ELLINGTON MANINGI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 25 March & 7 July 2022

Bail Pending Appeal

N T Tsarwe, for the appellant
Ms *K H Kunaka,* for the State

MUTEVEDZI J: This is an application for bail pending appeal in terms of s 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (herein after the Code).

The background of the case is that on 14 October 2021, the applicant was charged with the crime of having sexual intercourse with a young person as defined in s 70 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (herein after the Criminal Law Code). He was convicted on his own plea of guilty. The court a *quo* sentenced him to 24 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition of future good behavior. He was left to serve an effective 18 months imprisonment. Aggrieved by that sentence, the applicant noted an appeal against it to this court on 24 November 2021. The notice was apparently defective. The defects were noted well after the time within which the appeal was required to be noted had already lapsed. The applicant therefore had to apply to have his non-compliance with the rules of court pardoned. The condonation was granted and applicant was allowed to note his appeal. That paved the way for him to file the current application for bail pending appeal.

I heard the application on 16 March 2022 and dismissed it on the sole ground that the trial court had not misdirected itself in the sentence it passed. The applicant therefore had no prospects of success on appeal. Later on I was requested to provide the detailed reasons for my decision. I proceed to give them below.

Despite having been convicted in the Magistrates' Court, it is trite that by virtue of s 123 (1) of the Code, the applicant can seek bail pending appeal from this court.

The applicant grounded his application on three main considerations, namely that:

1. His appeal enjoys prospects of success
2. There is no risk that if he is admitted to bail, he will abscond and
3. There are delays associated with hearing of appeals hence if not admitted to bail the appeal would be for academic purposes

Prosecution opposed the application. They argued that the appeal does not enjoy any prospects of success. Sentencing is the province of a trial court and appellate courts may only interfere with a sentence where the trial court has clearly misdirected itself. In this case so the prosecutor argued, the trial magistrate adequately justified why she resorted to a custodial sentence. Further the state agreed with the observation by counsel for applicant that the consideration of risk of abscondment goes hand in hand with the question of prospects of success. Regarding the ground of likely delay in the hearing of the appeal the state was of the view that no such delay will ensue because currently there is no backlog of appeals in the High Court.

The Law

The law regulating applications for bail pending appeal is banal in this jurisdiction. Authorities which explain the considerations abound. These range from the latter-day ones such as *S* v *Tengende and Others* 1981 ZLR 445 (SC) *Chivhango* v *The State* SC 94/05 and the more recent ones like S v *Chikumba 2015(2) ZLR* 382 (H). Bail pending appeal is different from bail pending trial. As such the considerations are also bound to vary. What is noteworthy is that in an application for bail pending appeal the presumption of innocence which the applicant enjoyed before conviction is taken away. He stands convicted and must be viewed as such until and unless his appeal against the conviction succeeds. The situation is dire in instances such as in this case where the conviction is not being challenged. In addition the right to bail conferred by s 50 of the Constitution of Zimbabwe, 2013 equally doesn't apply. The applicant must therefore rely on the benevolence of the court in the exercise of its discretion to restore his liberty whilst he awaits the determination of his appeal. It is the reason why an applicant is obligated to put before the court cogent reasons why it would be in the interests of justice that he be released on bail. As commanded by law, the court must exercise the discretion to grant or not to grant the applicant bail judiciously. To achieve that end, the court must be guided by the following:

a) the prospects of success on appeal and
b) whether there is risk that if admitted to bail, the applicant would abscond.

Prospects of success

The threshold in relation to this aspect is relatively lower than has been erroneously suggested in some quarters. I am not required to satisfy myself that the applicant stands absolutely no chance to succeed on appeal or that his appeal is ill- fated and condemned to fail. All he must show is that he stands a chance to succeed on appeal. In other words he should only convince the court that he has a fighting opportunity. See *S* v *Chikumba (supra*). Once he establishes the existence of prospects of success, the court must lean in favour of admitting applicant to bail unless other factors militate against his release. Conversely, where he fails to convince the court of the existence of that fighting chance on appeal, the applicant's chances of being admitted to bail at best dwindle and at worst are non-existent. Clearly therefore the prospects of success appears to be the most dominant consideration as all the others are contingent on it.

Application of the law to the facts

In the instant case, the applicant's grounds of appeal become the focal point. They are stated in his notice of appeal as:

AD SENTENCE

1. The court a quo erred and misdirected itself at law in failing to properly consider the suitability of a community service order where it imposed a sentence which is effectively less than 24 months imprisonment
2. The court a quo erred and grossly misdirected itself on points of fact in failing to appreciate or consider the following mitigatory factors:
   a. The high moral blameworthiness of the complainant considering the circumstances surrounding the commission of the offence;
   b. That complainant was close to the age of 16 years; and
   c. That appellant is a first offender who pleaded guilty to the offence
3. Consequently, the court a quo grossly erred at law by failing to consider the above mitigating factors and imposed a sentence which is grossly excessive so as to induce a sense of shock
4. The court a quo erred and misdirected itself on a point of law by failing to gather sufficient presentencing information to establish whether the appellant *bona fide* believed complainant to be capable of consenting to sexual intercourse.

An analysis of the grounds will show that the major contention is ground number one where it is submitted that the court *a quo* failed to consider the imposition of community service. Grounds 2 and 3 appear to be submissions which support why community service should have been opted for. They cannot, standing alone be regarded as grounds of appeal. Ground 4 is hopeless in that it relates to whether or not the complainant was capable of consenting to sexual intercourse. It is an issue that goes to the conviction of the applicant yet

he is not appealing against conviction. The failure to appeal against conviction is understandable given that he pleaded guilty to the charge. I will therefore deal with the applicant's prospects of success from the basis of the indicated sole ground of appeal.

In her reasons for sentence, the trial magistrate covered the following issues as mitigation:

i. That the applicant was a first offender
ii. That the complainant at the age of 15 years was near the age of consent which is 16 years
iii. That the complainant may have had sexual intercourse prior to the commission of this offence

In aggravation she considered the following:

i. The applicant committed an offence generally regarded as serious
ii. The age difference between the accused and the complainant was so wide that the accused could easily be the complainant's father. With accused at 35 and complainant only 15, the gap was a whopping 20 years.
iii. Accused took advantage of complainant who had gone to his house for assistance

In addition the magistrate drew guidance from decisions of the High Court particularly the case of *S* v *Banda* HH 47/16 which instructed magistrates to have regard to our laws which prescribed extensive protection of children. It urged trial courts not to pay mere lip service to sentences of imprisonment. The Constitution of Zimbabwe, 2013 requires that measures be taken to ensure children are protected from maltreatment, neglect or any form of abuse.

It is against the background of such reasoning that the applicant attacks the trial court's sentence. If that reasoning is juxtaposed against the so-called grounds of appeal and the factors allegedly not considered, the allegations become preposterous. A court is not regarded as having considered factors submitted in mitigation only when it arrives at a sentence which an accused person wished for. As rightly pointed out by the trial magistrate, the fact that the complainant may have been sexually active prior to this offence could not take away the applicant's moral blameworthiness. He had sexual intercourse with a young person who was so under age that she could have easily passed for his daughter.

Sentencing is a largely discretionary process. Appellate courts will not interfere with sentences imposed by trial courts merely on the ground that the appeal court could have passed

a somewhat different sentence from that imposed. If the sentence complies with the relevant principles even where it is more severe than the ones ordinarily passed in similar cases, the appeal court will certify it because it is the discretion of the sentencing court. In the instant case, the magistrate clearly considered the correct principles in imposing the penalty. The purpose of the crime of having sexual intercourse with young persons is to protect the young persons from the savagery of older men. The rationale is that the immaturity of the young girl may drive her to make irrational or even stupid decisions such as agreeing to have sexual intercourse without appreciating the ramifications of her action. Those objectives recognise that in some instances, the girl may even solicit for sexual intercourse. An older man is still expected to say no. In these days where children are exposed to sexual and other explicit material particularly on social media platforms the integrity of mature men to resist abusing young girls must be heightened. It is the reason why the severity of punishment increases in correspondence with the age of the offender. For a mature man of 35 years to have sexual intercourse with a 15 year old and seek to escape responsibility for his inexcusable behaviour by clamouring for community service is being disingenuous. See *S* v *Ivhurinosara* HH353/13.

In the justification of her sentence, the trial magistrate, after explaining the principles of sentencing behind dealing with the offence in question arrived at the conclusion that *"a fine or community service under the circumstances will be too lenient. The accused is 20 years older than the complainant and was supposed to play the role of protecting the minor."* It is clear therefore that the allegation that the trial court did not consider community service was simply throw in to mud the waters. The law does not prescribe that every offence where a sentence of 24 months or less is imposed the court must resort to community service. It is a principle that is not meant to be applied with the rigidity that the applicant seems to suggest. There are instances when community service is simply not the appropriate penalty. The instant case is one such instance particularly given the reasoning of the trial court which cannot be faulted.

It was for the above reason that I was of the view that the applicant will not escape imprisonment in this case. Once that conclusion is made, it follows that even if an appeal court may interfere with the sentence by slightly reducing the prison term the applicant cannot be released on bail.

In the final analysis, there are no prospects that the applicant will succeed in having the prison sentence substituted with a non-custodial punishment of any form. Like I explained earlier in this judgment, it becomes unnecessary for me to debate the other considerations of

risk of abscondment and delay in the hearing of appeals in this court. They are both dependent on the prospects of the applicant's appeal succeeding. They must be viewed as additional thresholds which an applicant must meet where a court finds that he/she has prospects of success on appeal.

Tadiwa and Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners