

EDEN MUCHAYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 3 August 2018 & 7 February 2019

Bail Pending Appeal

Applicant in person
F. I Nyahunzvi, for the respondent

NDEWERE J: The applicant was charged with rape in that on 13 June 2016, at 8746, Budiro 5 B, in Harare, he had sexual intercourse with the complainant, Shield Nhandava, once, without her consent.

The applicant was convicted after a full trial and on 1 July 2016 sentenced to 13 years imprisonment with labour, with 3 years suspended for 5 years on condition he is not convicted of an offence involving sexual assault or sexual abuse.

He filed an appeal on 14 July 2016. Although the first paragraph of his Notice of appeal said he was appealing against the sentence, from his grounds of appeal, it is clear he is taking issue with both the conviction and the sentence.

On 28 May 2018, the applicant filed an application for bail pending appeal. The State opposed it, arguing that the applicant had no prospects of success against both conviction and sentence.

After considering the written and oral submissions by both the applicant, I hereby deliver the court's ruling.

The background of the case is that complainant, an eighteen year old mother of one, had sought assistance from Albert Makaha, a deacon church mate, because her husband had abandoned

her, taking all their property with him. Albert Makaha discussed the complainant's predicament with his friend, the accused, on 12 June 2016. The accused then told Albert Makaha that his mother was looking for a housemaid. He provided Albert Makaha with a cellphone number which he said belonged to his mother. Albert forwarded this number to the complainant. The complainant called the number and was answered by the accused. The accused asked the complainant to meet him the following day in Mbare so that he takes her to his mother for employment as a housemaid.

The following day, on 13 June 2016, the accused met the complainant at Mbare bus terminus. He confirmed that his mother needed a housemaid and said he would take her to his mother after work. In the evening on the same day, the accused person took the complainant to his house on the pretext that he was taking her to his mother's house. When they got to the house, the accused told the complainant to get into the house and wait for his mother who was still at work. He left the complainant alone and went out. He came back around 2100 hours, switched on his TV and radio; increased the volume and locked the door. He started fondling the complainant. She resisted and screamed, to no avail. The accused had sexual intercourse with her once without her consent. After that, the accused told the complainant that he was willing to take her as his wife. He locked the door and went out.

The following day, 14 June 2016 the accused went away leaving the door locked. He returned around 1500 hours and unlocked the door and left it open. The complainant left the premises and went to Albert Makaha's house where she narrated her ordeal. Thereafter a police report was made and the accused got arrested around 4 pm on 14 June 2016. The complainant medically examined and a medical affidavit was provided.

The accused's defence was that he proposed love to the complainant and she accepted his proposal and they agreed to meet the following day on 13 June 2016, about their newly formed relationship, not about a job. Thereafter, they went to his house and had sexual intercourse by consent as lovers. He said he was surprised when the police came to arrest him.

The complainant was the first to testify. She said accused raped her. She did not consent and there was no affair. She said she cried during the rape, called out, pinched him and slapped him; to no avail.

She repeated that evidence of her crying twice ; on p 43 and on p 50. But the accused did not challenge that evidence at all throughout his cross examination of the complainant.

The next state witness was Albert Makaha, the accused's friend of three years. He corroborated complainant's evidence that she communicated with the accused because the accused had said he could find her a job as a housemaid. He never mentioned any love relationship. He said complainant later came crying, saying accused had raped her.

The accused suggested that the whole case was a fabrication by Albert. But why would a friend of 3 years fabricate such a case against his colleague, if the rape did not happen?

The accused's own evidence corroborated the state case. He confirmed that Albert Makaha told her that the complainant was looking for a job as a housemaid and that he knew someone who wanted a house maid.

On p 62, the accused confirmed giving Albert Mahaka one of his mobile numbers 0733 857 340, although he lied to Albert that the number belonged to the person who needed a maid.

He actually said Albert's testimony about the above mobile number was true. He admitted lying to Albert, on p 62, that the number he gave him was for Maud, yet it was his number. It is clear that he gave Albert this number which Albert was not familiar with; to hide his identity, because he had already planned some mischief towards the complainant.

On p 63 the accused confirmed having sexual intercourse with the complainant on 13 June 2016. He said it was by consent; the complainant said it was rape.

The complainant reported the rape promptly at the earliest opportunity. The court found the complainant's evidence about the rape credible. It disbelieved the accused. The reasons for dismissing the accused's assertion is the fact that he lied from the outset; to Albert, and then to the complainant about knowing someone who needed a maid! How could the court believe his evidence in court when he had admitted to lying even to his friend? Therefore the court *a quo* did not err when it rejected the applicant's defence and convicted the applicant.

As regards the defence witnesses, accused said Mr Cheza's evidence was irrelevant. He further said Watch's evidence would just be hearsay. At p 70 he said; "Watch will tell the court about what I told him about my love affair with complainant." Watch's evidence would therefore have been inadmissible.

There are therefore no prospects of success on appeal against conviction

As regards sentence; there are no prospects of success as well. The sentence of 13 years, 3 years suspended for 5 years is actually on the lenient side for cases of this nature. There are no prospects of such a sentence ever being reduced further.

There being no prospects of success against both conviction and sentence, bail pending appeal is denied. The accused can prosecute his appeal while serving.

National Prosecuting Authority, respondent's legal practitioners