POLITE ZIMUNYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 18 July 2019 and 1 August 2019

Bail Application

M Mareanadzo, for the applicant
Ms *T. L Katsiru,* for the respondent

MWAYERA J: The applicant was arrested and arraigned before the magistrate court on a charge of rape. He was detained in custody and has approached this court seeking for bail pending trial.

It is alleged that the applicant took advantage of the complainant's mental disorder condition and had sexual intercourse with the complainant without her consent or realising that the complainant might not consent. Thus the applicant was charged with Rape as Defined in s 65 of the criminal law (Codification and Reform) Act [*Chapter 9:23*].

The bail application is opposed. The respondent counsel argued that admission of the applicant to bail would be prejudicial to the interests of administration of justice. The state's contention being that given the seriousness of the offence and the likely sentence the applicant would not stand trial but abscond. Further the respondent argued that considering that the complainant is mentally challenged the applicant would jeopardise the interests of administration of justice by direct and indirect interference.

The applicant on the other hand argued that applicant was a suitable candidate for bail. The allegations though serious would not cause the applicant to abscond since he is eager to stand trial and prove his innocence. The applicant's defence being that the complainant is his girlfriend and that she is mentally sound. The applicant's argument is that they had consensual sexual intercourse and that he was being prosecuted for impregnating his girlfriend. The applicant was prepared to relocate to an alternative address to alley the state's fears of interference and was willing to abide by bail conditions deemed necessary.

In applications of this nature the court has to strike a balance between the applicant's right to his individual liberty as provided for in the Zimbabwean Constitution and the interests of administration of justice. The applicant is presumed innocent till proven guilty by a competent court of law and such an applicant is entitled to bail as a matter of right unless there are compelling reasons why such applicant ought not to be admitted to bail. Section 50 of the constitution is instructive. See *State v Felody Minsaka* HB 55-16.

In other words were the interests of administration of justice anchored on the societal interest to have matters prosecuted to their logical conclusion is not at risk the applicant should not be denied bail. In circumstances where bail conditions are decisive and ensure the enjoyment of both the right to liberty and interests of administration of justice then the court should lean more in favour of granting bail. The factors which fall for consideration have to be cumulatively considered so as to come up with an informed and appropriate decision. The factors that fall for consideration include (but are not limited) the following:

1. The nature of allegations.
2. The strength of the state case.
3. The likely sentence in the event of conviction of the applicant.
4. The nature of defence of the applicant.
5. The risk of abscondment.
6. The risk of interference with witness
7. The risk of committing further offences on bail.
8. The individual personal circumstances.

It is important to note that the seriousness of the offence on its own is not good enough to deny an applicant who will stand trial bail. In this case the applicant's defence is that had consensual intercourse with the applicant and that the applicant is mentally stable. He is just being charged for impregnating his girlfriend. The applicant is prepared to relocate to a place out of town in Nyazura to avoid direct conduct with the complainant so as to minimise dangers interference. The applicant is also prepared to report regularly at the police station so as to minimise the risk of abscondment. In fact when he was advised that the police were looking for him the applicant surrendered himself to police. This is an indication of not having an inclination to abscond. MAKONESE J made pertinent remarks in *S v Sibanda* HH 11-19 when he stated:

> "In this matter there are no compelling reasons to deny bail pending trial. All applicants are of fixed abode. The interests of justice will not be compromised if the applicants are granted bail. The possibility of abscondment is not a real possibility as there is no evidence at all placed before the court indicating the applicants have an inclination or propensity to abscond. The state may not rely on speculation and conjecture as grounds for opposing bail."

The remarks aptly apply with force in the present case when one considers that the applicant surrendered himself to the police. That conduct is not consistent with likelihood of abscondment. Further state's fears of interference and abscondment can be cured by conditions. In fact the state fears of interference are quite speculative as they are based on the complainant's mother having gone to court in the company of the accused's mother. These people are neighbours who stay in the same high density suburb and their connection on approach to court by the two mothers cannot be imputed to be interference by the accused. The state's fears in this case are not ones which appropriate bail conditions cannot guarantee.

This is a matter where there are no militating or compelling grounds warranting denial of bail to the applicant.

Accordingly the applicant is admitted to bail.

It is ordered that:

Applicant be and is hereby admitted to bail on the following conditions:

1. He deposits $200-00 with the Clerk of Court Mutare magistrates Court.
2. He resides at Harmat Farm Claire Primary School, Nyazura until the matter is finalised.
3. He reports at Nyazura Police Station once every week on Fridays between 6:00am and 6:00pm.
4. H does not interfere with any state witnesses including the complainant and does not interfere with investigations.

Mvere Chikamhi Mareanadzo, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners