

TINOS TAURO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATANDA-MOYOJ
HARARE, 16 April 2015

Application for Bail pending Appeal

Ms R Bwanali, for the applicant
Ms S Fero, for the respondent

MATANDA-MOYO-J: This is an application for bail pending appeal. The applicant was charged and convicted of contravening s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] that is to say Rape. He was sentenced to 16 years imprisonment of which 6 years imprisonment was suspended for 5 years on condition that during that period, the accused person would not commit any offence of a sexual nature for which he would be convicted and sentenced to a term of imprisonment without the option of a fine.

The applicant noted an appeal with this court on the following grounds;

“A – Ad conviction

- 1) That the court grossly misdirected itself and unjustly convicted applicant especially by failing to appreciate the following;
 - (i) There were glaring inconsistencies in the evidence of the State relating to the manner, date, time and place of the rape.
 - (ii) The court accepted that the evidence of the complainant was not credible in material respects.
 - (iii) Complainant indicted that the report was coerced out of her by her father and not made of her own violation.
 - (iv) A protracted period elapsed before the matter was reported.
 - (v) It was wholly unreasonable for the court to disbelieve the possibility that appellants presence at his homestead on the date of the crime, exonerated him from the performance of the impugned conduct.
 - (vi) The State failed to fulfill the burden on it by law of proving applicants guilt beyond any reasonable doubt.

B. Ad Sentence

1. The nature of the sentence imposed is so excessive as to induce a sense of shock.
2. The court erred in failing to take the provisions of section 65 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in assessing sentence.
3. Mitigating factors were not taken into account in imposing sentence thereby the court grossly misdirected itself.
4. The court further grossly misdirected itself by not stating the extent to which mitigating factors served to reduce sentence imposed as is required by law.
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Pending the determination of the appeal the applicant applied for bail. In such applications the applicant must show that it is in the interest of justice that he be admitted to bail. He must show that there are reasonable prospects of success on appeal and that there is no risk of him absconding. See *Keith Chinowawa Manyange v The State* HH 1-2003, *S v Williams* 1980 ZLR 446 AD, *Ncube v S* (2014) ZAECPEHC 34, *S v Mabena* 1999 (4) SA 623 (CC).

The state opposed the granting of bail pending appeal on the grounds that the applicant was properly convicted and that applicant enjoys no prospects of success on appeal. Applicant's conviction was based on witness' credibility which remains the domain of the trial court. Because applicant has no prospects of success on appeal, the greater the risk of him absconding. Coupled with the above the state submitted that the Appeal Court now sits 4 days in a week and there are no longer any delays in the hearing of appeals.

I have perused the record of proceedings and I am of the view that applicant's prospects of success on conviction are not good. The requirements for the offence of rape seemed to have been satisfied. The magistrate even found in favour of the applicant that the sexual intercourse was consensual. The girl was 11 and from the evidence applicant knew the girl was 11 years old. There are therefore no chances that an appeal court would interfere with the conviction.

I agree with counsel's respondent that there is a possibility that the sentence might be interfered with. However, I am of the view that a custodial sentence would still be imposed. There is no danger that the appeal might be heard after applicant has completed serving the prison term which is likely to be imposed on appeal. Applicant would not be prejudiced by prosecuting his appeal whilst serving. I have also taken note that the Appeal Court now sits four days per week and should applicant be really interested in prosecuting his appeal, he could do so in a short space of time. Because applicant has tested the rigours of

imprisonment, he is most likely to abscond if granted bail. The interests of justice do not favour the granting of bail to the applicant.

Accordingly the application for bail fail and is hereby dismissed.

Kwiriwiri Law Chambers, applicant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners