

MTHOKOZISI NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 DECEMBER 2021 & 13 JANUARY 2022

Application for bail pending appeal

B.E. Ndlovu for the applicant
T.M. Nyathi for the respondent

DUBE-BANDA J: This is an application for bail pending appeal. The applicant was arraigned before the Regional Magistrate's Court sitting in Bulawayo, on a charge of rape as defined in section 65 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The allegations against him were briefly as follows: that on the 18 March 2021 he unlawfully had sexually intercourse with complaint without her consent. After a protracted trial he was convicted and sentenced to 10 years imprisonment.

Aggrieved by his conviction applicant noted an appeal to this court and such appeal is still pending under cover of case number HCA 73/21. Applicant now seeks to be released on bail pending the finalization of the appeal. The grounds upon which applicant seeks to be released on bail pending appeal are set out in his statement in support of this application. In his written application applicant contends that he has prospects of success on appeal because his guilt was not proved beyond a reasonable doubt as required by the law. It is argued that in her statement to the police complainant indicated that the person who raped her had a tattoo and a dreadlock, while applicant did not have any of those features. It is contended that this is a case of mistaken identity.

In its written response respondent opposed the release of the applicant on bail pending appeal. It being argued that the prospects of success on appeal are non-existent and the reasoning of the trial court cannot be faulted and is sound at law. It is contended that the state proved its case beyond a reasonable doubt. Further it is argued that applicant was sentenced to a ten year prison term and if released on bail this would be an inducement to abscond.

Mr *Nyathi* in his oral submissions in court conceded that it is in the interests of justice for applicant to be released on bail. Counsel argued that it was not proved that applicant was the perpetrator of the crime of which he was convicted. Counsel anchored his argument on the issue of tattoos and dreadlocks and contended that this might be a case of a mistaken identity. Mr *Nyathi* is not the counsel who drafted the written response referred to above.

In considering whether it is in the interests of justice to release the applicant on bail pending appeal, the court will be guided by the following principles: prospects of success on appeal; likelihood of abscondment in the light of the gravity of the offence and the sentence imposed; likely delay before the appeal is heard and the right of an individual to liberty. See: *S v Dzawo* 1998 (1) ZLR 536; *S v Bennet* 1985 (2) ZLR 205 (HC); *S v Ncube & Ors* HB 04-03. The court has to factor in all the relevant considerations, and determine whether individually and / or cumulatively they constitute circumstances which would qualify to admit a convicted and sentenced person to bail. It can be said that it would not be in the interests of justice to deny bail pending appeal to an individual who has demonstrated prospects of success on appeal. See: *S v Kilpin* 1978 RLR 282. A person who is able to demonstrate on a balance of probabilities that his appeal enjoys prospects of success is unlikely to abscond and would rather present himself to clear his name. Such person's right to liberty should be given effect to, this safeguards against the risk of having an otherwise innocent person languish in prison in respect of a case for which he might end up being cleared by the appeal court leading to an 'empty victory.'

I am mindful of the caution that a bail application is 'not a dress rehearsal' for the court ultimately hearing the appeal. I am entitled though to take into account the prospects of success on appeal as far as that could be determined at this stage. On the facts of this case obviously the appeal court would be alive to the risk that an honest witness who is convinced of the correctness of her identification might nevertheless be mistaken. See: *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C. For the purposes of this application I take the view that the risk of honest error was reduced by the following facts and evidence: there is no dispute that complainant was raped; there is no dispute that it is applicant and his friend who assisted complainant and her mother with firewood, the complainant and her mother spent a considerable time with applicant and his friend; complainant informed the police that she was able to identify her assailant and that such person was at a place where a foundation was

being dug. She said the assailant was one of those persons who gave her and her mother fire wood. Complainant led the police the place where they were given fire wood, which place turned out to be applicant's place of work. The complainant pointed the applicant to the police and before anything was said to him he took to his heels. To me the complainant was in no doubt as to who had raped her.

Applicant's case of mistaken identification turns on the issue of a tattoo and dreadlocks. Under cross-examination complainant explained that the tattoo that she saw on the assailant was drawn using a mighty marker and that it was not similar to other tattoos. Obviously such a tattoo is not permanent. In cross examination the issue of dreadlocks was not put to the complainant. For the purposes of this application, I take the view that this issue of tattoos and dreadlocks has just been taken out of context. It is for this reason that I hold the view that the concession by Mr *Nyathi* was not been properly taken. On the evidence on record, my thinking is that applicant has no prospects of success on appeal against conviction.

The prospects of success and the possibility of abscondment are interconnected. The less likely the prospects of success, the more the inducement there is on applicant to abscond. In the circumstances, there is a real likelihood that the applicant will be tempted to abscond and not await to serve the prison term at the conclusion of the appeal. The fact that he has been convicted and has already experienced incarceration, and is fully aware of the sentence imposed, affords abundant incentive for him to abscond. There is, therefore, a high probability that he will abscond if he is released on bail pending appeal. In light of this, the appellant fails the second test as he is a flight risk.

In consideration of the facts and submissions in support and against the granting of bail, viewed individually and holistically, I take the view that applicant did not discharge the *onus* of showing that it would be in the interests of justice to release him on bail at this stage. In *State v Tengende & Ors* 1987 ZLR 445, the court held that the proper approach in applications for bail pending appeal is that in the absence of positive grounds for granting bail it will be refused. Applicant has not proffered any positive grounds for allowing him to be released on bail. In my view, the prospect of a prison term, coupled with his fresh experience of post-trial incarceration, affords abundant incentive for him to abscond. See: *S v Gumbura* SC 349/14. It is for these reasons that this application must fail.

In the result, the application for bail pending appeal is dismissed and applicant shall remain in prison.

Makiya & Partners applicant's legal practitioners

Prosecutor-General's Office respondent's legal practitioners