

FORBES SIGUDHU

versus

THE STATE

HIGH COURT OF ZIMBABWE

ZHOU J

HARARE, 23 & 28 September 2016

### **Bail application**

*W. Chishiri*, for the applicant

*F. I Nyahuzvi*, for the respondent

ZHOU J: On 29 June 2016 the applicant was convicted by the Magistrates' Court at Harare of one count of aggravated indecent assault as defined in s 66 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 10 years imprisonment of which 3 years imprisonment were suspended for 5 years on condition that within that period he does not commit any offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine. The applicant noted an appeal to this court against both the conviction and sentence on 5 July 2016. That appeal is still pending.

The applicant has now approached this court seeking admission to bail pending the determination of his appeal. The application is opposed by the respondent.

In an application for bail after conviction and sentence the applicant must show positive grounds for him to be allowed to prosecute his appeal while out of jail. The presumption of innocence no longer applies to him since he has already been convicted. In considering whether such positive grounds exist the court will consider the prospect of success of the appeal and weigh that factor against other factors such as the seriousness of the offence, the period of imprisonment imposed and the likely delay in the hearing of the appeal as well as the need to uphold the liberty of the applicant where that can be done without jeopardising the administration of justice.

In the present case the Magistrates' Court found that on 29 May 2016 at Number 10711 Phase 2, Eastview, Harare, the applicant unlawfully and with indecent intent inserted his fingers into the sex organ of the complainant who is a female person without her consent.

The applicant's defence was that he never touched the complainant. He claimed that he was in a relationship with her. His defence was correctly rejected by the learned

Magistrate as the complainant's evidence was supported by two witnesses who saw the applicant when he was holding the complainant and struggling with her. At the hearing of the present application the applicant's counsel submitted that the applicant is not challenging the conviction for indecent assault, but the finding that it was perpetrated in aggravating circumstances. The grounds of appeal are a complete abandonment of his defence.

The question of whether it was just a case of indecent assault or one of aggravated indecent assault is for the appellate court to determine. The distinction only has a bearing on the sentence that may be imposed. On the evidence which was placed before the Magistrates Court that Court accepted the complainant's evidence that the applicant inserted his fingers into her being. I do not find any misdirection to justify the assertion that the appeal has prospects of success. Two independent witnesses saw him as he struggled with the complainant who was calling out for help. He, through his counsel, now seems to accept that he was holding the complainant. He does not explain why he was doing that.

The appeal against conviction clearly has no prospect of success. Further, the sentence imposed is quite severe, and would induce the applicant to abscond if he was admitted to bail at this stage. The applicant is aware of the seriousness of the case.

Accordingly, the application is without merit. It is dismissed.

*Rubaya & Chatambudza, applicant's legal practitioners*  
*National Prosecuting Authority, respondent's legal practitioners*