

TAVONGA SHAVA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 3 & 8 November 2016

Application for bail pending trial

Mr *K. Chuma*, for the applicant
Ms *S. Bhusvumani*, for the State

MAFUSIRE J: The applicant was arrested for rape on 5 October 2016. He was remanded into custody. He applied for bail pending trial. I reserved judgment. This now is my judgment.

The facts were somewhat scanty. The complainant is a six-year-old female minor. The applicant is her uncle in the sense that he is her mother's brother.

There was a conflict on the age of the applicant. On the request for remand, Form 242, his age was put at twenty four years. However, in the bail response by the State, his age was put at nineteen years. This was based on an age estimate following a dental examination that was carried out in a previous conviction for aggravated indecent assault. The applicant himself insisted he was seventeen years old, and therefore a minor.

The reason for the conflict on the applicant's age was that he had no identity documents of any sort. Both he and the State resorted to some deductive process to estimate his age. They both started counting from the previous conviction. It was common cause that the previous conviction was in 2011. The applicant has insisted in his current application that at the time he was only ten years old and that he did not even know that he was committing an offence as he thought he was playing with the victim. If applicant was ten years old in 2011, then now he must be fifteen. But he has said he is seventeen years old. He has no supporting document of any sort, only his word of mouth.

On the other hand, the State has insisted that the applicant had been fourteen years old at the time of the previous conviction. His age was estimated by a dental surgeon following some medical examination of his teeth after which a purported affidavit in terms of s 278[2] of the Criminal Procedure & Evidence Act, *Cap 9: 07* [*"the CP & E Act"*] was filed. So five years

down the line, the applicant should, according to the State, be nineteen years old, and therefore a major.

The State has further argued that at any rate, if the applicant had been ten years old at the time of the previous conviction, then he would have been *doli incapax* [i.e. below the age of criminal responsibility]. He would not have been charged with a criminal offence, let alone sentenced to six strokes with a rattan cane as was done.

Mr *Chuma*, for the applicant, challenged the purported affidavit by the dental surgeon and the State's reliance on it. He said it was not a sworn statement, therefore not an affidavit. As such, it should not have been taken at face value as actual proof of the applicant's age at the time.

I shall come back to this conflict later.

In this application the applicant has completely denied the rape accusation. He said it never happened. He said the State's case was very weak. As such, there was no inducement for him to abscond if freed on bail. He said he has no intention to abscond.

The applicant has also relied on the new Constitutional. The right to bail is now one of the fundamental rights and freedoms enshrined in the Bill of Rights under Chapter 4 of the Constitution. Only unless there are compelling circumstances will an accused person be denied bail. The onus rests on the State.

Mr *Chuma* argued that the recent amendment to the C P & E Act, which by the insertion of s 115C, thrusts the onus on the accused to prove the right to bail, is manifestly in conflict with the Constitution. As such, the Constitution, being the superior law, should prevail. But Mr *Chuma* would not commit himself to urging the court to make a specific declaration as to the constitutional invalidity of the amendment, let alone to refer the matter to the Constitutional Court in terms of s 175 of the Constitution.

To support his argument that he will not interfere with witnesses, the applicant has offered to remove himself from the village where the complainant lives and where the crime was allegedly committed. He has opted to go and stay with some relatives in another village which was said to be some fifty kilometres away.

The applicant said that the police have already completed their investigations and that therefore there is no likelihood of his interfering with witnesses.

The applicant offered bail in the sum of \$50. He said he is prepared to live with any strident reporting conditions that the court might deem fit to impose.

In opposing bail, Ms *Bhusvumani*, for the State, argued that there is a strong inducement for the applicant to abscond because the case against him is very strong. Among other things, the rape happened, not once but twice on two nights in succession. On the first occasion, the complainant reported the abuse the following morning to one Francisca Vengai [*“Francisca”*] who, unfortunately, took no action. On the second occasion the complainant again reported to Francisca. This time Francisca made a report to the village headman. Eventually the matter was reported to the police. Although the medical examination showed that the complainant’s hymen had not been broken as such, it showed some interference in that it was found to have stretched. Ms *Bhusvumani* argued that at least there is evidence of legal penetration. She said that is sufficient for a charge of rape.

Ms *Bhusvumani* further argued that the complainant’s previous conviction, though not of rape but of aggravated indecent assault, was still of a sexual nature. It was a very relevant conviction. As such, the applicant had a propensity to commit sexual offences.

Ms *Bhusvumani* also argued that at six years of age, the complainant is a vulnerable witness. At trial she will only testify with the aid of special facilities that, among other things, prevent direct communication with the applicant. Therefore, the likelihood of interference by the applicant, if out on bail, is high.

Regarding the shifting of onus from the State to the accused person, Ms *Bhusvumani* conceded that s 115C of the CP & E Act, seems in direct conflict with the Constitution. As such, should the issue of onus of proof turn out to be decisive, the court cannot avoid making a declaration of constitutional invalidity and referring the matter to the Constitutional Court.

Regarding the applicant’s offer to remove himself from the village where the crime was allegedly committed, Ms *Bhusvumani* found it of no consequence, especially if the applicant was going to be staying with some relatives, albeit fifty kilometres away. She said the alleged rape was one in the family. Usually in such circumstances relatives try and interfere in favour of protecting the perpetrator. Therefore, the applicant’s suggestion did not remove the apprehension of interference. At any rate, Ms *Bhusvumani* concluded, the applicant had submitted nothing like a sworn statement from those relatives confirming their willingness to take him on.

That was the case before me.

Firstly, I resolve the conflict regarding the age of the applicant in favour of the Sate. Apart from his say so, there was no other material or information to support his claim that he

was only ten years old at the time of his previous conviction. He did not say who told him he was ten years old at the time or when he might actually have been born. There was just nothing on which he based his age estimate.

On the other hand, in computing the applicant's age in the absence of birth documents, at least the State produced some material which would generally be admissible in terms of statute. It was a scientific estimation of a person's age by a medical examination of his teeth. In the case of the applicant's previous conviction, the results of that medical examination had been admitted in the regional magistrate's court which convicted him. That court would have been satisfied of the applicant's age. Otherwise it would be an outrageous miscarriage of justice if it not only convicted a minor lacking criminal capacity by reason of age, but also would go on to sentence him to six strokes.

The applicant's emphasis that the dental surgeon's statement should only have been by way of an affidavit before it was given any weight is not always the practice. In bail applications, the evidence does not always have to be in affidavit form. In most cases, *ex parte* statements are made by both sides, without formality: see *S v Ndhlovu*¹ and *S v Nichas*².

Therefore, I find that the applicant was fourteen years old at the time of his previous conviction and that now he is nineteen years old.

On the issue of whether or not the State has a strong case against the applicant, again there was a conflict on some relatively important detail. In its bail response, the State averred that the rape happened twice, on each occasion the complainant reporting to Francisca. On the other hand, the applicant, who has maintained his denial, argued that the claim that he raped twice was not backed by the State's own papers. He pointed out that the Form 242 made reference to only one incident. But Ms *Bhusvumani* explained that the State's response was compiled when the investigations had finally been completed. Among other things, the complainant's statement to the police referred to being raped twice.

In my view, whether the rape happened once or twice will be a matter for the trial court to resolve. At this stage the court's dominant pre-occupation is whether, if freed on bail, the accused will stand trial or abscond, and whether he will not interfere with witnesses.

In terms of s 117[2][a] of the C P & E Act, the grounds upon which a court may deny bail are the likelihood that if released:

¹ 2001 [2] ZLR 261 [H], at p 268C - D

² 1977 [1] SA 257 [C]

- 1 the accused will endanger the safety of the public, or of any particular person; or
- 2 the accused will commit an offence referred to in the First Schedule [i.e. any offence the minimum penalty for which exceeds six months without the option of a fine, and any conspiracy, incitement, attempt or being a participant in any such offence]; or
- 3 the accused will not stand trial or appear for sentence; or
- 4 the accused will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- 5 the accused will undermine or jeopardise the proper functioning of the criminal justice system, including the bail system; or
- 6 in exceptional circumstances, there is a likelihood that the release of the accused will disturb the public order or will undermine public peace or security.

Section 117[3][a] says that in considering whether there exists a likelihood of the accused endangering the safety of the public, or of any particular person, or whether he will commit a First Schedule offence, the court shall take into account, among other things, any disposition of the accused to commit a First Schedule offence as evident from his past conduct.

In my view, the previous conviction carried by the applicant is, metaphorically, his albatross. The conviction was, undoubtedly, a First Schedule offence which, but for his age at the time, would definitely have earned him a term of imprisonment exceeding six months. Section 66 of the Criminal Law [Codification and Reform] Act, *Cap 9:23* [“***the Criminal Law Code***”] provides that a conviction of aggravated indecent assault carries the same penalty as that for rape. The maximum penalty for rape is life imprisonment.

The applicant’s previous conviction was very relevant to the charge he now faces. Both are offences of a sexual nature the prescribed minimum sentences for which are identical. The State says the rape in question happened two nights in succession. *Prima facie* that makes a strong for the prosecution case, especially given the extra detail about the complainant’s consistent reports to Francisca.

Therefore, I consider that the State may have shown a disposition by the applicant to commit First Schedule offences as envisaged by s 117[2][a][i], as read with s 117[3][a][iv] of the C P & E Act.

In considering whether, if released on bail, there is a likelihood that an accused will not stand trial, s 117[3][b] of the C P & E Act directs the court to take the following factors into account:

- 1 the ties of the accused to the place of trial;
- 2 the existence and location of assets held by the accused;
- 3 the accused's means of travel and his or her possession of access to travel documents;
- 4 the nature of the offence or the nature and gravity of the likely penalty;
- 5 the strength of the case for the prosecution and the corresponding incentive of the accused to flee;
- 6 the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
- 7 any other factor which in the opinion of the court should be taken into account;

In the present case, Counsel substantially touched on almost all the above factors, albeit in varying degrees of emphasis. Fireworks were largely on paragraphs 4 and 5.

The issue of the nature of the case, the gravity of the likely penalty, the relative strength of the case for the prosecution and the corresponding incentive of the accused to flee are factors that help the court to gauge the pull of the inducement to abscond. The general premise is that the stronger the State's case is, the greater the likelihood of absconding, and *vice versa*: see *Fletcher Dulini Ncube v State*³. Of course, by itself this factor is not decisive.

In my view, a final decision on the bail factors cannot be made without reference to the new Constitution.

In my recent judgment in *S v Jealous Nemaringa and Anor*⁴ I said⁵:

“In my view, in an application for bail pending trial, the starting point is to consider the dispensation brought about by the new Constitution in May 2013. Section 50[1][d] of that Constitution says that any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. It is now a fundamental human right and freedom that an arrested person be charged or tried out of custody. That he or she may remain incarcerated until the charge or trial is rather the exception. There ought to be some compelling reasons justifying it.

³ SC 126-01

⁴ HMA 3-16

⁵ At p 3 of the cyclostyled judgment

This, in my view, is an exceptionally high burden. And it is now provided for in no less a law than the Constitution.”

On the question of who the onus to prove compelling circumstances lies, I had this to say:

“The Constitution does not say directly on who this onerous burden lies. But manifestly, it must be the State. That, in my view, and from a purposive approach, is clearly the spirit of the Constitution. But the CP & E Act has recently been amended, effective 17 June 2016⁶. Section 115C has been inserted. It first states that in any application, etc. where, among other things, 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 person should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as the compelling reasons for the denial of bail by a court.”

Section 115C[2][a][ii]A and B of the C P & E have reversed the onus of proof from the State to the accused in respect of certain crimes. The new provision relevant to this case is s 115C[2][a][ii]A. After editing out irrelevant matter, it reads:

- “[2] Where an accused 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]
- [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 interests of justice for him or her 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.”

Rape is one of the Third Schedule offences in respect of which the power to admit persons to bail is excluded or restricted. In the *Jealous Nemaringa* case above, I said the constitutionality of, *inter alia*, s 115C of the C P & E Act had not been raised, let alone argued. So I expressed no further view on it. But before I abandoned the point, I said this⁷:

⁶ See the Criminal Procedure and Evidence Amendment Act, No. 2 of 2016

⁷ At p 6

“... Mr *Chavarika*'s argument seemed to me to run counter to the ethos or principle or spirit of the new Constitution. In terms of it the emphasis is on the right of accused persons to personal liberty. Among other things, one should not be deprived of one's liberty without just cause [s 49[1][b]]. Once arrested and not released, a person is entitled to be brought to court within forty-eight hours or else he or she must be released immediately, unless a competent court has authorised his or her continued detention [s 50[2]]. It does not matter that the forty-eight hours may lapse on a Saturday, Sunday or a public holiday.

Probably to emphasise the importance of the right to personal liberty, parts of s 50 empower anybody to bring an application for a *habeas corpus* in respect of someone who, among other things, is being detained illegally, so that they may be released or brought before the court for the lawfulness of their detention to be justified. To cap it all, any person who has been illegally arrested is entitled to compensation from whosoever might have been responsible, except if there is a law that has been passed to protect judicial officers or other public officers acting reasonably and in good faith.

But sub-section [6] of s 50 speaks directly to the situation of Accused 2 herein. It says any person who is detained pending trial for an alleged offence, and is not tried within a reasonable time, must be released conditionally or unconditionally. Furthermore, in terms of s 70[1][a], an accused person is presumed innocent until proved guilty.”

In the present case, the constitutionality of s 115C[2][a][ii]A has squarely been raised. Both Counsel readily agree that it being in conflict with the Constitution, it must give way. It is akin to a clash between a locomotive and a motor vehicle at a rail-road crossing. Such a clash only goes one way – in favour of the train.

Mr *Chuma* was not keen that in the event that I find the provision to be unconstitutional, as indeed I have, I should then go on and refer the matter to the Constitutional Court for a final declaration of constitutional invalidity in terms s 167[3] and s 175[1] and [4] of the Constitution. He was merely content to urge me to follow the Constitution and to ignore any other dissident provision.

On the other hand, Ms *Bhusvumani* felt that once a declaration of constitutional invalidity is made by a subordinate court, the issue must, as a matter of course, be referred to the Constitutional Court for a final declaration of invalidity.

However, unlike the situation that MUREMBA J and I dealt with in the cases of *S v Willard Chokurumba*⁸ and *S v Walter Mufema & Ors*⁹ respectively, the referral of a matter to the Constitutional Court for a declaration of constitutional invalidity is now governed by the Constitutional Court Rules that were published under S I61 of 2016. In terms of r 24 thereof, a

⁸ HH 718-14

⁹ HH 409-15

subordinate court wishing to refer an issue to the Constitutional Court for a final declaration of constitutional invalidity, must request the parties to make submissions on the issue and state the specific constitutional question to be referred.

A referral to the Constitutional Court may also be made upon request by a party. Part of the material to be referred may include a statement of agreed facts, or the evidence led by the parties, and the specific findings of fact by the subordinate court. The record is then referred via the Registrar.

In casu, it is my finding that s 115C[2][a][ii]A is *ultra vires* Chapter 4 of the Constitution. However, since none of the conditions for referral as prescribed by r 4 of the Constitutional Court Rules has been fulfilled, the issue shall not be referred.

In my view, there are no compelling circumstances to deny the applicant bail pending trial. Ultimately, the risk of absconding is an ever present concern whenever a person has been arrested for an offence. The likelihood of that actually happening is generally greater where the offence in question is a serious one and the penalty likely to be severe. But this does not constitute compelling circumstances.

That the victim of the alleged offence is a vulnerable witness and/or that the accused is a family member are also relevant factors. But again these do not constitute compelling circumstances. There is no question, especially from the review records from the magistrate's courts, that the rape of minor girl children by male members of the family is disturbingly far too high, probably calling for extra judicial interventions. But paradoxically, that makes such cases no more exceptional for purposes of bail applications than other equally serious offences where bail is granted. A bail enquiry is not of a penal nature.

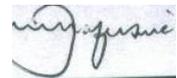
At nineteen years old, the applicant is still relatively young. He is unemployed and is therefore dependent on others for maintenance and support. He has no personal identity document of any kind, let alone a passport. That does not mean he will not run away if released on bail. But having considered all the other surrounding circumstances it is felt that the risk of flight is minimal. The bail will be coupled with stringent conditions.

There has been no supporting statement from the applicant's relatives whom he said live in another village fifty kilometres away and who are allegedly prepared to take him in until his trial. The applicant must file a sworn statement or statements by those relatives affirming their alleged commitment to take him in. Thereupon he will be released into their custody.

In the circumstances, subject to this judgment, the applicant is hereby granted bail pending his trial and shall be released upon the following terms and conditions:

- 1 The applicant shall deposit with the clerk of court, Mwenezi, bail in the sum of fifty dollars [\$50];
- 2 Upon such payment and the fulfilment of all the other pre-release conditions, the applicant shall be released into the custody of his uncle and aunt at Mubaiwa Village, Chief Chitanga, Mwenezi, where he shall continue to reside until the commencement of his trial;
- 3 The applicant shall report to the Zimbabwe Republic Police, Mwenezi once every Friday between the hours of 06:00 hours and 18:00 hours;
- 4 The applicant shall not interfere with any State witnesses.

8 November 2016

A handwritten signature in black ink, appearing to read 'Gurajena', is written over a horizontal line.

Chuma, Gurajena & Partners, legal practitioners for the applicant
National Prosecuting Authority, legal practitioners for the State