

FUNGAI MOSES MAKOTAMO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 13 September 2018

Bail Application

ASSESORS: 1. Mr Chipere
2. Mr Magorokosho

JT Fusire, for the Applicant
M Musarurwa, for the State

MWAYERA J: On 13 September 2018, I dismissed the applicant's application for bail pending trial. These are the reasons for my disposition. The applicant was arraigned before the court facing allegations of rape as defined in s 65 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in that sometime in July 2018 and at Chikuku Village, Chief Marange, Mutare the accused person unlawfully and knowingly had sexual intercourse with Progress Makotamo a female juvenile aged 8 years who at the time of sexual intercourse was incapable of consenting to sexual intercourse knowing that she had not consented to sexual intercourse due to the incapacity or realising that there was real risk or possibility that she might be incapable of consenting.

The brief circumstances as discerned from the outline of the State case attached to the application are as follows:

The applicant requested the 8 year old complainant to bring fire to his residence which she did. Thereafter, the applicant is said to have requested the complainant to sweep his dining and bedroom which request the complainant complied with. While she was inside, the applicant followed and took off his trousers and caused complainant to take off her pant. Following which he caused the complainant to lay on top of him and he inserted his male organ in the complainant's female organ. Thereafter he advised complainant not to tell anyone and he sent one Ian Chibi to give her some chips zipnaks.

The complainant who was crying because of pain revealed the ordeal to her father the following day and the matter was reported to the police.

The applicant in his application argued that he is a suitable candidate for bail since he did not commit the offence. The allegations according to the applicant were as a result of bad blood between himself and the complainant's father. He further stated that as a Zimbabwean with no contacts outside he would avail himself for trial. The State opposed the application pointing out that although the applicant is entitled to his right to liberty in the circumstances of this case, it would be prejudicial to the administration of justice to admit him to bail.

The respondent argued that the applicant and complainant are related and that the complainant is aged 8, hence chances of interference and possibly settling a criminal matter domestically are high. The respondent argued there are high chances of direct and indirect interference which would be prejudicial to the administration of justice. The respondent further argued that given the timeous report and confirmation by medical evidence the State case is portrayed as strong and that is likely to induce temptation to abscond and thus jeopardise the interest of administration of justice.

The law is settled in applications for bail pending trial, the court has to seek to strike a balance between the right to liberty as provided for in the Constitution and the interest of administration of justice. Section 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] outlines factors for consideration which among others include:

1. Whether or not the release of applicant on bail will endanger the safety of the public or any person.
2. Whether or not the applicant will stand his trial.
3. Whether or not the applicant will influence or intimidate witnesses.
4. Whether or not the release on bail of the applicant will undermine or jeopardise the proper functioning of the criminal justice system, including the bail system.

The right to liberty can only be withdrawn where there are compelling reasons to withdraw the right. See *Nyamutata Moreblessing v The State* HH 424/18. *S v Jonathan Muala* HH 122/15 and also *S v Last Ncube* HB 136/18. The right to liberty is anchored on the hallmark of the presumption of innocence until proven guilty by a competent court of law. On the other hand the interest of administration of justice is anchored on the societal interest to have a matter prosecuted to its logical conclusion.

In this case, given the applicant is a brother to the complainant's father and that they stay in close proximate the State's fears of having the matter domestically resolved to the

detriment of administration of justice is not far-fetched. Further, the complainant is 8 and prone to both direct and indirect interference. The complainant on the first day of the alleged commission of the offence was told not to report she complied and only reported the following day because of pain. On sighting the applicant she might freeze and be influenced into not disclosing what transpired.

Given the circumstances of how the allegations occurred and surfaced the chances of conviction are high as the State case appears strong. Upon considering the seriousness of the offence coupled with the strength of the case the chances of abscondment are high. Moreso given in the event of conviction lengthy imprisonment is called for. When there is likelihood of abscondment occasioned by temptation to flee given the gravity of the offence and likely sentence and the high risk of interference then it would not be in the interest of justice to admit the applicant to bail.

In this case there are compelling reasons militating against admission of the applicant to bail. Accordingly, it is ordered that:

The Application be and is hereby dismissed.

Pundu and Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners