KELVIN LLYOD SIREWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 16 DECEMBER 2015 & 31 DECEMBER 2015

Bail Pending Appeal

T. Batasara, for the applicant
Ms S. Fero, for the respondent

TAGU J: The applicant was arraigned and convicted after a protracted trial by the Regional Magistrates Court sitting at Harare for contravening section 66 of the Criminal Law) Codification and Reform) Act [*Chapter 9:23*]- Aggravated Indecent assault (1 count). He was sentenced to 12 years imprisonment of which 5 years imprisonment was suspended for 5 years on the usual condition of future good conduct. The applicant was left with an effective prison term of 7 years. He noted an appeal against both conviction and sentence with this Honourable court under case number CA 790/15. The present application is for bail pending the prosecution of the appeal noted above.

The application is opposed by the respondent.

The law governing applications for bail pending appeal is well settled. In *Moffat Mungwira* v *State* HH 216/10 it was restated that

> "As in all applications of this nature, the court has the discretion to grant or decline the relief sought. In exercising that discretion in a case where the application relates to bail pending appeal, the court will be guided by the following principles:
>
> (i) Prospects of success on appeal
> (ii) The livelihood of the accused absconding in light of the gravity of the offence and sentence imposed
> (iii) The likely delay before the appeal is heard

(iv) The right of an individual to liberty"

In *casu*, the counsels for the applicant and for the respondent are in agreement on the principles to be applied which have been enunciated in a number of cases such as *S* v *Dzawo* 1998 (1) ZLR 536; *S* v *Manyange* 2003 (1) ZLR 21 (H); *S* v *Bennet* 1985 (2) ZLR 205 and *S* v *Kilpin* 1978 ZLR 282.

In *Moffat Mungwira* v *State* (*supra)* it was stated that-

> "of the above principles, the most cardinal in an application of this nature is whether the appeal has prospects of success. In this regard, the applicant need not show that the appeal will certainly succeed. Rather all he needs to show is that the appeal is reasonably arguable and that it is not manifestly doomed to fail.".

In my view the applicant has to pass the cardinal point first of showing that he enjoys prospects of success on appeal before dealing with the other principles.

Prospects of success on appeal

Mr *Batasara* submitted that the applicant's appeal has reasonable prospects of success. He argued that the court *a quo* erred and misdirected itself in finding the applicant guilty when the essential elements of the offence of aggravated indecent assault were not proved beyond reasonable doubt. In particular he submitted that the state failed to prove that the applicant penetrated the *anus* of complainant and that the only evidence available is the word of the complainant. Further he submitted that the defence of alibi raised by the accused was not rebutted.

However, Ms *Fero* opposed the application and submitted that the complainant gave a clear, chronological and straight forward narration of what transpired on the day in question. The complainant was called by the applicant whom he knew previously. The complaint was given beer and slept in the same room with applicant and another person known as Simba who is at large. The complainant who had slept with his shorts and pants on dreamt of having sexual intercourse with a woman only to wake up with his pants and shorts down and the applicant was equally undressed. His *anus* was smeared with faecal matter. At that moment he held the applicant's penis. The two quarrelled which quarrel spilled to the second witness, the guard. He reported immediately to the guard one Isaac Hurudza that he had been sodomised and he showed the guard a bucket of feases, condoms and lubricants. The matter was immediately reported to the police and complainant was medically examined a day later. The medical examination concluded that penetration per anus was

probable.

I read the record of proceedings. I closely examined the medical report. The medical report was compiled by one Rudo M. Mashingaidze a registered government nurse at the Adult rape clinic at Parirenyatwa Hospital on 3 August 2015. The offence was alleged to have occurred on 2 August 2015. The medical practitioner noted on the anus the following-

"Anus matter with loose faecal matter. Bruising and Abrasion at 5, 6 and 7 o'clock".

Commenting on evidence of penetration the medical practitioner said it was "probable as evidenced by fresh bruise and abrasion….(not clear because of the date stamp stamped on the other notes)".

In my view given the time the report was made and the time of the examination it is clear beyond doubt that penetration of the anus was effected. Mr *Batasara* submitted that the fresh bruising and abrasion could have been caused by something else. I do not agree. It was as a result of penetration per anus. The court a quo cannot be faulted for concluding that penetration was effected. The offence was proved beyond a reasonable doubt.

Coming to the issue of the defence of alibi, the counsel for the applicant submitted that the applicant could not have been out at the time the offence was committed because he was nursing a sick relative. I am not convinced because the offence occurred in the same room where the complainant slept together with the applicant. The applicant does not dispute that complainant slept in the same house. An issue was raised about conflicting statements which complainant signed. The complainant clearly explained that he was made to sign some statements by the police which were recorded by the police. His own statement which he wrote using his own hand clearly tells a story of how he was abused by the applicant. It would have been unfair for the court *a quo* to pin the complainant on the correctness or otherwise of a statement drafted by the police. The trial court cannot be faulted for convicting the applicant and the appellate court cannot disturb such conviction. There are therefore no prospects of success on appeal against conviction. The sentence imposed for this kind of offence is within the range of sentences imposed for similar offences. There are also no prospects of success on appeal against sentence.

Likelihood of absconding

The applicant enjoys no prospects of success on appeal. He has already tasted the rigors of

imprisonment and this may tempt him to abscond. It is in the interest of justice that the applicant prosecutes his appeal while serving. He has been convicted and sentenced so the presumption of innocence falls away and there are compelling reason to keep him in custody.

Likely delay before appeal is heard

I agree with the submission by Ms *Fero* that appeals no longer take long to be finalised. In *casu,* the applicant's record of proceedings has been transcribed and the applicant can expedite the setting down of his appeal for hearing by filing his heads of arguments.

For the above reasons the application for bail has no merit and will fail.

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

Mupanga Batasara, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners.