PHEPHISANI MHLABA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 21 & 23 July 2015

Bail application

A. Mazvaba for the applicant
E. Makoto for the respondent

ZHOU J: This is an application for bail pending appeal. The applicant was convicted by the Magistrates Court at Chivhu of indecent assault as defined in s 66 and rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] on 8 January 2015. Both counts were taken as one for the purpose of the sentence. He was sentenced to 15 years imprisonment of which 4 years was suspended on the usual condition that he shall not within a period of 5 years be convicted of any offence of a sexual nature for which upon conviction he is sentenced to a term of imprisonment without the option of a fine. The applicant appealed to this court against both the conviction and sentence. He now seeks release on bail pending the determination of that appeal.

The brief background to the matter is as follows. The complainant is a girl aged 15 years. The applicant is brother in law to the complainant, in that he is married to the complainant's sister. The applicant and his wife stayed with the complainant at Manjonjo Village, Chief Nyoka, Chivhu where the applicant was employed. On 16 September 2014 the complainant and the applicant were the only persons at the homestead, as the applicant's wife was away in Zhombe. The offences which the applicant was convicted of are alleged to have been perpetrated on the night of that day.

The considerations where bail is being sought after conviction and sentence are different from when bail is being sought pending trial. In *S* v *Tengende* 1981 ZLR 445(S) at 448, BARON JA said:

> "But bail pending appeal involves a new and important factor: the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused."

See also *S* v *Labuschagne* 2003 (1) ZLR 644(S) at 649A-B.

In the case of *S* v *Dzvairo* 2006 (1) ZLR 45(H) at 60E-61A PATEL J (as he then was) stated the principles in the following terms:

> "Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice, and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospect of success on appeal is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail."
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> See *S* v *Dzawo* 1998 (1) ZLR 536(S) at 539E-F.

The applicant's grounds of appeal are very general and lack precision and concision. It is not clear from those grounds what aspects of the learned magistrate's conclusions and reasoning are being attacked. In the submissions made in support of this application by his counsel the applicant's contention was that his appeal has prospects of success because the medical doctor found no visible evidence of penetration as the hymen was intact, and did not observe any injuries, tears, swellings and or lacerations around the complainant's private parts. But the perforation of the hymen is not a requirement for penetration in a rape case; nor is the presence of injuries around the complainant's private parts. The position of the law as to what constitutes penetration is settled. The case of *S* v *Sabawu* 1999 (2) ZLR 314(H) at 316G-H, CHATIKOBO J stated the law as follows:

> "It is a trite proposition that for the purposes of the crime of rape, penetration is effected if the male organ is in the slightest degree within the female body. It is not necessary to prove that the hymen was ruptured. If authority were required for this settled position I would refer to *S vMhlanga* 1987 (1) ZLR 70(S) at 72F and *S* v *Torongo* S-206-96."

In the case of *S* v *Mhlanga* 1987 (1) ZLR 70(S) at 72E-G, DUMBUTSHENA CJ, cited the above principle as submitted by eminent jurists in the following terms:

> "For the purposes of establishing the offence of rape it suffices for the penetration to be slight. In Smith & Hogan *Criminal Law* 5 ed p 407 the learned authors say:
> 'The slightest penetration will suffice and it is not necessary to prove that the hymen was ruptured.'
> In *South African Criminal Law* Vol 11 2 ed Hunt says at 440:
> 'There must be penetration, but it suffices if the male organ is in the slightest degree within the female body. It is not necessary in the case of a virgin that the hymen should be ruptured . . .'
> See *S* v *K en ' n Ander* 1972 (2) SA 898 at 900C"

The complainant gave evidence that the applicant's organ was thrust inside hers. She never suggested that there were any visible injuries on her body caused by the sexual assault. She only mentioned a drop of blood which would obviously not be there at the time that she was examined because she washed her body before she went to school. The applicant himself knew that he had not destroyed the hymen, which is the reason why he said, according to the complainant, "I have not deflowered you at all". But the Magistrate found as a fact that the applicant did insert his male organ into the complainant's organ. Once the issue of the hymen being intact is discounted nothing remains of the applicant's case on the merits. The graphic description of the assault by the complainant cannot be explained away in the manner suggested by the applicant that it was a scheme by the complainant and his wife to punish him for having an affair with some other woman. The complainant reported the rape almost immediately after she left the applicant's home to her friend who in turn referred her to her teacher. The offence involved is a very serious one. The sentence imposed upon the applicant though on the lenient side is considerable, and would in all likelihood induce him to abscond. The proper administration of justice would be negated if the applicant was to be admitted to be released at this stage.

Given the above circumstances, this court is of the view that the applicant should not be admitted to bail pending appeal.

In the result, the application for bail pending appeal is dismissed.

Musoni Masasire Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners