

Judgment No. HB 141/04
Case No. HCB 258/04

BUSANI MASUKU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 25 NOVEMBER 2004

G Nyoni for applicant
A V Mabande for respondent

Bail pending appeal

CHEDA J: Applicant applies for bail pending appeal.

The brief facts are that applicant is employed by the Ministry of Education and Culture as a teacher. He was charged with 5 counts of rape and he pleaded not guilty to all of them. Of the 5 counts he was convicted for rape on three counts, on the 4th count he was convicted for indecent assault and acquitted on the 5th count. He was sentenced to a total of 27 years of which 7 years imprisonment was suspended for 5 years on condition of good behaviour.

Mr *G Nyoni* for applicant argued that the court *a quo* should not have convicted applicant because the procedure and/or approach in evaluating the evidence of minors was not properly followed. He pointed out that there were glaring inconsistencies in the state witnesses' evidence and also that applicant's defence of an *alibi* was not followed. In view of these points, he is of the strong view that applicant's appeal against both conviction and sentence will succeed.

On the other hand Mr *Mabande* is of the view that the trial court did not err at all and therefore the conviction is proper, thus his chances of success on appeal are non-existent. He

went further to argue that in view of the seriousness of the offences and the lengthy prison term imposed, applicant will therefore have adequate reason to abscond.

Bail pending appeal clearly removes the presumption of innocence as there is a conviction already. It focuses on the question of success of the appeal. The success should not be a mere possibility but a reasonable prospect thereof. It is, my view, that where applicant has not shown a reasonable prospect of success of his appeal, bail pending appeal should not be granted. However, if this prospect is present, the court should not hesitate to grant bail, as failure to do so will no doubt deprive him of his liberty. It is important to note that, it is both in his interest and that of society that applicant be allowed to enjoy the freedom of movement, occupation and association. Therefore, the granting of bail in those circumstances is a must.

Applicant has pointed out certain anomalies in the trial proceedings which if accepted by the supreme court will no doubt result in the success of his appeal. If this occurs, bearing in mind the length of the prison term imposed, he will certainly suffer actual prejudice.

Both counsel have touched on the principle regarding evidence of minors in general and in sexual matters in particular which they do not seem to agree as to what the correct approach is. This approach will no doubt will be adequately dealt with by the superior court once and for all. I am of the opinion that the issue of the alleged inconsistencies in the state witnesses, the alleged animosity between applicant and Mr and Mrs Tickeys and the *alibi* raised by appellant, the court might have a different view which might result in its interference in the decision reached by the court *a quo*.

Bail pending appeal should not be lightly refused where there are reasonable prospects of success on appeal. The only fear respondents will have in these

circumstances is that applicant will abscond, but, in my view those chances are diminished as applicant firmly believes in his innocence. This factor has to be taken into consideration together with the reasonable prospects of success on appeal and the likely delay before the appeal is heard, see *S v Ncube & Anor* HB-4-03.

The seriousness of the offences cannot be played down, but of course as long as the reasonable possibility exists that a superior court might interfere with the court *a quo*'s decision, the seriousness of the case therefore ceases to be the only determining factor in persuading the court not to grant bail.

This is one of the cases where the court has to award applicant a chance to canvass his misgivings about the trial proceedings. In the light of the above reasons this application is granted and the following order is made.

1. That applicant pays \$500 000 to the Assistant Registrar, High Court of Zimbabwe, Bulawayo.
2. That he resides at 1371/2 Old Magwegwe, Bulawayo.

Messrs Majoko & Majoko applicant's legal practitioners
The Attorney General's Office respondent's legal practitioners