

BENSON PHIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 15 February 2019 & 7 June 2019

Bail Ruling

I Muchini, for the applicant
A Muzuwi, for the respondent

NDEWERE J: The applicant was convicted on 30 April 2018, of rape in that he had unlawful sexual intercourse with a mentally retarded girl which resulted in pregnancy. The applicant admitted having sexual intercourse with the girl. His defence was that she had consented.

During the trial, the State led evidence to show that the complainant was mentally retarded and that the applicant must have been aware of this since he was a neighbour for 15 years and a friend of the complainant's brother.

At the conclusion of the trial, the court convicted the applicant and sentenced him to 10 years imprisonment with labour, with four years suspended for 5 years.

The applicant noted an appeal on 20 November 2018, after being granted condonation. Thereafter, he applied for bail pending appeal.

The State opposed the application for bail pending appeal, saying the court *a quo* did not misdirect itself in convicting the applicant; neither did it misdirect itself in sentencing him.

In the first ground of appeal, the applicant said the court erred on a point of law by accepting the evidence of the complainant, a mentally retarded person. That ground would have had merit if the applicant had disputed having sexual intercourse with the complainant. As it is, the applicant admitted having sexual intercourse with the complainant and a medical report

confirmed sexual activity by the complainant. So the court did not err at all because besides the complainant's evidence, the court heard the evidence of the applicant himself and the medical report which confirmed that sexual intercourse took place.

The second ground was that the court erred by convicting the applicant when he had alleged ignorance of the complainant's mental retardation. This ground would have had merit if the applicant and the complainant were strangers. They were not strangers. They had been neighbours for 15 years. In addition, the applicant had been friends with the complainant's brother. How could applicant not have known that the complainant had some mental retardation after such a long association as neighbours, when the challenges were apparent to the court which observed the complainant for a very short period when she came as a witness? So clearly, that ground of appeal has no merit.

The third ground of appeal is a repeat of the first and second grounds of appeal. So it also has no merit. Since there is no merit in the appeal, the applicant has no prospects of success in it. He should therefore continue serving his sentence because the appeal is unlikely to succeed and change his situation.

The sentence imposed was 10 years imprisonment, with four years suspended for 5 years. That sentence is actually on the lenient side. Other offenders get sentences ranging from 15 years to 20 years for rape. This means there are no prospects of success in the appeal against sentence as well.

It is not in the interests of justice to release convicted prisoners on bail when they have no prospects of success on appeal.

Bail pending appeal is therefore denied. The accused can process his appeal whilst serving his sentence.

Mauwa & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners