

GODFREY CHOWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 30 May 2019 and 13 June 2019

Bail Pending Trial

K Manyengawana, for the applicant
Mrs J Matsikidze, for the State

MWAYERA J: This is an application for bail pending appeal. The applicant was arraigned before the Regional Court Rusape facing allegations of rape as defined in s 65 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The applicant denied the allegation but was convicted after trial and held liable for raping a 13 year old juvenile. The applicant was sentenced to 18 years imprisonment of which 3 years imprisonment were suspended on usual conditions of good behaviour.

Dissatisfied by the court's findings the applicant filed a notice of appeal against both conviction and sentence. Pending the hearing of the appeal the applicant has approached this court seeking to be admitted to bail. The respondent is opposed to the application.

It is settled that in an application for bail pending appeal the main consideration is whether there are prospects of success on appeal. This factor is considered in conjunction with the likelihood of abscondment in light of the gravity of the offence and the sentence imposed, the likely delay before the appeal is heard and the right of an individual's liberty see *S v Dzawo* 1998 (2) ZLR 536, *S v Makamure* HH 103/10, *Moffat Mugwira v The State* HH 216/10.

The trial court convicted the applicant, a stepfather to the complainant of rape. The court relied on the evidence of the complainant whom the court held as credible and having no motivation to fabricate against the accused. The complainant was abused on 26 July 2018 and threatened with death if she reported. When she was threatened with further intended abuse on 30 July 2018 she fled to an aunt's place and then disclosed her ordeal to her grandmother. The complainant on earlier occasions complained of sexual abuses of being "fingered" by accused on her private parts and reported to her mother who was indifferent and preferred the

complainant dealt with the matter with the accused. The court *a quo* also considered evidence of the recipient of report Nelia Mutsago. The witness' evidence further vouched the complainant's credibility. The court also relied on the medical evidence which was conclusive on penetration. The court was alive to the defence of alibi raised by the applicant at trial. He said he was with his wife. It is settled where the defence of alibi is raised the accused should disclose all details for investigations and that once the defence is raised the state has the onus to disprove. The stage at which the defence is raised is important. In this case as conceded by applicant's counsel the defence was only raised at trial. The police could not have investigated without information. However, when the applicant raised the defence he pointed out that he went to Rusape with his wife. The wife testified in court and the trial court did not hold her as a credible witness. In any event the witness and the applicant went back home, placing the applicant at the scene of crime. The other defence witness who testified Viola Makuwaza gave incredible stories suggesting other possible perpetrators which version was rejected by the trial court. It is on this backdrop of evidence that the trial court made its findings on credibility of the state witness and complainant. Such a finding in these circumstances appears unshakable. The complainant dependant on the stepfather for her livelihood and looked up to him as a father. Even as she testified she referred to him as father. The finding on credibility of complainant which the applicant seeks to impugn seem unshakable. It is therefore highly unlikely that an appeal court will interfere with the findings on credibility by the trial court. See *S v Soko* SC 118/92, *S v Mlambo* 1994 (2) ZLR 410.

There are no prospects of success on appeal and indeed no positive grounds to grant bail. The applicant's counsel rightly conceded that the sentence imposed if the conviction is proper is in sync with other cases of similar nature. He correctly referred the court to the case of *S v Banda* 2002 (1) ZLR 156 which make it clear that for rape of juveniles an effective prison term of not less than 10 years is appropriate. In the present case given the fact that the findings of the court *a quo* on credibility appear unshakable, there are no prospects of success on appeal. The likelihood of abscondment cannot be farfetched given the serious offence for which the applicant is a convict. Further as an inducement to abscondment is the lengthy imprisonment term and that the applicant has already tasted the rigours of prison. The right to individual liberty cannot on its own stand in the way of the interests of administration of justice as clearly there are no positive grounds for granting bail in the absence of prospects of success on appeal. See *S v Tengende and Others* 1981 ZLR 445.

In the circumstances, the conviction seems unassailable and the sentence is appropriate such that the appeal court is unlikely to interfere with both conviction and sentence.

The application for bail pending appeal is accordingly dismissed.

Chiwanza & Partners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners