehended, committed a series of unlawful entries in the form of house break ins. In one of the counts where they broke into a complainant's house, the gang had stolen the complainant's pellet gun and all three accused

had gang raped under very aggravating circumstances. The applicant in particular had been repeatedly violent towards the complainant during the rape and afterwards.

Two members of the gang, one of them the applicant, were apprehended as a result of a tip off in which one of the persons to whom they had sold the stolen property, identified the applicant as the source of the property. The State facts reveal that the applicant had subsequently led the police to the various places where they had committed the crime.

In his bail application, the applicant argued that the likelihood of him absconding if granted bail is nil as he has no passport. He also argued that stringent conditions could be attached to his bail to prevent him from fleeing if this was a concern. In looking at this factor I took into account that the record reveals that one of the three co-accused in the matter remains at large. I also took into account that given the sentence meted out against the applicant, the likelihood of him fleeing is certainly not such a remote possibility as he tried to depict. Whilst he denies committing any of the offences, some of the complainants, including the rape complainant confirmed recognising him at the scene. My view was that he is likely to abscond if he is granted bail.

On prospects of success, he argued in his application that his chances are high. He challenges the informant's evidence that led to his arrest. He avers that the informant to whom he sold some of the property leading to his identification may even be the one who committed the offence. He also challenges the identification parade and says the police arrested the wrong people. He asserts that the witnesses and the police were all not credible and that he was assaulted by the police. In refusing to grant him bail, I shared the State's view that in light of the overwhelming evidence that led to his arrest as captured in the record, his are merely assertions with insufficient evidence to rebut the State's findings. There was no justification to granting bail pending appeal.

He also argued in his application that the sentence induces a sense of shock. Despite his denial vis a vis committing any of the offences, the applicant nonetheless asserts that the offences were committed in an amateurish way and that the sentence should not have exceeded 24 months. It is hard to see how he can describe them as such if he was not involved. In any case his averment shows a lack of appreciation of the seriousness of his offence. His view is that the counts on unlawful entry should have been treated as one for purposes of sentence. The portion of the sentence for the counts of unlawful entry under

aggravated circumstances, which amounts of 6 years and 7 months does not in my view induce any sense of shock. The fact that the value of the stolen property was in his view minimal is neither here nor there.

The bulk of the sentence is from the aggravated gang rape charge. The Magistrate took into account the violence used, the fact that the three accused risked exposing the complainant to HIV/AIDS and the risk that they pose to society. The applicant's view with reference to this charge is that his prospects of success are high because he should never have been convicted in the evidence of the medical report which was submitted. He argued that the complainant bore no visible signs of rape. The medical report though, did not rule out rape. More particularly he argued that a woman with a child as in her case, could not have had tears on her hymen that had healed as described in the medical report. His view is that the State needed to bring in evidence to show how it was possible for vagina tears to be healed within hours of rape. In essence he maintains that the complainant should still have exhibited rape signs at the time that she was medically examined. The record however is clear in that whilst the rape and unlawful entry under aggravated circumstances in relation to this count were reported within hours to the police, the medical report appears to have come later.

In denying him bail pending appeal, I did not see any prospects of success on account of his argument pertaining to the details of the medical report. This is because the relevant provision under which he was convicted of defines rape as follows:

65 (1) If a male person knowingly has sexual intercourse or anal intercourse with a female person and, at the time of the intercourse

- a) The female person ***has not consented*** to it: and
- b) He knows that ***she has not consented*** to it or realises that there is a real risk or possibility that she may not have consented to it;

He shall be guilty of rape and liable to imprisonment for life or a shorter period.
(*My emphasis*)

The legal test is not what kind of wounds and signs did a woman exhibit but whether the accused had sex with her without her consent. The record is clear that a report of unlawful intercourse was made on the very night of the offence. The trial upon which he was convicted was not about the complainant's body in terms of how slowly or quickly her bodily parts

manifested signs of physical healing. Perspective should not be lost in that he was tried and convicted of a crime whose essential elements are forcing her to have sex against her will. I cannot see how he sees prospects of success on account of his argument which merely boils down to condemning the complainant for not conforming to his own stereotypical view that a rape is only such if injuries are present to the genitalia. His own belief is that a rape victim can only be such if her private parts show signs of brutality. His assault of the complainant while raping her, and his insistence in this application that the medical report did not reveal “violent” signs of rape in fact point to a very disturbing pattern on his part of associating sex with violence. In refusing him bail my reasoning was that he would be a very dangerous person to let loose on society pending his appeal as he believes that he can get away with it. This is a complete misunderstanding of the offence of rape. He clearly did not have her consent. The complainant moreover was able to identify him.

It was my view that the 20 year sentence is unlikely to be reduced as the magistrate correctly took into account the relevant aggravating circumstances.

Section 65(2) provides as follows:

For the purpose of determining the sentence to be imposed upon a person convicted of rape, a court shall have regard to the following factors in addition to any other relevant factors and circumstances:

- a).....
- b)the degree of force or violence used in the rape
- c)the extent of physical and psychological injury inflicted upon the person raped
- d) the number of persons who took part in the rape
- e)whether or not any weapon was used in the commission of the rape
- f).....

In my view these aggravating circumstances were all present in the rape and as such it is unlikely that the court hearing the appeal will consider the sentence as unduly harsh.

Since my opinion is that the sentence is unlikely to be reduced, Applicant’s argument that it will be at least five years before his appeal is heard makes no difference. Even if the sentence is reduced he will still most likely receive a lengthy custodial sentence.

It is for all the above reasons that I refused to grant his application for bail pending his appeal.

Attorney General's Office, for the State