MUNYARADZI KEREKE
versus
FRANCIS MARAMWIDZE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 27 September & 7 October 2016

Bail Pending Appeal

T. Mpofu, with him *S. M. Hashiti*, for the applicant
C. Warara, with him *R. Wenyeve*, for the respondent

ZHOU J: The applicant was convicted by the Magistrates Court at Harare of the offence of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The conviction was pursuant to a private prosecution instituted by the respondent after the Prosecutor-General had declined to prosecute the applicant. Following the conviction, the applicant was sentenced to fourteen years imprisonment of which four years imprisonment were suspended for five years on condition that within that period the applicant does not commit any offence of a sexual nature and for which upon conviction he is sentenced to imprisonment without the option of a fine. That left him with an effective sentence of ten years imprisonment. The sentence was passed on 11 July 2016. On 21 July 2016 the applicant noted an appeal to this court against both the conviction and sentence. That appeal is yet to be determined. He has now approached this court seeking admission to bail pending the determination of his appeal. The application is opposed by the respondent.

At the commencement of the trial in the Magistrates Court the applicant was facing one count of indecent assault and one count of rape. He was acquitted on the indecent assault charge.

The factual allegations which underpinned the rape charge were that at 0300 hours on 22 August 2010 and at Number 11 Tavey Road, Vainona, Harare, the applicant unlawfully had

sexual intercourse with the complainant, an eleven year old girl, without her consent knowing that she had not consented to it or realizing that there was a real risk or possibility that she might not have consented to it. The complainant was the daughter of the brother of the applicant's wife. The applicant was therefore the husband of the complainant's paternal aunt.

In the summary of the prosecution's case it is alleged that on the date in question the complainant's aunt, Patience Muswapadare, who is customarily married to the applicant woke up the complainant and asked her to mind the baby while she was preparing food for the applicant. The complainant went to the bedroom where the baby was. The baby fell asleep. The complainant then decided to sit on a couch in the bedroom. The applicant is said to have entered the bedroom and sat on the same couch as the complainant. He then started to fondle the complainant while simultaneously kissing her. The complainant tried without success to push the applicant away. She was overpowered by the applicant who then produced a firearm which he pointed at her and ordered her to comply with his orders. He pulled up the complainant's dress and pulled her underwear down. He went on to remove his trousers and pulled down his underwear, mounted her, and had sexual intercourse with her once without her consent. During the intercourse footsteps were heard whereupon the applicant stopped the sexual assault upon the complainant. Upon realizing that there was no person who had entered the room the applicant attempted to resume the assault, but the complainant managed to free herself and put on her underwear. She then went to her bedroom. Later in the day the complainant told her elder sister that the applicant had fondled her breasts. On 30 October the complainant told one Ndinatsei Maramwidze that the applicant had made sexual advances to her. Ndinatsei Maramwidze in turn told her father-in-law and mother-in-law about what the complainant had said. A report was made to the police.

In his defence outline the applicant denied the allegations made against him *in toto*. The complainant's case as pleaded in the defence outline was that the allegations had been contrived by the respondent in order to exert pressure upon the applicant to pay the complainant's school fees. According to him the case had been manipulated by his political adversaries and "business enemies". He stated that on the date and at the time alleged he was not at the Vainona residence where the rape was alleged to have taken place, but was at Number 75 Wallis Road, Mandara,

also in Harare. He also stated that he no longer had a firearm on that date as he had returned it to his former employer, the Reserve Bank of Zimbabwe, on 14 June 2010.

Bail pending appeal is a procedure by which a person who has been convicted and sentenced to an imprisonment term can petition the court to allow him to enjoy his liberty while he or she awaits the prosecution of the appeal noted against the conviction and/or sentence. The principles applicable to an application for bail pending appeal are settled in this jurisdiction. They differ significantly from those which apply where admission to bail is sought pending trial. That distinction is apposite given the fact that where bail is sought after conviction and sentence the presumption of innocence which is encapsulated in s 70(1) (a) of the Constitution of Zimbabwe no longer applies. Also, s 50 (1) (d) which gives an arrested and detained person the right "to be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention", equally has no application. In the case of *S* v *Tengende* 1981 ZLR 445(S) at 448, BARON JA said:

> "But bail pending appeal involves a new and important factor; the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused."

See also *S* v *Labuschagne* 2003 (1) ZLR 644(S) at 649A-B; *S* v *Williams* 1980 ZLR 466 (AD).

In *S* v *Dzvairo* 2006 (1) ZLR 45 (H) at 60E-61A, PATEL J (as he then was) elegantly unpacks the above principles in the following terms:

> "Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospect of success is weak, the

> length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail."

See *S* v *Williams* (*supra*) at p. 468F.

Although the judgments referred to above were given prior to the advent of the 2013 Constitution of Zimbabwe, the fact that the principles in those judgments have not been recast or given any new dimension by the Constitution validates them. They have stood the test of time, and enjoy recognition by the new Constitution. The effect of those principles is to place the onus squarely on the applicant to establish positive grounds upon which the court should suspend the operation of the sentence imposed upon him pending determination of his appeal. The application entails inviting the court to restore to the applicant a right to liberty that has been taken away in accordance with the due process of the law while the decision by which that liberty was taken away is still extant in the sense that it has not been set aside. The court is therefore enjoined to strike a balance between the competing considerations, namely, the liberty of the convicted person and the need to ensure that the administration of justice is not endangered.

As regards the prospects of success of the appeal, this court has held that what is required is to show that the appeal has substance in the sense that it is not a predictable failure. There are many features of the evidence led on behalf of the prosecution which are evidently unsatisfactory and cause some anxiety to this court. Questions abound as regards the circumstances in which the offence was committed. The first aspect pertains to the inconsistencies in the complainant's description of the events of the day in question. In one instance she states that the offence was committed around 0300 hour; in another statement she states that it was around 1930 hours. In the summary of the case for the prosecution and in her evidence-in-chief the time is stated as around 0300 hours. In one statement she states that the accused pointed the firearm at her before he started fondling her breasts and kissing her. In the summary of the prosecution's case and in her evidence-in-chief the fondling of the complainant and kissing came prior to the production of the firearm. In her evidence-in-chief in court the complainant stated that the applicant came around 0300 hours. She also stated that the applicant started fondling her before he produced a firearm and ordered her to comply with his orders. He then raped her. After the rape she left the

room and went into the room where she was supposed to sleep. Her grandmother was in that room. She slept. Nothing is said about the assignment to look after the baby which had been interrupted by the rape. The door to the room in which the rape took place was not closed. There were persons in the house apart from the complainant and the applicant. Although the complainant states that she tried to scream but had her mouth closed by the applicant it is inconceivable how she could not be heard by the other persons in the house. Also, the complainant stated in her evidence in chief that she told her sister Tinashe about the rape on the Sunday morning but told her not to tell anyone. Why would she give an instruction to her sister not to tell other persons about the sexual assault after she had confided in her? In the summary of the prosecution's case it is stated that the complainant told her sister, Tinashe Taruvinga, that the applicant had fondled her breasts. There is no suggestion that she mentioned the rape to her sister. In the same summary it is stated that on 30 October the complainant told Ndanatsei Maramwidze that the applicant had made sexual advances to her. Again she did not mention the rape according to that summary. Her reason for that instruction was that she did not want people to know about it because she was not comfortable. But then she states that she herself subsequently told her aunt, Sally Ndanatsei Maramwidze about the sexual assault. In one of the statements which was referred to during her cross-examination it was shown that she had told the police that the applicant had raped her twice, and not once as she had stated in her evidence in chief. During cross-examination the complainant stated that the applicant merely produce a firearm but did not point it at her. That contradicts her evidence in chief and the statement given to the police that the firearm was pointed at her.

The Learned Magistrate considered the inconsistencies in the complainant's evidence and attributed them to the fact that she was a child. That is not an unsound proposition. That, however, is a matter that is better left to the appellate court. On the issue of the door to the room in which the sexual assault took place being open the Magistrate accepted the explanation by the complainant that what she meant was that the door was not locked. The Magistrate rejected the applicant's version that he had returned the gun prior to the date that the offence was committed. Evidence which contradicted that of the applicant was accepted. He also rejected the applicant's claim that the allegations of rape had been created by his political and business nemeses. The totality of the evidence shows that indeed the applicant sought to manipulate the evidence,

especially in relation to the return of the firearm, in order to suit his version of events. After weighing the evidence of the prosecution against that of the defence, the Magistrate accepted the prosecution's evidence, and thus convicted the applicant of the offence of rape.

The court has no difficulty in accepting as justified some of the criticisms by the applicant of the evidence of the complainant. If the question of the prospects of success of the appeal was to be considered by reference to the complainant's statements alone or was the only consideration in this matter the court would have readily granted the application. However, the evidence of the complainant has to be considered in its totality and not piecemeal or in isolation from the rest of the evidence, including that of the accused person. That is the approach that was taken by the Learned Magistrate. Also, as pointed out above, the prospect of success of the appeal is only one of the factors. It is not decisive on its own, but has to be weighed against the other factors in order to come up with a decision that does not jeopardize the administration of justice. Put in other words, the prospect of success of the appeal does not on its own always constitute a positive ground justifying admission to bail after conviction and sentence.

In the instant case the offence which the applicant was convicted of is a very serious one. The sentence imposed is quite long. The length of the sentence, coupled with the fact that the applicant has already been subjected to the inconveniences of prison life are factors which would induce the applicant to abscond. His conduct which was found by the Learned Magistrate to have been disruptive of the investigations and, in some instances, seeking to manipulate the evidence of potential state witnesses makes his assurances that he will avail himself to complete his sentence if the appeal fails difficult to believe. Thus, while there is no direct evidence that the applicant will abscond, it would be an improper exercise of the court's discretion to ignore the expressed skepticism of the Learned Magistrate regarding innocence of the applicant in the events which ultimately resulted in a delay in the prosecution of the case. The applicant was also not forthcoming as to the immovable properties which he has which could be available as security. There was a suggestion that they were encumbered save for an undivided share in a movable property the full particulars whereof were not given either in the draft order or in the submissions made on behalf of the applicant. This court has also noted that the applicant has been very equivocal about the address stated in the draft order. The evidence on record shows that he did not necessarily have one residential address. In denying the charge of rape he stated

that he was at an address in Mandara. Nothing is said about what became of that residence. Indeed, nothing is also said about the Vainona address at which the offence was committed. It is difficult to ascribe one residential address to the applicant even in the face of his assurance that he used to reside in rented accommodation. That is so because he did not have one residential address, according to the facts highlighted above.

The court has also considered that the record of proceedings is now ready. The preparation of the record is one factor that would usually contribute to the delay in the setting down or hearing of an appeal. Since that record has been transcribed the applicant should seek to expedite the determination of his appeal.

In all the circumstances, this is a matter in which notwithstanding some unsatisfactory features of the evidence upon which the conviction was predicated the court is of the view that the admission of the applicant to bail at this stage would undermine the administration of justice. The applicant has not shown positive grounds for this court to reach a different conclusion. His right to personal liberty must therefore yield to the need to uphold the proper administration of justice.

In the result, the application for bail pending appeal is dismissed.

Mutandiro Chitsanga & Associates, applicant's legal practitioners
Warara & Associates, respondent's legal practitioners