PEDZISAI MUSUMHIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 5 August 2014

**Bail pending appeal**

*R Murambatsvina,* for applicant
*I Muchini,* for the defendant

TSANGA J: This is an application for bail pending appeal in a matter where applicant was convicted of Rape under s 65 of the Criminal Law [Codification and Reform] Act [*Cap 9:23*]. He was sentenced to 15 years imprisonment of which 4 years were suspended on the usual conditions of good behaviour, leaving an effective sentence of 11 years imprisonment. He has appealed against both conviction and sentence and hereby applies for bail pending determination of the appeal.

Factually, the 47 year old applicant is said to have raped a 16 year old complainant after she had come to fetch water at a water point located on his homestead. She was a form three school pupil and known to him in family circles, the two being supposedly related. He was found guilty of having perpetrated a single count of rape using threats to kill her. A witness, one Efa Chigwedere, had stumbled upon them in the act and report having seen the applicant making coital movements. Applicant maintained in his evidence that he did not rape her but had merely embraced her and that she was in fact his girlfriend.

In summary, the grounds on which the appeal has been lodged are that the investigation officer did not attend the scene of the crime; that the medical affidavit contains information that the wounds were still fresh when it was carried out two weeks after the event; and that the rape report itself was only made after rumours had circulated that the accused and complainant were seen embracing each other. Another ground is that applicant and complainant are not closely related as was indicated in sentencing him. As regards sentence it is contended that it is too harsh, manifestly excessive and induces a sense of shock. This is taking into consideration that the applicant is a first offender.

Acknowledging that upon conviction the presumption of innocence no longer prevails, Applicant has laid out the main principles applicable in cases of bail pending appeal. These include the likelihood of absconding in light of the sentence imposed; the prospects of success of the appeal; the right of applicant to individual liberty; and the likely delay before the appeal is heard.

In its response the state‘s view is that the intended appeal is reasonably arguable and that doubt exists that the sexual intercourse may have been consensual. According to the State this is in light of the victim’s failure to take the opportunity to scream and explain that a rape was in progress to the witness Efa Chigwedere who stumbled upon them. Also highlighted is complainant’s failure to make a report soon after the rape to any person whom she may have reasonably been expected to make a complaint. (*R v C* 1955 (4) SA 40; *S v Makanyanga* 1996 (2) ZLR 231 & *S v Banana* 200 (1) ZLR 607 (SC) were referred to). It is also the state’s view that the report of the complainant may not have been properly admitted. Like the applicant it also critiques the medical report which did not clarify whether the injuries were consistent with a sexual assault which it says was 31/2 weeks old. The state’s view is also that the bail conditions are sufficient to allay fears of abscondment.

In assessing prospects of success in bail applications pending appeal in cases involving rape, it is necessary that such cases are looked at not just from the perspective of the bail applicant who has been convicted of rape but also from the lenses of the complainant who has experienced the rape. This is even more so in cases were the alleged rape has taken place between parties who are known to each other as it is precisely in such cases that the administration of justice can be hampered. In such situations, applicants more often than not when convicted, seek to take advantage of the fact that the two were known to each other, the conduct of their victims may generally fall short of the standard that society has so relentlessly crafted in terms of the expected behaviour of its ideal rape victim. She must scream - very loudly. She must show evidence of physical resistance. She must be battered and bruised if she is a genuine victim. If she knows her assailant she instantly loses credibility and the understanding is that she was not raped. It is the duty of the court to assess an application for bail pending appeal in rape cases unfettered by such dangerous myths which can clearly threaten the quest for substantive justice.

Research done in Zimbabwe through WLSA on cultural inhibitors to reporting gender based violence and sexual assault indicates that silence cannot be equated with acquiescence. Fear of lack of support from the family, fear of the consequences that might befall the complainant, which may range from being totally blamed for the event, being thrown out of the home to being forced to marry the rapist are some of what keeps many women from not reporting. (See Alice Armstrong, ***Culture and Choice: Lessons from Survivors of Gender Violence in Zimbabwe*** WLSA; Harare 1998 pp126-128**).**

Having carefully examined the applicant's grounds of appeal in light of the facts, and the state response in light of applicable principles to be taken into account, I am of a different view regarding the prospects of success of this appeal. At the core of the definition of rape, in terms of s 65, is sexual or anal intercourse by a male persona with a female person who has not consented to it. The applicant's first ground of appeal is that the investigation officer did not attend the crime scene. The evidence of the investigation officer is of course useful in any criminal investigation. However this does not appear to be a case where the case turned in any way on the attendance by the investigation officer to the place where the rape took place. Also the investigation officer stated that the applicant was not at home when he visited. The fact that he says he did not see the toilet appears is neither here nor there looking at the definition of rape and the factors that led to the conviction of the applicant.

The second ground on which the appeal has been filed touches on the medical report done on 12 May. The rape took place on 28 April so the report was done some 16 days after the commission of the offence. It was not three and half weeks later as alleged by the state in its response. The applicant's contention is that the report contains information that the wounds were still fresh. The reason why I see little prospects of success on this ground is that the report does not at all describe the wounds as fresh but refers to "bruising (healing) with redness." To reject findings on bruising on the grounds of elapsed time appears to suggest that rape victims must adhere to an assumed stereotype regarding the nature and healing of their wounds. Failure to fit a stereotype is unlikely to be a basis for tampering with the findings of the court below when the evidence itself does not appear to point to a consensual sexual act.

The third ground which the appeal has been lodged is that the report was not instaneous and that the report and allegations were only made to run away from reprimand. Again I see little prospects of success on appeal of the facts if this case are examined objectively, shorn of myths that surround the kind of behaviour that constitutes the "good

rape case" or what the "ideal rape victim" would have done under the circumstances. The evidence on record also appears to suggest that threats and use of force were used to engage in the sexual act. It is thereof certainly not outside the realm of possibility that a sixteen year old threatened with force would be overcome with fear and that her inaction would be largely due to this. This is a case that pits a 47 year old man against a 16 year old school girl. Her failure to scream when she saw the said witness, Efa Chigwedere, needs to be viewed in this context. With women often held culturally as custodians of what is deemed to be appropriate sexual conduct, and with the responsibility for sexual restraint being placed on a woman's shoulder, regardless of her age or power imbalances, it is understandable that the complainant failed to report to Efa Chigwedere even when she was now free of the sexual assault. The requirements to be met by a rape complainant as set out in *S v Nyirenda* HB-86-2003 should therefore not be divorced from the cultural context that might contribute heavily to swift action not being pursued. A young girl who has been raped may not make a voluntary report because her cultural context makes it difficult for her to do so without being re-victimised. She may fail to report without delay as expected by the law because in her lived reality she has no idea if she will receive support or condemnation, if not eternal damnation. She may not report to the first person she could reasonably be expected to report for fear of being reduced to a liar and a tease. It is these realities that must therefore with equal measure, inform the scrutiny of the likely prospects of an appeal in a rape case.

The fourth ground of appeal is that complainant and applicant were not closely related and that the relations were not clearly explained. The record reveals that the reasons for sentence are captured as the seriousness of the offence; the age difference of 31 years between the accused and the close relationship between the two. It was therefore not just that they were said to be closely related. It was therefore a combination of factors that influenced sentence. However the sentence for a single count does seem to be on the high side and may indeed attract a reduction on appeal. Nonetheless this appears to be a case where applicant will serve a custodial sentence which is unlikely to be affected by any delay in hearing the appeal.

In light of all of the above, the application for bail pending appeal is hereby dismissed.

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