

NORMAN BANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 13 March 2018

Application For Bail Pending Appeal

J. Zuze, for the applicant
R. Chikosha, for the respondent

NDEWERE J: This is an application for bail pending appeal against both conviction and sentence. The application is opposed by the respondent.

The applicant appeared before the Magistrate Court on a charge of performing indecent acts with a young person as defined in s 70 (1) (a) (i) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. After a contested trial the applicant was convicted and sentenced to 24 months imprisonment, 6 months of which were suspended for 3 years on the usual conditions of good behaviour. The conviction and sentence was on 19 February 2018. He lodged his appeal with this court on 26 February 2018.

The guiding principles in an application of this nature were clearly outlined in *S v Dzawo* 1998 (1) ZLR 536 @ 539 as follows:

- “(a) Whether there are prospects of success on appeal
- (b) The risk of abscondment
- (c) The right of an individual to liberty taking into account the delay that may be encountered in finalising appeals.”

These were the main factors enunciated in the earlier cases of:

The State v Kilpin, 1978 RLR, 282 (AD)
S v Williams 1980 ZLR 466
S v Benatar (2) ZLR 205 (HC)

Mr *Zuze* for the applicant stated in the bail statement and advanced oral argument that there are high prospects of success on appeal against both conviction and sentence in that:

“The trial magistrate erred in accepting fictitious and false evidence of the complainant.

The evidence of the complainant was not meaningfully corroborated.

It was highly unlikely and unbelievable that the complainant was indecently assaulted in the presence of some adults in the same house.

The court relied on its observation of the applicant that he did not look vegetative in one of his hands.

The court was speculative in its analysis of evidence to the extent of imposing a sentence which induces a sense of shock.

The court did not justify in its reasons for sentence why a custodial sentence was appropriate.

The court *a quo* erred in not considering community service or at least a fine. The case of *S v Tshuma* HB 70/13 was referred to.

That s 70 (1) (a) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is non-existent.

It was argued the above were serious misdirections on the part of the trial court which warranted the appeal court to intervene.

In response Mr *Chikosha* for the respondent admitted that the section under which the applicant was charged was wrong in that the correct paragraph under s 70 (1) was (b) not (a) as cited and that there is no sub para (i). He however argued that the defect was curable under s 203 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*].

It is important to note that despite the wrong citation the details of the charge, the state outline and the evidence led at trial were all for a charge of “**performing indecent acts with a young person.**” The question is what prejudice did the applicant suffer as a result of this wrong citation? Certainly none. While there is need for trial magistrates to be diligent in ensuring that correct sections are cited, in the present case, the omission is not as fatal as to cause the proceedings to be set aside.

The rest of the attacks by Mr *Zuze* are based on factual findings by the magistrate. I was not persuaded that the magistrate erred in her findings of fact. I did not see anything from the reading of the record of proceedings suggesting complainant’s evidence to be fictitious and false. I will in brief summarize the critical path of her evidence:

“She knew the applicant and respectfully addressed him as daddy

That he entered the kitchen where she was and fondled her breasts and buttocks.

He later came back and did the same to her and also asked if she could kiss him but she refused and by then had asked her if she had seen his small key.

Before he left he asked her if she did not love him.

While she confirmed the presence of some people in the lounge, she said she could not report the matter to them because they were drinking alcohol and were drunk and playing music and feared further abuse from them.

She reported the matter to her mother immediately when she arrived from church.”

It is also important to note that the offence was committed on 24 December 2017 and the trial started hardly a month later on 19 January 2018. The findings of fact by the trial magistrate *visa vis* the evidence of the complainant in my view cannot be faulted.

I find no basis for classifying the evidence of the complainant as fictitious. There was nothing to suggest that the evidence was fabricated. No meaningful reason was advanced by the applicant at trial why a young child of 9 years who respectfully addressed him as daddy would turn against him to fabricate a detailed story such as this. In my view, the appeal against conviction has no prospects of success. On the sentence, it was said to induce a sense of shock. Reference was made to the Tshuma case cited *supra*. A reading of that case, which was a criminal review, shows that it is not relevant to the present case. The facts and ages are different. Even the relationships are different.

Mr *Zuze* made emphasis that the trial magistrate was obliged to inquire into the suitability of community service and referred the court to the case of *Leonard Silume v The State*, HB 12-16. Where the learned Judge said the sentencing court has a discretion in assessing the appropriate sentence which sentence an appeal court will not interfere with unless there is misdirection or the sentence is manifestly excessive. The Judge also referred to a number of other decided cases which showed that where a court settles for imprisonment of 24 months or less then the court must inquire into the suitability of community service.

The trial magistrate stated that in a bid to protect the girl child, a fine or community service will be too lenient and a custodial sentence was necessary. But she did not go into an inquiry as to why community service is inappropriate given the level of the period of imprisonment that fell within the range where the court was obliged to consider community service as an alternative. This was a misdirection.

There is therefore prospects of success on appeal against sentence.

It has also not been shown that the applicant is likely to abscond if granted bail pending appeal. Mr *Chikosha* argued that the offence for which the applicant was convicted is a very serious one. However, despite the serious nature of the offence, the circumstances do not suggest that the applicant is likely to abscond.

In the Williams case (*supra*), at 468 G-H, the court said that:

“...the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice.”

In the present case I do not see any danger in releasing the applicant on bail pending the determination of his appeal.

In the result the application for bail pending appeal succeeds and the applicant is admitted to bail pending appeal on the following conditions:

- 1.1 He deposits \$100-00 with the Registrar of the High Court, Harare
- 1.2 He resides a No. 5011 Dzivaresekwa Extension, Harare
- 1.3 He reports once a week every Friday at Dzivaresekwa 2 Police station

Zuze law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners