CRB B732/02

EDMORE MUSASA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE 9 April 2002

**Application for bail pending appeal**

*Mr. Mufadza*, for the applicant
*Mr. Mushangwe*, for the respondent

HLATSHWAYO J: This is an application for bail pending appeal. The applicant, Edmore Musasa, is an unmarried male adult aged 25 at the time of his conviction. He was charged and convicted on one count of rape of a 4-year old girl in case number R235/00 heard by Regional Magistrate, Mrs. O Nzuma, sitting at Chitungwiza. He was sentenced, on 2 April 2002, to 10 years imprisonment of which one year was conditionally suspended for five years, and has since commenced serving his sentence at Harare Central Prison. An appeal against both conviction and sentence has been noted. In support of his application for bail pending appeal, the applicant submitted the notice and grounds of appeal and the trial magistrate’s judgment, forming part of the record of proceedings. Both Mr. *Mufadza* and Mr. *Mushangwe*, submitted, and I agreed with them, that it was accepted, though probably not invariably acceptable, for an application for bail pending appeal to be decided on the basis of the trial court’s opinion but without the benefit of the full record, which might take too long to obtain. A full record, would, of course, be required for any appeal.

Mr. *Mufadza,* on behalf of the applicant, submitted that bail pending appeal should be granted basically on two grounds: firstly, that there is no danger of abscondment and secondly, that there

are prospects of success on appeal on both conviction and sentence. Mr. *Mushangwe*, for the respondent, was of the view that there are prospects of success on appeal against conviction only, and thus did not oppose the granting of bail. I shall deal with the two grounds in turn below.

DANGER OF ABSCONDMENT

It was contended that the applicant is a person of fixed abode, was gainfully employed at the time of his sentence, that while he was on bail pending trial he abided by the bail terms to the letter and that from this the court should draw the conclusion that he will abide the outcome of his appeal and will not abscond. While it is true that decisions on granting or refusing bail are premised on an estimation of an applicant's likely future conduct and that therefore past conduct is relevant in such an assessment, the value of past conduct must be weighed in the light of the reality of the changed circumstances presented by the conviction and sentence.

In this case the applicant has been convicted of a serious offence and sentenced to a long term of imprisonment, and the temptation on his part to abscond is likely to be very high indeed, and the imposition of the suggested usual monetary and reporting conditions is unlikely to be an effective deterrence. Of course, the likelihood to abscond is closely related to the prospects of success on appeal, to which I will turn shortly. I have examined the line of cases referred to in the applicant's heads of argument – *S v Williams 1980* ZLR 466 (A), *S v Dzawo* 1998 (1) ZLR 536 (S), *Hollington and Anor v The State* B 751/2000 (unreported) and *S v Benatar* 1985 (2) ZLR 205 (HC) – but I am satisfied that they do not negate the approach I have outlined above.

PROSPECTS OF SUCCESS ON APPEAL

I shall only deal with the prospects of success on appeal against conviction only, for it appears to me that assuming that the conviction was proper, the sentence imposed would appear to be appropriate, if not slightly on the lenient side.

The applicant made the following submissions in his grounds of appeal:

a) That the trial magistrate erred in fact by finding that reference to a "stick" by the complainant necessarily meant a "penis" without contexualising it within the broader factual set-up;
b) That the trial court erred in fact by finding that the appellant could have abused the complainant from a standing position when the complainant herself was in a sitting position according to her testimony, and
c) The trial court erred in fact and law in finding that there was enough corroboration of the complainant's story.

The factual matters raised by the applicants in points (a) and (b) above are addressed in the learned trial magistrate's opinion as follows:

> "The mother also indicated that the complainant had reported to her that the accused had placed a paper around his penis and since the complainant was of a tender age, she assumed that the accused might have worn a condom before he raped the complainant. The complainant gave her evidence in the Victim Friendly Court. The court had to take into account that she was aged 4 when she was sexually abused. By the time she gave her evidence several months had already passed. The complainant indicated that she knew the accused and that the accused had touched her on her vagina. She went further to say that the accused had used a "stick" to touch her private parts. The child then indicated that she was in a seated position when this happened. The complainant went further to say that the accused had applied some oil on her private parts." (pages 6-8)

The reference to the applicant's "penis" as a "stick" is discussed again further on in the judgment, thus:

> "The investigating officer in this case also testified and told the court that she interviewed the complainant about the case. She then revealed that she was in the accused's room when the accused removed her pant and injured her private parts using a stick. The complainant went further to tell the officer that the stick she was referring to was his penis and that the accused

used a paper to wrap around the penis. He first applied Vaseline on her vagina and raped her. The police officer understood the child's language well when she referred to the stick. She also assumed that the accused had used a condom because the complainant referred to a plastic paper which the accused used to wrap his penis (in)." (page 12)

Now, considering the above narration in the trial magistrate's opinion, it cannot be said that she misdirected herself in anyway in concluding that by "stick" the child meant the applicant's "penis". The child's evidence that this "stick" was first wrapped in a plastic paper (condom) before it was applied to her vagina clearly shows that the child is not referring to an ordinary "stick". As to the exact positions of the complainant and the applicant when the offence was committed, it would require the examination of the complete record to determine whether any serious inconsistencies arise. However, at any rate it is not inconceivable that the complainant could have been abused while seated on a table or window sill or any higher object while the applicant was in a standing position.

As far as corroboration is concerned the credible evidence of the mother, the investigating officer and the medical report strongly corroborated the complainant's story. The complainant was in the accused's room at the relevant time. The mother beat up the child precisely for having been "in other people's homes" contrary to her specific instructions not to. Talent Nkoma told the court that on the alleged date and time she was at home with the complainant, that when the complainant's mother had gone to the shops, the complainant entered the accused's room and that when the mother came back, she found the complainant in the accused's room and so she beat up the complainant. Dr. Illif, who examined the complainant six days later, confirmed that the child had been sexually molested because her hymen was stretched and

attenuated. She found some bruising on the urethra and concluded that these findings were "highly suggestive of penile penetration" and discounted the possibility that the child could have inserted an object into her vagina to injure herself.

The applicant's suspicious response when asked by the mother about what he had done to the child is further corroboration as it is inconsistent with his innocence because he replied: "Did you take the child to the doctor?" It would appear that he must have done something to her that would require the mother to take the child to a doctor. His explanation that he was referring to the beatings the mother had inflicted on the child is not convincing since the question by the mother was what he, the accused, had done to the child.

Therefore, on the basis of the applicant's grounds of appeal, I found that there was absolutely no prospect of success on appeal, and accordingly I would have declined bail on that basis. However, in his response to the application, Mr. *Mushangwe*, conceded that there were prospects of success and highlighted other considerations than the ones the applicant had sought to rely upon, thus:

a) In rape cases children have a tendency to fantasize– *See S v Svova* SC 20/99 at page 4 of the cyclostyled judgment. *See* also the *Prosecutor's Handbook*, 2nd ed., Legal Resources Foundation at page 59. The learned magistrate does not appear to have paid careful regard to this possibility.
b) There were two other young men who were staying with the complainant who are brothers to the complainant's mother, it is possible or cannot be ruled out that one of them ravished the complainant. It follows therefore that the applicant could have

been falsely incriminated in order to shield the real culprit.

c) After the complainant left the applicant's room, she did not show any sign of having been ravished, it was only two days later that her mother noticed that she had difficulties in walking. Upon being interrogated by her mother, the complainant refused to disclose what had happened to her. It was only a day later after further probing by her mother that she came up with the name of the applicant.

d) It is said that during the act, the complainant cried but surprisingly although there were people at the house nobody heard the cries.

I will consider first the respondent's grounds (b), (c) and (d) above, which deal with factual issues and consider lastly ground (a) which deals with a possible legal misdirection.

The possibility that one of the complainant's mother's two brothers could have committed the rape leading to the false incrimination of the accused would have been a very strong defence if it had any basis at all. The fact that the applicant does not raise it at all in his grounds of appeal tends to show that the applicant never placed any much weight in such a possibility. At any rate the learned magistrate does deal with the point adequately in her judgment, thus:

> "She (the complainant) even dismissed the suggestion by the defence that she could have been raped by her mother's brothers. She was clear and she confirmed this to the investigating officer. From the beginning she maintained that it was the accused person who sexually molested her." (at page 17)

The second issue raised by the respondent that the complainant did no show any signs of having been molested on the first day does not even bear scrutiny. The mother found the child in the

applicant's room and immediately chastised her for disobeying her specific instructions not to "enter into other people's homes". The last thing she suspected at that point was that what she had feared most might happen to her child if she disobeyed had already tragically and brutally occurred. It is not also inconceivable that the discomfort the child felt in walking became progressively worse with time and thus, on the second day she was observed to be having difficulties in walking. And when she eventually revealed what had happened to her, she mentioned both the abuse and the fact that the applicant was the perpetrator.

The last factual doubt raised by the respondent is if the complainant cried during the ordeal, as alleged, then Nkoma who was outside the house should have heard her. There appears from the opinion to have been lack of clarity on whether the allegation was that the child had "cried out", "screamed" or merely flinched and sobbed with pain. Without examining the full record, one is not in a position to resolve this apparent difficulty. However, the point is not a very strong one. Nkoma was outside the house and the accused and the complainant were in a room inside the house. Whatever expression of distress the child may have made, the child is unlikely to have had the presence of mind of an adult to raise alarm and seek help as she could not fully appreciate what was being perpetrated upon her.

The respondent's final concern is the allegation that in rape cases children have a tendency to fantasize and that the magistrate does not appear to have paid careful regard to this possibility. However, in point of fact, the learned magistrate did address her mind to this much-abused and ill-understood theory and discounted it in the specific facts of this case in the following words:

"Considering her age, unlike a juvenile who is now conscious of

> her sexuality, it would be unfair to say that a four-year-old child was fantasizing and romancing about the case…The complainant in this case, though of tender age, was clear. Although she lacked the vocabulary to say some of the things, she had the knowledge and ability to describe the sexual abuse she was subjected to.”

Many judgments of this court and the Supreme Court have underlined the fact that it is highly unlikely for very young complainants to making serious allegations without any basis at all. See, for example, MUCHECHETERE JA in *S v Machowe*, S-14-99 at page 9 and CHINHENGO J with the concurrence of GARWE J in *S v Madzomba* 1999 (2) ZLR 214, where it was said in respect of rape allegations made by a five-year old twenty months after the abuse:

> “It is, of course, quite possible that a child of so tender an age can make without much thought, generalized and damaging allegations against the only person at the place she is to be removed. That must, however, be balanced against the consideration why and whether a girl of so tender an age could make so serious an allegation against the appellant and Abias if nothing of the sort had taken place. The fact of the matter is that her hymen was found missing which tended to confirm her evidence that she had been sexually abused.” At page 222.

Furthermore, psychological research has established that young children do not fantasize about being raped and other unusual, horrific occurrences but that there fantasies and play are characterized by their daily experiences. In this regard, J R Spencer and Rhona Flin, *The Evidence of Children: The Law and the Psychology* , 2nd ed., Blackstone Press Ltd, 1993 at pages 317-318 made the following observation:

> “There is certainly no psychological research or medical case study material which suggests that children are in the habit of fantasizing about the sort of incidents that might result in court proceedings; for example, observing road accidents or being indecently assaulted. Children’s fantasies and play are characterized by their daily experience and personal knowledge, and unusual fantasies are seen by psychiatrists as highly suspicious: `The cognitive and imaginative capacities of three-year-olds do not enable them to describe anal intercourse and spitting out ejaculate, for instance. Such detailed descriptions from small children, in the absence of other factors, should be seen as stemming from the reality of the past abuse rather than from the imagination`Vizard, E., Bentovim, A., and Tranter, M (1987) Interviewing sexually abused children”

Similarly, the complainant’s description in this case of how the applicant pricked her vagina with his “stick”, that he first wrapped it in a plastic paper

(condom) and that he applied Vaseline on her vagina before he ravished her is not the stuff that young children's fantasies are made of. The trial magistrate was therefore correct in the manner she dealt with the evidence of the child complainant. She also raised pertinent points on how the prosecution and defence council should approach the evidence of young children. In support of that view I can do no better than quote from the opinion I expressed with the concurrence of CHATIKOBO J in the case of *Joshua Mashave v The State* HH-96-2001:

> "In our law children, on the other hand, are not suspect witnesses in the same way as are accomplices, but it has been said that their evidence must be approached with caution. One must add, however, that the caution referred to here is not morbid or negative caution but what one might call creative or positive caution. The latter approach would be where a judicial officer (or any other person dealing with the testimony of a child) uses knowledge of psychology or other relevant disciplines in order to maximise the value of such testimony, while negative caution would be adherence to the old approach of treating the evidence of a child with suspicion and instinctively seeking its corroboration.
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> A refreshing approach to child witnesses was ably set out by EBRAHIM JA in *S v Sibanda* 1994 (1) ZLR 394) in which the learned appeal judge, after summarizing the key findings from the useful study by Spencer and Flin, *The Evidence of Children: The Law and Psychology*, 2nd ed., Blackstone Press Limited, 1993 and creatively applying them to the case before him, observed as follows:
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> "A rational decision as to the credibility of a witness (especially a child witness) can be arrived at only in the light of a proper analysis by means of testing it against likely shortcomings in such evidence in the manner suggested by Spencer and Flin, *op.cit*. To reach an intelligent conclusion in such an analysis it is necessary to apply, as they do, a certain amount of psychology and to be aware of recent advances in that discipline. This will undoubtedly mean an increase in the workload of judicial officers and the machinery of justice generally, but ways must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society." at pages4-5.

Accordingly, I have come to the conclusion that there are no prospects of success on appeal against conviction and, given my comments on the danger of abscondment, the application for bail pending appeal must fail and is hereby dismissed. The applicant indicated their desire to appeal to the Supreme Court against this decision, and I have granted them the leave to appeal.

*T H Chitapi & Associates*, applicant's legal practitioners.

*The Attorney-General's Office*, respondent's legal practitioners.