

TAURAI CHIKWIZU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16 May, 2017 & 26 May, 2017

Bail Pending Appeal

T Chivale for the applicant
E Mavuto for the respondent

CHITAPI J – This is an application for bail pending appeal. The applicant was convicted by the Regional Magistrate at Harare of the offence of rape as defined in s 65 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:33*]. The allegations against the applicant which he denied were briefly that the applicant and the complainant (aged 17 years old) were neighbours residing at Zimbabwe National Army 2 Brigade Flats in Cranborne. The applicant during the night of 27 February, 2017 knocked on the door to the complainant’s residence but on seeing him, she shut the door. The applicant forcibly opened the door and the two then sat on sofas next to each other. The applicant demanded a hug from the complainant who refused to oblige. The applicant then forcibly pushed the complainant to the floor and had forced sexual intercourse with the complainant, whereafter he threatened to shot the complainant if she reported the sexual assault to anyone. He was sentenced to 16 years imprisonment with four years suspended on condition of good behaviour on 24 March, 2017. The applicant was legally represented at his trial. Being dissatisfied with the conviction and sentence imposed on him, the applicant noted an appeal to this court on 5 April, 2017. The appeal reference is case no. CA 220/17. The appeal is yet to be set down for hearing and is therefore pending determination.

The applicant seeks to impugn his conviction on the basis of three grounds of appeal set out in the notice of appeal. The grounds of appeal against conviction are couched as follows:

“ 1. The Learned Magistrate grossly erred and misdirected himself by convicting the

- appellant when the evidence on record shows that the charges were not freely and voluntarily laid against the appellant.
2. The Learned Magistrate fell into error and misdirected himself when he convicted the appellant of rape when there was no evidence of penetration.
 3. The court a quo fell into error when it convicted the appellant on basis of speculative and circumstantial evidence when the evidence showed that the accused's defence remained probable."

As against sentence, the applicant set out two grounds of appeal which read as follows:

4. The sentencing court a quo misdirected itself by imposing the sentence of effective imprisonment when there was no evidence to support the conviction.
5. The court a quo misdirected itself by relying on non-existent aggravating features resulting in the imposition of lengthy imprisonment term."

On 28 April, 2017 the applicant filed this application seeking that he be admitted to bail pending the determination of his appeal. Such application is made in terms of s 123 (b) (ii) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. I note in passing that it is good practice for counsel where he or she files an application based on a statutory provision to cite the relevant provision relied upon. The importance of citing the provision lies in that the court is alerted to the applicable law and its jurisdiction and powers relative to the provision cited. It should not be left to the court to surmise on its jurisdiction before invoking it.

The respondent opposes the application. The basis for the opposition in the main is that there are no prospects of success against both conviction and sentence. As against conviction it was submitted by counsel for the State in his written response which he did not add on to at the hearing that as the case had been decided on the basis of credibility of witnesses, such findings as were made by the trial magistrate were unlikely to be disturbed on appeal. Counsel also submitted that the complainant had given a clear and straightforward narration of how she was raped, that there was no question of mistaken identity, that the rape report was freely and voluntarily made to the complainant's sister in law at the earliest opportunity, that the complainant had no motivate to fabricate the rape allegations and that the medical evidence supported the rape allegation. State counsel also submitted that the applicant had advanced a bare denial in his defence.

State counsel also submitted that the dim prospects of success would induce the applicant to abscond. She submitted that there was no risk of a delayed appeal hearing because the appeal court now sits three times weekly. Since the applicant's record had been transcribed, counsel

argued that the applicant could minimize the prejudice which could be occasioned by a delayed hearing by taking steps to expedite the hearing of the appeal.

In the application, the applicant's counsel made proper and correct submissions of law. He quoted the case of *S v Tengende & Ors* 1981 ZLR 445 to the effect that the proper approach by a court to determining an application for bail pending appeal is to refuse the application in the absence of positive grounds to grant it. In recent times however, the verbiage used by the courts and in legislation has been to underpin the grant or refusal of bail on what the interests of justice dictate. For example s 115 C of the Criminal Procedure and Evidence Act provides as follows:

“115 C Compelling reasons for denying bail and burden of proof in bail proceedings

(1) In any application, petition, motion, appeal, review or other proceedings before a court in which the grant or denial of bail or the legality of the grant or denial of bail is in issue, the grounds specified in s 117 (2), being grounds upon which a court may find that it is in the interests of justice that an accused should be detained in custody until he or she dealt with in accordance with the law, are to be considered as compelling reasons for the denial of bail by a court.

(2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail-

(a) before a court has convicted him or her of the offence-

(i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;

(ii) the accused person shall, if the offence in question is one specified in-
A Part 1 of the Third Schedule, bear the burden of showing, on a balance of probabilities, that it is in the interest of justice for him or hers to be released on bail, unless the court determines that in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden;
B Part 11 of the Third Schedule, bear the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail;

(b) after he or she has been convicted of the offence, he or she shall bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail.”

The purport of s 115 C (I) is that first and foresight it applies to “any application, petition, motion, appeal, review or other proceeding before a court in which the grant or denial or legality of the grant or denial of bail is in issue.” The subsection therefore applies to all species of bail at

whatever stage of a case or proceedings before a court. Section 115 C was enacted because of the need to ventilate s 50 of the Constitution of Zimbabwe No 20/13 which deals with the rights of arrested and detained persons. Section 50 (1) (d) of the Constitution compels the release of an arrested person unconditionally or on reasonable conditions pending a charge or trial unless there are compelling reasons for the continued detention of the arrested person. The constitution does not define what constitutes compelling reasons. Section 115 C defines compelling reasons and therefore plugs the gap. Specifically it provides that what constitutes compelling reasons which a court may consider good grounds to deny an applicant admission to bail in the interest of justice are as set out in s 117 (2) of the Criminal Procedure & Evidence Act.

In respect of an application for bail pending appeal as obtains in this application, the application is provided for under s 123 of the Criminal Procedure & Evidence Act. The application *in casu* falls under s 123 (I) (b) (ii) of the said section, being an application for admission to bail pending determination of an appeal pending in this court from the decision of the magistrate convicting and sentencing the applicant. It is important to note the provisions of s 123 (2) of the said Act. The section provides as follows

“(2) sections 117 and 117 A shall, with any changes that may be necessary, apply to this section.”

It therefore follows that a court should take into account in determining the existence or otherwise of compelling reasons which in the interests of justice justify that bail is denied bail at whatever stage of a criminal court process the factors set out in ss 117 and 117 A, with necessary adjustments where applicable. I do not propose to list which of the provisions of ss 117 and 117 A may be applied to an application for bail under s 123. To do so would amount to an exercise in futility because the application of the provisions are case dependent. To put it simply, whether or not and which ones are relevant depends on the circumstances of each case.

I also consider it necessary to draw a distribution between the provisions of s 50 (1) (d) and s 70 (5) of the Constitution. There have been cases brought before the court where counsel has sought to argue that s 50 (1) (d) is applicable to applications for bail pending appeal. The provisions clearly do not apply. Section 50 (I) (d) seeks to protect the rights of an arrested person who has not yet been convicted by the court and should be read together with s 70 (I) (a) which entrenches the right of every person accused of an offence to be presumed innocent until

proven guilty. The constitution in seeking to give effect to the presumption of innocence as aforesaid set stringent conditions which should be demonstrated in the form of compelling reasons to justify pre-trial detention.

A convicted person is no longer presumed innocent and the right of appeal and review given to such person who essentially will now be a convict does not entitle him or her to the protection afforded by s 50 (1) (d). It is therefore anomalous to invoke the provisions of s 50 (1) (d) in a bail application made under s 123 of the Criminal Procedure & Evidence Act. Counsel for the applicant as I have already noted was correct in pointing out that the applicant is not entitled to bail pending appeal as of right.

It will be noted that s 115 C (2) of the Criminal Procedure & Evidence Act saddles a convict with the onus to show on a balance of probabilities that it is in the interests of justice that such applicant be released on bail. The term interests of justice in any given case is circumstantial. However, it can safely be said that it would not be in the interests of justice to deny bail pending appeal to an applicant who has demonstrated good prospects of success on appeal see *S v Kilpin* 1978 RLR 282. An applicant who is able to demonstrate on a balance of probabilities that his appeal enjoys prospects of success is unlikely to abscond and would rather present himself to clear his name. Such applicant's rights to liberty should be given effect to by the court in its discretion to safeguard against the risk of having an otherwise innocent person languish in prison in respect of a case for which he or she ends up being cleared of by the appeal court.

Counsel for the State referred to the case of *Moffat Mungwira v State* HH 216/10 where it is stated as follows:

“As in all applications of this nature, the court has a discretion to grant or decline the relief sought. In a case where the application relates to bail pending appeal, the court will be guided by the following principles:

- (i) prospects of success on appeal
- (ii) likelihood of abscondment in the light of the gravity of the offence and the sentence imposed
- (iii) likely delay before the appeal is heard
- (iv) right of an individual to liberty.

See also *S v Dzawo* 1998 (1) ZLR 536 and *S v Bennet* 1985 (2) ZLR 205 (HC), *S v Ncube & Ors* HB 04/03.

In arguing that there were no prospects of success on appeal counsel for the State submitted that the case had been decided by the court *a quo* basing on witness credibility. Counsel submitted on the authority of *Chimbwanda v Chimbawanda* SC 28/02 that an appeal court will not interfere with a trial court's findings on credibility unless a misdirection of fact or law has been established. I accept that this is the approach which the court of appeal will adopt in a matter which falls for determination on the basis of credibility findings. It was submitted that the court *a quo* had accepted the applicant's version of events and rejected the applicant's version. Counsel submitted that the complainant had given a clear and straightforward narration of how she was violated by the applicant and remained consistent in her evidence as to the manner that she was raped, time of day and the identity of the applicant.

State counsel continued in her opposition to state that the applicant had made a timeous report of the sexual assault upon her to her sister in law voluntarily. It was additionally submitted that the medical evidence was only carried out after the report which the complainant made. In other words counsel's argument was that it was not as if the complainant was first examined before she revealed the sexual assault. The medical evidence was said to support the complainant's evidence because the medical practitioner observed healed hymenal tears and concluded that penetration was probable. Lastly, it was submitted that there was no motive for the complainant to lie against the applicant whom she did not know before and that the applicant had proffered a bare denial of the offence.

In respect of sentence, State counsel submitted that the court *a quo* had considered all factors relevant to sentence and that the appeal court was unlikely to interfere with the sentence imposed.

State counsel submitted in conclusion that there was a high likelihood of abscondment by the applicant because of the absence of prospects of success. It was counsel's view that the justice of the case called for a dismissal of the application so that the applicant continues to serve his sentence pending appeal. Further counsel was of the view that as the record of proceedings in the court *a quo* had been transcribed and the appeal court was sitting three times a week, there was little prejudice to be suffered by the applicant on account of a likely delay in the hearing of appeal as appeals no longer take very long to be heard.

The applicant mounted a spirited attack on the court *a quo*'s judgment and the evidence. Unlike the State counsel who made generalized submissions, applicant's counsel took the court through the record and made specific reference to those aspects of the evidence and judgment which he sought to impugn. I will deal with a few of the criticisms advanced.

Defence counsel attacked the evidence of the applicant on the basis of inconsistency. He observed that the complainant in her report had alleged that she had been indecently assaulted only to change her story and allege rape after she had been interrogated on her virginity status and threats of being taken for medical examination made. In my reading of the magistrate's judgment, he noted the inconsistency and made a finding on why the complainant could be excused for not telling the truth or shifting goal posts. The complainant had also reported a case of indecent assault to the military police. How the indecent assault later graduated to rape is a factor which was not ventilated in the judgment or evidence.

The court *a quo* found that the complainant was "frugal" with her report and had first reported indecent assault and not rape because of threats made to her by the applicant. In my view it would be illogical that the complainant if she had been threatened would have reported a less serious crime. She would in all probability not have incriminated the applicant at all in any wrong doing had she been threatened and the threats were bearing on her.

The defence counsel justifiably took issue with the magistrate's dismissal of the medical testimony by the medical practitioner who was in any event a State witness. The medical evidence was that the examination result was inconclusive as to whether penetration had been effected. The report showed that the complainant was sexually active prior to the alleged sexual abuse. For inexplicable reasons the magistrate branded the medical practitioner as someone who thought she was a super witness who could take over or undermine the role of the investigating officer. The attack on the witness could properly be challenged as having undertones of impartiality on the part of the court *a quo*.

The learned magistrate did not only attack the evidence of the medical practitioner. He also attacked the evidence of other State witnesses and sought to correct inconsistencies in the State outline so that they did not conflict with the evidence of the complainant. The approach of the magistrate was that only the complainant was a truthful witness and was dismissive of all evidence including that of the State witnesses where the same was not supportive of the

complainant or exculpated the applicant. Such an approach was with respect wrong. It is not the duty of a court to build a case for the State or a defence for the accused in a trial.

In this application, I am not required to rule nor is the applicant required to convince me or prove that his appeal will with certainly succeed. He merely has to show that the appeal is reasonably arguable. See *Kilpins* case (*supra*). Judges have been innovative with language and expressed prospects of success as being present unless the appeal can be shown to be susceptible to or deemed to predictable failure. I will be conservative with language and express the position as simply that the applicant should demonstrate on a balance of probabilities that he or she has reasonable prospects of success.

The applicant is of fixed abode and is a member of the Zimbabwe National Army. He should be given the benefit that he is unlikely to abscond. Unless decommissioned from the army, any abscondment from his work station would constitute an offence under the Defence Act. The applicant would therefore be burning his fingers twice if he were minded to abscond. I have also indicated that where there are prospects of success demonstrated by the applicant. The applicant will in my view be more likely to stay put and seek to prove his innocence.

The applicant has thus discharged the onus to show that it is in the interests of justice that he be admitted to bail pending appeal. I therefore grant the applicant's prayer as follows:

1. The applicant is hereby admitted to bail pending appeal No CA 220/17 on the following conditions:
 - (a) He deposits US\$300-00 with the Clerk of Court, Magistrates Court Harare.
 - (b) He resides at House No. 183 Zata Street; Mbare, Harare, until the appeal is determined.
 - (c) He reports at Braeside Police Station on the 1st day of each successive month pending the determination of the appeal.

J. Mambara & Partners – applicant's legal practitioners
National Prosecuting Authority – respondent's legal practitioners