CRB B2861/02

HENRY MUZVUZVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 9 January 2003

Application for Bail Pending Appeal

Mr *Bachi Mzawazi*, for the appellant
Mr *F Ziyambi*, for the respondent

HUNGWE J: After hearing argument in this matter I dismissed the application for bail pending appeal. I was asked for reasons for that decision. These are the reasons:

In his ground of appeal against conviction the applicant stated:

"1. The evidence of the complainant was inconsistent, contradictory and unreliable.

2 2. There was no real evidence linking the accused to the offence.

3 3. Court erred in depending on the credibility of the complainant, finding her evidence credible on two counts and disbelieving her evidence on the third count.

4. Evidence of the defence witnesses was credible and reliable. Their evidence was not properly assessed by the court."

In regard to the grounds of appeal against sentence the applicant holds that the sentences imposed is so harsh as to induce a sense of shock. Applicant, then sets out the ground upon which he hold the sentence to be so harsh as follows:

"(a) As a first offender the court ought to have suspended a portion of his sentence in line with the usual sentencing

practice.

(a) He was diagnosed as being HIV negative

(b) He being a school teacher will loose his job with the result that his family will suffer.

(c) Trial took 15 months to conclude."

The background to this application is that in the trial complainant gave evidence as to how the applicant then the accused, raped her on three occasions. He was teaching grade 7. She was doing grade 6.

On the first occasion applicant sent her to take some ballpoint pens from his house. He followed under the pretext of having forgotten to give her some books to take there. He found her there. As she was about to leave, he grabbed her and forcibly ravished her. He thereafter threatened her with death should she disclose her ordeal to anyone. She left and complied with the demand not to report.

On the second occasion, the complainant and other pupils were assigned to do general work, They would have to ask for hoes from the accused. Accused then assigned complainant and another girl to weed inside his yard. When their work was done they were required to attend an assembly. She forgot to leave the hoes. After assembly, she went to accused's residence to return the hoes. The applicant asked her to take the hoes into the house. She complied, when she got inside he followed; locked the door behind him and again ravished he without her consent.

The events leading to the third count are no longer relevant as he was acquitted on that count.

The trial magistrate before who the witnesses appeared believed

the version given by the complainant. In a well-reasoned judgment she analyzed all the evidence placed before her. She dealt with issues of credibility and arrived at her findings in flawless reasoning.

In an application for bail following conviction, the crux of the matter is firstly, that the discretion to grant or refuse bail is vested in the court and secondly that in exercising that discretion, the court must endeavor to the best of its ability to put in balance the interest of the individual and interest of the administration of justice. The decision must not endanger the administration of justice whilst at the same time it must not frustrate the liberty of the individual. See *S v Benatar* 1985 (2) ZLR 205.

In order to strike that delicate balance, the court must consider whether or not the interest of justice will not be endangered by the grant of bail and whether there are any prospects of success on appeal.

As was stated by HENOCHSBERG J in *R v Mthembu* 1961 (3) SA 468 at 471:

> " I think the law is that, if justice is not endangered, the court favors the liberty of the accused, more particularly where there is a reasonable prospect of success. That, I think, is to be gathered from the decision in the case of *Rex v Milne & Enleigh* (4) 1950 (4) SA 601 (W) and the cases therein cited. In the light of what was said in *R v Desai* 1953 (2) PHH 92 it seems to me that the onus of establishing that justice will not be endangered, and that there is a reasonable prospect of success, is upon the applicant."

I respectfully associate myself with his lordship's views on the matter.

The applicant bears the onus to satisfy the court that on the evidence led, he has good prospects of success. He has chosen to attack the manner in which the trail court treated the evidence of the prosecution.

It is trite that issues of credibility are the province of triers of fact. The appellate court will not easily interfere with the trial court's findings on credibility unless there are outstanding features in the matter. Such features are for example the finding of fact being so unreasonable that a reasonable court applying its mind to issues that have to be decided could not have made that finding. There is no basis for stating that the trial court's findings do not accord with the facts.

I am not convinced that that is the case here. Nor am I persuaded to hold that there are reasonable prospects of success in respect of the appeal against conviction. As against sentence, whilst there is some prospect of success in that the appeal court may decide to suspend a portion of his sentence I do not believe there will be a serious reduction of sentence. The applicant must serve his sentence.

In the premises, the application was dismissed.

Bachi Mzawazi and Associates; appellant's legal practitioners
Office of the Attorney General; respondent's legal practitioners