

DESMOND CHIPUNZA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
NDEWERE J  
HARARE, 23 July & 16 October 2019

### **Bail pending appeal**

*K. Musimwa*, for the applicant  
*Ms N. Badalene*, for the respondent

NDEWERE J: the applicant was convicted on 21 March, 2019 of rape and sentenced to 11 years, 3 years suspended for 5 years on condition accused did not commit a similar offence to which he is sentenced to imprisonment without the option of a fine.

The applicant noted an appeal against both conviction and sentence on 29 March., 2019. The grounds of appeal were as follows:

- “1. The magistrate erred by failing to find that the complainant had consented but due to her drunkenness she could not remember what transpired.
2. The magistrate erred by failing to find that the parties had been in love for the past seven years.
3. He erred by failing to find that the evidence of the parties friends had not been placed before the court so as to arrive at what actually transpired.

AD SENTENCE:

1. The sentence is manifestly excessive and induces a sense of shock.
2. The trial court failed to place due weight on the mitigatory factors that the appellant was a first offender, had no intention to harm the complainant but were all in a drunken stupor.
3. The court *a quo* failed to make an inquiry into circumstances whether or not the appellant and the complainant were in a relationship.
4. The court *a quo* paid lip service to all mitigatory and extenuating circumstances.
5. The court *a quo* also failed to consider the complainant’s contributory provocation under the circumstances.
6. The court *a quo* failed to place due weight on the remorsefulness of the appellant.”

The applicant filed an application for bail pending appeal on 12 July, 2019.

The state filed a concession to the application for bail pending appeal on 18 July, 2019. The court was not convinced by the State’s concession so it invited oral submissions from the applicant’s counsel in support of the application on 23 July, 2019. Thereafter, judgment was reserved.

The major issue for the court to determine in a bail pending appeal is whether the applicant has prospects of success on appeal. Unlike in a bail pending trial where the accused is presumed innocent, the applicant in a bail pending appeal will have gone through a trial in a competent court and got convicted and sentenced. There is no point in granting bail pending appeal to such an applicant if the appeal is doomed to fail. An applicant whose appeal has no prospects of success is better off serving his sentence, rather than delay the service only to be thrust back into prison after a predictable failure of the appeal. It is also not in the interest of the administration of justice to release convicted persons on bail when they have no prospects of getting an acquittal or a major reduction in the custodial sentence after the appeal. Convicted persons without prospects of success must remain in prison and continue serving their sentence.

For a convicted person to be released on bail pending appeal, they must point out the misdirection (s) by the court a quo which is likely to make an appeal court arrive at the conclusion that the case against accused's was not proved and thus acquit him, or that the sentence was so excessive as to induce a sense of shock and thus reduce it drastically.

The background facts given by the State were that the complainant was a 29 year old woman who was friends with a 34 year old man. Both the complainant and the accused persons lived with their mothers. The complainant stayed in a cottage at N58 Ngoni, Norton while her mother stayed in the main house. The accused lived at No. 12 Post Road Twinlakes, Norton.

On 13 October, 2018, the complainant invited a few friends to N58, Ngoni for a small party to celebrate her mother's birthday. Apart from the complainant and her mother the people who came were Tapiwa, Zidi, Frank, the accused and Angeline. Angeline was a tenant at N58. The people ate and drank.

Around 9pm, the men, including the accused, said they were going to buy more beers. After they had left, the complainant fell asleep on her bed in the cottage, fully dressed in her jumpsuit and apron. She woke up around 3am and realised that there was a man lying on top of her having sexual intercourse with her. She initially thought she was dreaming. She asked who it was and the accused replied and told her it was him. She immediately slapped him and punched him. She got out of bed and ran outside the cottage crying out that she had been raped. The accused person also got out and ran away. He forgot his slip ons in the cottage. Angeline responded to the complainant's call, came out of her quarters and was surprised to see the complainant naked, with just an apron. She went back into her quarters and brought a torch and a piece of cloth commonly referred to as a "Zambia" for the complainant to cover herself. They got into the cottage together. Complainant told Angeline that she woke up to find the accused

raping her. When they looked on the bed they observed some semen on the sheets and the complainant's jumpsuit on the floor. Angeline advised the complainant to report to the police and left.

The matter was later reported to the police and the complainant was medically examined. The medical report was availed to the court as an exhibit.

The accused's defence outline was that he was friends with the complainant. He said on 13 October 2018, he visited his friends who included the complainant. He bought some beer and they were drinking together. Besides the complainant, he mentioned three other friends Zid, Kaka and Frank. He said they started drinking before noon. He said around 7 or 8 p.m., he indicated that he wanted to leave but the complainant said he could not leave because they were having a party. He said they continued drinking until they got drunk. He said Zid and Kaka left for their houses but he remained at the complainant's house. He said they both slept on the bed and during the night, he felt the complainant caressing her. He asked her what she was doing and she said it was okay. So he responded accordingly and had sexual intercourse with her.

She said while he was still having sexual intercourse with her, there was some noise outside, and complainant reacted by slapping him and punching him. She then jumped off the bed and went outside screaming that she had been raped. The accused said he was shocked by her screaming alleging rape so he put on his shirt and ran away to his residence. He left his slip on shoes at the complainant's house and went to his resident barefooted. Around 8 a.m. the following day, the complainant got to his house with Kaka, Zid, Malvern and a fourth person. She repeated the rape assertions and said she needed money for medical expenses and the accused's mother gave her \$5 cash and \$14 eco-cash. The accused said the people who accompanied her told him that rape was a serious offence but encouraged the complainant and the accused to talk things over since they were friends.

He said he was arrested two days later.

The complainant's evidence was that 13 October 2018 was her mother's birthday. She therefore arranged a small party for her. She invited the accused and three other male friends. Angeline and her mother were also present. They drank some beer. At around 9 p.m., the male guests left and said they were going to buy more beer. After they had left, the complainant fell asleep on her bed, in the cottage. She was dressed in a jumpsuit and an apron. Around 3 a.m., she woke up and felt that someone was lying on top of her and having sexual intercourse with her. She asked who it was and the accused responded that it was him. She immediately slapped him and punched him. She touched his manhood and realised that he had been having sexual

intercourse with her without any protection. She got out of bed, screaming that the accused had raped her. She got out of the cottage where she stayed and when she was outside, she called out to Angeline, a tenant at N58. The accused also got out and ran away. Angeline got of her room in the main house and asked her why she was crying out. The complainant said that the accused had raped her. Angeline observed that the complainant was naked, save for an apron. She fetched a piece of cloth commonly referred to as a “Zambia” and a torch. The complainant covered herself with the cloth and together they got into the cottage. They observed semen on the sheets and the complainant’s jumpsuit on the floor. Angeline advised the complainant to report the matter to the police.

The following morning, she proceeded to the accused’s resident in the company of the other friends who had been at the party. The friends suggested that they talk things over since they were friends. The accused’s mother gave her \$5 cash and \$14 eco-cash for transport and treatment and pleaded with the complainant not to report the matter to the police. She later reported the rape to the police and she was sent for medical examination.

She confirmed being friends with the accused for about 7 years. She admitted that since accused stayed far away, she had invited him to sleep over at her mother’s place. She said he had done this previously and slept in the main house. She said when she suggested that he stays overnight, he had said he could not sleep over.

She denied being drunk, although she admitted that she had taken some alcoholic drink. She denied ever fondling the accused and queried “why she would fondle her brother”? She said she never did that neither did she say it was okay to anything. She said she woke up without her jumpsuit. She believed the accused removed it together with her underwear while she was asleep. She said a jumpsuit was not difficult to put on or to remove. “you can just put it on the legs then you pull it up.”

The description of the jumpsuit was not provided. But the simple way it is put on the legs and then pulled up is the way it is slipped off at the shoulders and then pulled off the body through the legs. Suffice it to say that when complainant said it was easy to remove a jumpsuit, the accused did not dispute that.

Angeline Shumba was the next witness. She confirmed receiving the report of rape from the complainant. She confirmed that she called out to her and the complainant came out of her cottage naked, save for the apron. She said the complainant was not drunk but she was shivering. She gave the complainant a cloth to cover herself with, got into the cottage together with her and observed some semen on the sheets and the complainant’s jumpsuit on the floor.

They also observed the accused's slip-on shoes which he left when he fled. She advised the complainant to report to the police. She said she did not see the accused himself on the morning of the rape. The complainant told her that he had run away.

The accused did not even cross-examine the second state witness. He said her evidence was true. Even the issue of whether it was possible for him to have removed the jumpsuit was not put to this witness.

The accused himself testified. He said he was divorced and he had been friends with the complainant since about 2010. He said he was not in love with her; they were just friends. He actually laughed at the suggestion that he could have been romantically involved with the complainant. He said he did not have the intention of being romantically involved with the complainant. He told the court that the complainant had a boyfriend, one Nicho. He confirmed that the boyfriend did not visit the complainant that night.

He agreed that on 13 October, 2018 he had sexual intercourse with the complainant. He said she was the one who began to fondle him and he responded and had sexual intercourse with her. He confirmed that she slapped him and punched him and ran out of the cottage naked screaming that he had raped her. He said he got scared and ran away, leaving his slip-on shoes at the complainant's house. He said she was crying.

The accused confirmed that although they had been drinking, both the complainant and him were not so drunk as not to know what they were doing. He admitted to knowing what he was doing at all times, except when he was asleep.

When asked why the complainant screamed "rape" if she had consented he said maybe it was for financial gain. But he had no evidence of any financial benefit derived by the complainant from him.

Most of the facts were common cause. The only issue for the trial court was whether the complainant consented to sexual intercourse and removed her jumpsuit and underwear to facilitate such sexual intercourse or whether the accused raped her and removed the jumpsuit and underwear while she was asleep.

If the complainant had consented and facilitated the removal of her jumpsuit and underwear, she would have no reason to cry out "rape" at 3 am and get out of the cottage naked, shivering and crying. If she had consented, she would not have slapped and punched the accused when she realised it was him. She would have had no motive to cry rape, if she had consented because this was a friend of hers for about 7 years, who had slept at their house before. If she had consented, she would have kept quiet and no one would even have known

about their intimacy. So she cried out because she was indeed raped by the accused. He took advantage of her heavy sleep from fatigue and the drinking and slipped the jumpsuit off her shoulders and pulled it from her legs. The apron was not an impediment to the rape so he left it tied onto the complainant. That is why the complainant ran out with just the apron without even realising it.

So the trial court did not misdirect itself at all in convicting the accused. Therefore the accused has no prospects of success on appeal against conviction.

The grounds of appeal are at variance with the evidence adduced in the court *a quo*. The first ground of appeal was that the court *a quo* erred by failing to find that the complainant had consented but due to her drunkenness, she could not remember what transpired. The evidence adduced on page 43 by the complainant was that although the complainant had drunk some alcohol, she was not drunk. See also page 72 of the record. The accused's own evidence confirmed this position that although she had been drinking, the complainant was not so drunk as not to know what was happening. He also said except for when he was asleep, he knew what he was doing. So the trial court decision was based on the evidence that was before the court, not unproven assumptions. The first ground of appeal therefore had no evidential basis.

The second ground of appeal said the magistrate erred by failing to find that the parties had been in love for the past seven years. Once more, there was no evidence to support this ground. The evidence before the court *a quo* was that the parties had a platonic friendship, as opposed to a romantic relationship, for 7 years. They were both agreed on this point. On page 57, the accused said he was never in love with the complainant, she was just a friend. He denied being romantically in love with her. He said he did not have the intention to be romantically involved with her. On page 61 the accused actually said he knew the complainant's boyfriend. So the second ground of appeal had no merit too.

The 3<sup>rd</sup> ground of appeal was that he erred by failing to find that the evidence of the parties friends had not been placed before the court so as to arrive at what actually transpired. That ground too had no merit. The complainant was raped at about 3.00am. The friends had left. So what relevant evidence could they add to the case? None whatsoever because they were no longer there. The case is that the accused raped the complainant while she was asleep. When she woke up and realised what was happening, she assaulted him, got out and made her first report to Angeline. Angeline was called. The other friends were not relevant because they were not there neither did they receive the first report.

On sentence, the grounds of appeal say the sentence is so excessive as to induce a sense of shock. If anything, the sentence which the accused got was on the lenient side. A sentence of 11 years imprisonment with 3 years suspended for 5 years is lenient when compared to sentences passed by our courts for rape in other cases which average between 15 years and 20 years and sometimes even more. So the accused has no prospects of success against both conviction and sentence.

There is therefore no legal basis to grant him bail pending appeal. He can prosecute his appeal whilst serving his sentence.

*Musimwa and Associates*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners