

**HH 89-03**  
**Crb B66/03**  
MARTIN POSHAI  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
HUNGWE J,  
HARARE, 4 June, 2003

Application for Bail Pending Appeal

**Mr V Chinhema for the applicant**  
**Mr N Mushangwe for the respondent**

HUNGWE J: This is an application for bail pending appeal. The applicant was convicted at Bindura Magistrates Court after a contested trial. He was convicted on four counts of rape on a 9 year old girl. He was sentenced to a total of 15½ years imprisonment. He appeals against both conviction and sentence. Pending that appeal, the applicant seeks an order admitting him to bail.

**It is trite that amongst the factors which the Court has to take into account when considering whether to admit an applicant to bail pending appeal or not are the**

following -

- a) the prospects of success on appeal;
- b) whether there is a likelihood that if admitted to bail, he will abscond thereby defeating the course of justice;

**The present applicant for bail pending appeal has an extra onerous task in so far as the onus lies on him to convince the Court that despite having been convicted of a serious offence; despite knowing now that he is facing 15½ years imprisonment, the Court must still find that it is in the interest of justice to grant bail. It is an onus not easy to discharge where the evidence led in the court *a quo***

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establishes guilt and there has not been pointed by the applicant an obvious irregularity or defect in the process leading to conviction. Where however an applicant pinpoints to an obvious irregularity in either procedure or evidence which is fatal to the process leading to conviction, then the onus on the applicant for bail is lighter.

The applicant has set out grounds of appeal attacking the propriety of the conviction in the Court *a quo*. The main thrust of the attack on the propriety of the conviction was that the court *a quo* erred in believing the complainant and her mother and disbelieving the applicant. In detail certain deficiencies on both the complainant and her mother's evidence were pointed out.

Particularly it was claimed by the applicant that on the evidence there was no proof beyond reasonable doubt of his guilt as complainant did not state in her evidence that she was penetrated by appellant. The answer to that is simply that an appeal court would have to look at all the evidence adduced and go through the reasons provided for in the judgment convicting the appellant. The appeal court will have to decide whether the trial court misdirected itself in believing this witness's evidence against that of the applicant. It would have to satisfy itself that the presiding magistrate who had the benefit of a personal appearance by the *dramatis personae* was wrong in his assessment of the credibility of these witnesses.

In considering the nature and quality of the complainant's evidence the court would have to take into account the fact of youthfulness. At nine years, it would be surprising in the context and background of this particular case were the complainant able to present herself as someone so uninhibited as to freely and publicly describe how an act as private as sexual intercourse was committed on her moreso if it was against her will. At 9 years she is virtually a child. It is expecting too much to have required that she tells an all male court how his penis was introduced into her vagina. This is not to say that in the absence of all evidence a conviction should nevertheless be allowed to stand simply because the complainant was a child. All that is being emphasised here is that the Court looks at the totality of the evidence and asks whether in spite of the deficiency in that regard, it can still be said that the State has proved its case beyond a reasonable doubt.

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Experience has shown that in most rape cases the offender is known to the complainant. He knows those weaknesses of the complainant and exploits these in the hope that they help cover up his track. There is therefore nothing untoward arising out of the fact that complainant would be assigned by her mother to serve applicant food and that she did so without protest.

The application for bail was dismissed for these reasons.

**An aspect which concerned me is that the State Counsel seemed convinced by the argument that as there was no evidence of penetration it followed that the conviction would be set aside.**

There is an overwhelming evidence corroborating the accusation against applicant. After he is pointed out by the complainant as the culprit to Police, he suggests to the complainant's mother an out of court settlement. Why would any adult seek this type of resolution of accusation made by a 9 year old?

In the present case the fact that complainant did not say she was penetrated is made up by the fact that the fact of penetration was established by the medical evidence. In any event, the appellant never disputed the fact that complainant was penetrated. The question then became who penetrated her?

**Once that becomes the only issue, then the magistrate's assessment of credibility can be the only bone of contention in the appeal. As I have said, an appeal court would be slow to disturb a finding on credibility for the reasons I pointed out.**

In the premises it is highly unlikely that in this case the appeal court would overturn the verdict of guilty of rape.

What however might happen is that applicant may be found guilty of maybe one count thereby leaving that court at large should that be the case. What then that means is that he may get a reduction in sentence. Such a reduction in sentence does not to my mind warrant a grant of bail at this stage.

What militates against the grant of bail even if he were to get a reduction of sentence is that he faces a custodial sentence. Any reduction may just affect the length of the custodial sentence not the type of sentence he will have to serve. He must await his fate whilst serving.

At the end of the hearing I dismissed the application as I was not satisfied that applicant had any prospects of success on appeal nor that he had discharged the onus on him as a

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convicted applicant that his release would hinder the proper administration of justice.