

**NHLANHLA MOYO**

**APPLICANT**

**AND**

**THE STATE**

**RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 26 NOVEMBER 2010 AND 2 DECEMBER 2010

*Mr Chikwakwa* for applicant  
*Mr Mabhaudi* for respondent

Bail Application

**MATHONSI J:** The Applicant was convicted of one count of rape by the Regional Magistrates' Court sitting in Bulawayo on the 13<sup>th</sup> October 2010. He was sentenced to 15 years imprisonment of which 3 years was suspended on condition of good behaviour. He has since appealed against conviction only.

The Applicant now applies for bail pending appeal arguing that his appeal has prospects of success given that the evidence led against him by the state was unreliable. Given that the hearing of the appeal will take a long time he is likely to serve a lengthy period before the appeal is disposed of and for that reason he ought to be released on bail pending appeal.

The state did not oppose the application and in his very brief response, *Mr Mabhaudi* for the state stated as follows:

“BE PLEASED TO TAKE NOTICE that the Respondent is not opposed to the Applicant being granted bail pending appeal for the following reasons:-

The victim indicated that one NHLANHLA was cutting her with a knife. No further probing was done on what that entailed in. The identity of this Nhlanhla was not yet again verified.

Conditions 1 -3 of the order filed of record are not opposed but the day of reporting in paragraph 4 must be changed to Friday.”

I was not sure that this concession had been properly made as a result of which I requested the record of proceedings to be made available to me which was done. Having gone through the record I felt that there was a need for the matter to be set down for hearing for purposes of exhausting the issues arising from the application.

An application for bail pending appeal is different from one made pending trial in that while in the latter situation the presumption of innocence favours the Applicant, in the former the Applicant having been convicted of the crime, he/she no longer enjoys that benefit.

*Kanyoka and Others v S* HB 102/10 at page 3.

As stated in *S v Kilpin* 1978 RLR 282 (A) at 285 H and 286A:

“The principles governing the grant of bail before conviction are entirely different from those governing the grant of bail after conviction and the difference is even more marked when the guilt of the accused is not in issue and the usual sentence for the offence is an effective prison sentence of substantial duration. It is wrong that a person who should properly be in goal should be at large and nothing is more likely to encourage frivolous and vexatious appeals than the attitude adopted by the magistrate in the present case.” (my emphasis).

In considering an application for bail pending trial the court is guided by the prospects of success on appeal and the issue of whether the Applicant will not abscond is released on bail.

Clearly the incentive for abscondment is very high where the Applicant has no prospects of success on appeal.

The issues which were before the trial court in this matter were very narrow indeed and presented very little difficulty. A 3 year old girl complained to her aunt of being hurt in her private parts by one Nhlanhla. At first they ignored her complaint but she persisted over a long period of time until they were forced to investigate. On a day when she wet herself in her sleep they examined her and discovered that her vagina was dilated.

This prompted her mother to take her to hospital where she was examined by a doctor who compiled a medical report. The said medical report was produced in court by consent and was never challenged at all. It concluded that the complainant had been sexually abused. That therefore put to rest the issue of whether she had been raped. She certainly was.

Having determined that she had been raped, the only issue remaining was the identity of the assailant. The complainant, who impressed the trial court as “a very clever child and was up and about in the separation room as she led evidence”, pointed to the Applicant as the person who had hurt her.

With the greatest respect to state counsel it is not correct that the identity of Nhlanhla was not verified. The complainant made it very clear that it was the Applicant who abused her and did not suggest the possibility that someone else did. She was asked to identify the person who had hurt her from among the people who were in court and she did not hesitate to pick the Applicant.

Some doubt has also been raised about the complainant's testimony that Nhlanhla cut her with a knife in her private parts. Apart from the fact that it is not an issue of earth-shattering magnitude, it is consistent with the abuse. A three year old would understandably conclude that what hurt her was a knife even if it was a penis, something she would not be expected to comprehend at her age.

To say that there was a boy called Nhlanhla in the neighbourhood who is aged about 4 years who may have raped the complainant is simply disingenuous and does not deserve to be taken seriously especially against the background of the Applicant, a 27 year old, having been picked out by the complainant.

I therefore come to the conclusion that the appeal has very little prospects of success and the application is not meritable. In any event the day of reckoning is nigh as the record of proceedings has been fully transcribed. It remains for the Applicant's legal practitioners to arrange for the set down of the appeal early next term.

Accordingly the application for bail pending appeal is dismissed.

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