

**EPHRAIM MATHUTHU**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 16 DECEMBER 2004 & 4 MARCH 2005

*C P Moyo* for the applicant  
*Ms T Mthethwa* for the respondent

Bail Application

**NDOU J:** This is an appeal against a decision of a Bulawayo Regional Magistrate refusing the applicant bail pending appeal against both conviction and sentence. The applicant was aged 64 years old at the time of the trial. He was charged with rape of a four year old child who was attending creche at My Little Pony and Friends. The applicant was employed as a driver at the creche. On 26 September 2003, children from the creche, inclusive of the complainant, visited Chipangali Wild Life Orphanage. The applicant was the driver on the trip. At Chipangali the complainant fell ill and could not participate in the tour of the orphanage with other children. The applicant was asked to look after the complainant. The complainant fell asleep in a hall. The applicant is alleged to have awakened her up and led her to a dark room which had a fish pond and closed the curtains. Whilst inside the room the applicant slid his hand under the complainant's pair of trousers and pants and inserted his finger into her vagina. Thereafter the complainant had difficulty in urinating. Her mother took her to the doctor on 29 September 2003. The doctor detected that the complainant had been sexually abused. The complainant revealed to counsellor during a counselling session that she been sexually abused by the applicant resulting

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in the latter's arrest and being charged with rape. The trial regional court found the applicant guilty of indecent assault, for inserting his finger into the complainant's vagina. The applicant was sentenced to undergo 30 months imprisonment with 10 months suspended for five years on the usual condition of good behaviour. The respondent opposes the application on two grounds, namely, no reasonable prospects of success and likelihood of abscondment. As against conviction, the applicant basically attacks the finding of fact by the trial court that the complainant is a credible witness. Further, the trial court is attacked for failing to apply the cautionary rule. The latter submission is made out of ignorance because the Supreme Court has already endorsed the view that such cautionary rule of practice is not warranted in sexual offences – *S v Banana* 2000(1) ZLR 707 (S) at 614F. It is trite that in an application for bail pending appeal the presumption of innocence no longer exists. It follows therefore, that in the absence of positive grounds for granting bail, bail should be refused – *S v Tengende & Ors* 1981 ZLR 445 (S) and *Mahachi v S* HB-111-04. The onus is on the applicant to show that he should be admitted to bail. In determining whether the applicant has discharged this onus, the court has to consider whether there are reasonable prospects of success and the likelihood of abscondment. *Criminal Procedure in Zimbabwe* by J Reid Rawland at 6-17; *S v Williams* 1980 ZLR 466(A); *R v Muller* 1957(4) SA 642A and *S v Benatar* 1985(2) ZLR 205(1).

On the prospects of success on appeal against conviction the finding of the trial court does not defy logic. There seems to be nothing grossly irregular with the proceedings. I have gone through the record and what I can discern is that there are no reasonable prospects of success on appeal against conviction – *S v Zulu* HB-52-03. As against sentence there is no misdirection. The sentence is within the sentencing

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discretion of the trial court. Sentencing discretion is the province of trial court and the appeal court is reluctant to erode such discretion – *Ramushu & Ors v S* SC-25-93.

Looking at the assessment of the sentence I am not in a position to say it is disturbingly inappropriate. It is not vitiated by irregularity or misdirection – *Msindo & Ors v S* HH-25-02. There are no reasonable prospects of success against sentence either. In view of these findings and the sentence imposed there is sufficient evidence for the accused to abscond – *R v Kara* 1961(1) SA 116 (GW).

Accordingly, the application for bail pending appeal against both conviction and sentence be and is hereby dismissed and bail is refused.

*Majoko and Majoko*, applicant's legal practitioners  
*Criminal Division, Attorney General's Office*, respondent's legal practitioners