NQOBANI MASUKU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 23 DECEMBER 2022 & 19 JANUARY 2023

Bail application pending appeal

Adv. G. Nyoni, for the applicant
B. Gundani, for the respondent

DUBE-BANDA J:

1. This is a bail application pending appeal. The applicant was arraigned before the Regional Court sitting in Bulawayo. He was charged with the crime of rape as defined in section 65 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He was convicted and sentenced to 15 years imprisonment of which 3 years were suspended for 5 years on conditions of good behaviour. Aggrieved by both conviction and sentence the appellant noted an appeal to this court, and such appeal is pending under cover of case number HCA 151/22.

2. The applicant contends that he has prospects of success on appeal, and that the appeal is free from predictable failure. In support of this contention the applicant submits that the complainant herself stated that she consented to sexual intercourse, although she explained that she did so because she was afraid her brother would die. Adv. *Nyoni* counsel for the applicant argued that the complainant only knew and understood the applicant to have the power of prayer. He could pray for someone to get healed, and that was all. The applicant was not understood to have the power to cause harm to anyone. Counsel submitted that it was not alleged that the applicant claimed to have the power to cause death or harm to befall the complainant's brother.

3. Counsel submitted further that in the absence of any assertion that the applicant could cause harm to the complainant's brother the notion of fear of any harm to the brother if she did not accede to the applicant's desires was entirely ridiculous and unrealistic. Counsel referred to paragraph 6 of the State Outline which says "the complainant's brother got sick and the accused person asked the complainant to have sexual intercourse with him so that her brother will not die and the complainant consented to the act to save his brother's life." Counsel argued that as long as it was alleged that the complainant consented to sexual intercourse, there was no case for the applicant to answer. Counsel argued that the bottom line is that the complainant from her own mouth she said she consented to sexual intercourse.

4. Mr *Nyoni* argued that the complainant's conduct was consistent with her consenting. It was submitted that she was told to tell the children to go to their parent's bedroom, thereby leaving the two in privacy, she did exactly that. From there she went to the other bedroom and sat on the bed, waiting for the applicant to join her. She observed the applicant engage in acts which were in preparation for a sexual act; the applicant pushed her and lifted her skirt and removed her pantie. It is said she did not resist or protest, she remained quiet. The applicant then removed a condom from his pocket, and wore it. Thereafter he lay on top of her and commenced to insert his organ into hers. Counsel submitted that it was clear that at all material times, the complainant knew and perceived that what was to take place between her and the applicant was sexual intercourse. She neither resisted by word nor by actions.

5. Adv. *Nyoni* submitted that it was common cause that the complainant screamed, and that as a result of the scream her brother's son Emmanuel Sibanda went and pushed the door and got into the bedroom and found the applicant on top of the complainant. Counsel argued that the complainant screamed not because she was being raped, but that she felt pain. Counsel submitted further that the evidence of Emmanuel Sibanda was common cause and neutral and he was not a star witness as found by the trial court. Counsel argued that the applicant's prospects of success on appeal are quite bright as against both conviction and sentence.

6. Counsel conceded that the sentence meted out to the applicant is quite long, however argued that there was nothing to suggest that if admitted to bail, and the appeal fails he will abscond and not serve his sentence. Counsel submitted that the applicant is a good candidate for bail pending appeal.

7. This bail application is not opposed. Mr *Gundani* counsel for the respondent submitted that the appeal has prospects of success. Counsel submitted further that a reading of the trial court's judgment shows that the conviction was anchored on the premise that the applicant's legal practitioner failed to cross examine Emmanuel Sibanda, whom it described as a star witness. Counsel argued that the evidence of Emmanuel Sibanda was not material to the case, as the complainant said she screamed out of pain not that she was being raped. She did not scream for help. The trial court is said to have misinterpreted the evidence of screaming.

8. Mr *Gundani* argued further that the report was not made timeously in the circumstances, and was only made after a year. Counsel submitted that the reason the complainant moved out of her brother's house had nothing to do with the allegations of rape. Counsel argued that the evidence does not support the conviction.

9. In *Gumbura v The State* SC 78/14 the court said the test to be applied in this regard is relatively uncomplicated: Is the appeal "reasonably arguable and not manifestly doomed to failure"? See *State* v *Hudson* 1996 (1) SACR 431 (W). As was highlighted in *Manyange* v *The State* HH 1-2003, there is a clear distinction between the principles governing the grant of bail pending trial and those relating to bail pending appeal. In the former situation, the presumption of innocence, which resides within the constitutionally guaranteed right to liberty, operates in favour of granting bail unless there are positive reasons for refusal. In the latter situation, on the other hand, the presumption of innocence is inoperative because the accused is a convicted and sentenced offender. The accused must go further than showing that he has prospects of success on appeal. He must establish that there are positive grounds for granting bail and that the grant will not endanger the interests of justice. In this regard, the public

perception is an integral factor to be taken into account. Where the grant of bail would result in a public outcry, the courts should be slow to grant bail in order to safeguard the integrity of the justice delivery system.

10. The gist of the evidence shows that the complainant considered the applicant her pastor and she respected him. She was loyal to him. She testified that she once fell ill and the applicant prayed for her and she got healed. The complainant liked her brother. The applicant asked the complainant whether she could do anything for her brother, and she agreed that she could do anything for him because she loved him. The brother fell ill and the applicant said complainant must do something to save her brother. She believed she could lose her brother as stated by the applicant, because he was a prophet and "knew everything." That "something" turned up to be sexual intercourse. The applicant then had sexual intercourse with the complainant, and warned her not to tell anyone and if she did so she could lose her brother and something could happen to her. She agreed to sexual intercourse because the applicant had told her that if she refused she would lose her brother and something could happen to her. She did not report the matter for a year because she was afraid of losing her brother or something happening to her.

11. In this case the trial court found that the complaint was a credible witness. That she had sexual intercourse with the applicant to save her brother's life. And that in the circumstances of this case the report was voluntarily made, and that the delaying in making it was satisfactorily explained. It rejected the testimony of the applicant and described him as a dishonest witness.

12. In *Gumbura v The State* SC 78/14 the court said as regards the credibility of witnesses, the general rule is that an appellate court should ordinarily be slow to disturb findings which depend on credibility. However, a court of appeal will interfere where such findings are plainly wrong. Thus, the advantages which a trial court enjoys should not be overemphasised. Moreover, findings of credibility must be considered in the light of proven facts and probabilities. See: *Santam BPK* v *Biddulph* (2004) 2 All SA 23 (SCA); *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S); *S v Mupande and 2*

Others SC 58 of 2019. I am not persuaded that any of the trial court's critical findings of credibility can be said to be manifestly wrong in light of the proven facts and probabilities of this case.

13. Admittedly the trial court erroneously misinterpreted the evidence of screaming and the evidence of Emmanuel Sibanda. The complainant did not scream because she was resisting. She screamed because of the pain. Again I agree with Mr *Nyoni* that the evidence of Emmanuel Sibanda was neutral. I say so because it is a common cause fact that the accused had sexual intercourse with the complainant, and that Emmanuel Sibanda opened the bedroom door and saw the applicant mounting the complainant. However there is evidence outside the erroneous interpretation that supports the conviction of the applicant. The misdirection does not go to the root of the matter and has no bearing on the conviction.

14. The issue is whether the complainant's consent was vitiated in terms of the provisions of section 96 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], i.e. whether the applicant used unlawful pressure to induce the complainant to submit to the act of sexual intercourse. The trial court accepted that she had sexual intercourse to save the life of his brother, which implies that the applicant used tricks to secure complainant's "consent" to sexual intercourse. Her consent amounts to submission under coercive circumstances. This finding appears to be consistent with the proven facts and probabilities of this case.

15. The words of Patel JA (as he then was) in *Gumbura v The State* SC 78/14 are instructive. The learned Judge of Appeal said:

> As was eloquently observed by Justice Douglas in *United States* v *Ballard* 322 US 78 (1944) – quoted by both of the courts below – religious doctrines and beliefs cannot be subjected to the rigours of legal proof. I would take this sentiment further to opine, in the circumstances presented by this case, that the quasi-mystical force of religious dogma might overwhelm its conscripts and devotees to the point where it operates to vitiate and negate any meaningful consent to sexual abuse and exploitation by their spiritual masters.

> Taking a broad conspectus of the facts and probabilities *in casu*, it appears to me that the complainants, having been enmeshed within the overpowering cocoon woven by the appellant, unwittingly succumbed to his sexual advances and predations. Thereafter, constrained by fear and misconception, they remained taciturn for several years and only reported their respective ordeals after appreciating the full nature of their sexual bondage.

16. I take the view that the words of Patel JA (as he then was) apply with equal force in this case.

17. The applicant tricked the complainant to secure her submission to sexual intercourse. She believed the applicant was a prophet and possessed spiritual powers, and that if she did not submit to sexual intercourse something bad will happen to her and her brother. She believed that by having submitted to sexual intercourse with the applicant she served her brother's life. This is the type of consent that is targeted to be vitiated by section 96.

18. I do not agree that the applicant has proffered any positive grounds for allowing him to proceed on bail. Moreover, he has failed to satisfactorily demonstrate his prospects of success on appeal. There is nothing else to commend his right to liberty. In light of the proven facts and probabilities of this case, I take the view that none of the grounds of appeal raised in this case are sustainable.

19. The respondent's concession is anchored on issues that are not germane to this case. Minus the trial court's erroneous misinterpretation of the evidence of screaming and the evidence of Emmanuel Sibanda there appears that there is evidence that supports the guilt of the applicant. I take the view that the concession was not properly taken.

20. The applicant has been convicted and received a heavy sentence. The possibility of absconding is always a very real danger in cases where long terms of imprisonment have been imposed. The prospect of a protracted prison term, coupled with his fresh experience of post-trial incarceration, affords abundant incentive for him to abscond.

At this stage the presumption of innocence no longer operate in favour of the applicant. The cumulative effect of these facts constitute a weighty indication that bail should not be granted.

21. In all the circumstances, I am amply satisfied that the appellant is not a good candidate for bail.

In the result, I order as follows:

The application for bail pending appeal be is and hereby dismissed.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
National Prosecution Authority, respondent's legal practitioners