

NOREST CHIGWADA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 25 July 2019 and 1 August 2019

Application for Bail Pending Appeal

D Muzawazi, for the applicant
M Musarurwa, for the respondent

MUZENDA J: On 19 July 2019, applicant applied for bail pending appeal seeking the following relief:

“IT IS ORDERED THAT:

1. The bail pending appeal be and is hereby granted on the following conditions:-
 - (i) Applicant deposits cash in the sum of RTGS\$100 to the Clerk of Court, Rusape.
 - (ii) Report once to Glen View Police Station on the last Friday of each month until the determination of the Appeal.
 - (iii) The Applicant is to reside at 7252 96th Crescent, Glen View Area 8, Harare, until the determination of the Appeal.”

The bail application appeal is opposed by the State.

BACKGROUND FACTS

On 11 June 2019, the applicant was arraigned at Rusape for Rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] where the State alleged that on 8 September 2018 and at Tsikada Primary School Bus Stop, the applicant unlawfully had sexual intercourse with Trish Mutisi, a female person without her consent knowingly or realising that there was a real risk or possibility that Trish Mutisi may have not consented. According to the State summary, applicant is employed by Mwayera buses as a conductor and the complainant Trish Mutisi is aged 16 years and resides at Village 13A Chinhenga. Applicant and complainant are not related.

On 8 September 2018 at around 0800 hours, the complainant boarded one of Mwayera buses from Harare going to Chinhenga with the applicant as the conductor. The applicant then went to share the same seat with complainant and on their way, the applicant proposed love to the complainant, complainant turned down the proposal stating that the applicant was married.

The bus reached Tsikada Bus Terminus where the complainant got off to relieve herself together with another woman unknown to the complainant. After about two minutes, the applicant followed the complainant and ordered the woman to go back into the bus as he wanted to talk to the complainant. The applicant then further asked the complainant to consider her response to his proposal. The complainant remained with her rejection and that is when the applicant pushed the complainant against a sign post, pressed her against it denying her any movement, forcibly removed complainant's pant from underneath her skirt, produced his erect penis and had sexual intercourse once with complainant without her consent. During the act, complainant screamed but no one heard her as there were some noise from the two buses which were at the terminus. The complainant managed to push away the applicant and returned to the bus but did not disclose the matter to anyone. The applicant returned to his seat in the bus and told complainant that he was going to marry her if she fell pregnant.

On 10 September 2018, the complainant made a report to her school teacher, Mrs Dodzo who then made a report to the Headmaster then to the police. Applicant was subsequently found guilty after trial and sentenced to 10 years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions of future good behaviour. On 14 June 2019 he filed an appeal against conviction only. Now he is applying for bail pending that appeal.

APPLICATION

In his application for bail pending appeal, the applicant contends that he is a good candidate for bail because according to him, there are good prospects of success against conviction. There is a good likelihood of delay before the appeal could be heard and he is not going to abscond. He adds that he has an arguable case on appeal because the Regional Magistrate failed to place due weight on the material inconsistencies in the complainant's evidence and highlighted the evidence he perceives complainant fared poorly.

The applicant pointed out that the court should have *mero motu* ordered an inspection in loco and also further pursued the applicant's alibi which was belatedly raised during cross-examination of the applicant by the State and not contained in the defence outline. The applicant is unlikely to abscond in light of the strong prospects of success on appeal. Applicant admits that the presumption of the innocence is no longer operative after the conviction and sentence, however there is no cognizance that the applicant will abscond.

The State on the other hand submitted that the onus is upon the applicant to satisfy the court that his admission to bail will not prejudice the administration of justice. Applicant has

no affidavit statement applying for bail pending appeal. The State urged the court to conclude that there is no application before the court because of the failure to attach an affidavit signed by the applicant. It went on further to contend that there are no prospects of success on appeal. The grounds of appeal filed by the applicant lack specifics and clarity, it amounts to no appeal. Due to the sentence passed on the applicant, if applicant is granted bail is likely to default. There is no delay in the appeal being heard since the record of proceedings is ready for setting down. The State supported the medical report and dismissed the applicant's argument on the alleged inconsistencies of the complainant. In the view of the State, the inspection in loco was not necessary. On the issue of alibi, the State submitted that the applicant failed to raise the defence of alibi, he did not.

THE LAW

In *S v Manyange*¹ MAKARAU J (as she then was) held that:

“In an application for bail pending appeal, as distinct from bail pending trial, the presumption of innocence is inoperative and for his application to succeed an application must show that there are positive reasons why bail should be granted. It is not enough for the applicant to show that he has reasonable prospects of success on appeal, he must go further and establish that there are positive grounds for granting him bail pending appeal and that the granting of bail will not endanger the interests of justice. The onus is on him to tip the balance in his favour.”

At p 21F, the Learned Judge further held:

“.... it was not enough for the applicant simply to point to some inadequacies in the State case he had to show that, in addition to his prospects of success on appeal, the interests of justice would not be endangered if he was granted bail.”

In *S v Labuschagne*² GWAUNZA JA (as she then was) held on p 644 D-F

“... That the mere fact that leave to appeal has been granted does not, per se, entitle a convicted person to be allowed out on bail. The onus of establishing that justice will not be endangered and that there is a reasonable prospect of success is upon the applicant. It is improper to allow people convicted of serious crimes to be walking in the streets instead of serving their sentences when the prospects of success are non-existent. Society would lose faith in the system and revolt.

Further, that, on the evidence, the applicant had not proved that there were positive grounds for granting him bail pending appeal. He had not discharged the onus of establishing that justice would not be endangered and that there was a reasonable prospect of success.”

ANALYSIS

In its response to the application, the State pointed out correctly that the applicant in this matter failed to file an affidavit in support of the application for bail pending appeal. The

¹ 2003 (1) ZLR 21 at 218

² 2003(1) ZLR 644

court has noted with concern the practice by legal practitioners to file what is termed “applicant’s statement.” The Statement contains case law authorities decided in South Africa and Zimbabwe and a brief summary for the grounds upon which the application is premised. Applicant’s statement nor affidavit is not attached. This procedure is not proper in my view. The applicant must sign a statement or affidavit that would form the evidence to be relied upon by the applicant in the application. Where there is no affidavit there is properly no application to talk of³. The applicant would have failed to discharge the onus bestowed upon him.

In this case the court condoned that omission in the interests of justice and proceeded to hear the matter on merits. It should also be pointed out that it is improper to combine case law authorities in a statement purportedly filed on behalf of the applicant. If applicant wishes to address the court on the points of law on bail, he should do so from the bar or file separate heads of argument divorced from the statement or affidavit prepared on behalf of the applicant.

Mr Muzawazi struggled to attack the conviction of the applicant. The judgment of the court *a quo* and the response filed by the State clearly shows that the prospects of success on appeal is a mountain for the applicant to climb. The test at this stage is obviously that the applicant must have an arguable case on appeal but even for that, the applicant failed to prove that in his evidence and argument before the court.

He failed to prove that there are positive reasons why bail should be granted. He failed to prove that to tip the balance in his favour. The applicant did not know the complainant, he could not explain the aspect of identification to the court, from 0800 hours in the morning from Harare to Tsikada Primary School, the complainant shared the same seat on the bus, spoke to applicant during the love proposal and sat and conversed with the applicant after the rape, in my view the court *a quo* was correct to conclude that in as far as the identity of the applicant was concerned, the complainant was not mistaken.

The so called inadequacies in the State case were capably explained by the trial court and in any case, it is not enough simply to aver that there are inadequacies, the applicant failed to show that the interests of justice would not be endangered if he was granted bail. Since applicant has already commenced serving his sentence, the onus was on the applicant to show that his release on bail would not result in him absconding thereby prejudicing the interest of justice. He failed to discharge that onus.

³ See *S v Labuschagne* (supra)

DISPOSAL

Accordingly, the application for bail pending appeal is dismissed.

Mtombeni, Mukwasha, Muzawazi & Associates, Applicant's legal practitioners
National Prosecuting Authority, Respondent's legal practitioners.