VICTOR CHIMINYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 20 March 2018 and 30 May 2018

Bail ruling

C K Mutevhe, for the applicant
F Nyahunzvi, for the State

NDEWERE J: This is an application for bail pending appeal. The State had conceded but I invited submissions from both parties.

The applicant, an Archbishop and Founder of Sangano ra Jehova Apostolic Church in Buhera, was convicted of the rape of a 15 year old Form 2 girl who was a member of his church. The evidence was that when the complainant was walking home after a church service with a 12 year old colleague, the Bishop called them back and invited them to stay the night as it was not safe to return to their home in the dark. Thereafter he started to pray with the complainant and the 12 year old colleague and her mother. Thereafter, he came up with a plan to separate the complainant from the 12 year old and her mother and invited the complainant to his shrine at his homestead for "more prayer". At the shrine, he told the complainant that he wanted to cast out a spirit on her through sexual intercourse with her and that if she disclosed the incident to anyone, he would break his clay pot and cause her to go mad or die. She initially refused but when he threatened once more to break the clay pot, she gave in. The complainant demonstrated to the court how the rape happened using the male and female doll given to her. She said after the act, she was told to clean her private parts with paraffin which was in a two litre container in his office. After that, she was told to re-join the others and go to sleep.

The complainant said she did not disclose the rape to anyone because of the fear of what would happen to her if the applicant broke the clay pot. About two months later, the complainant attended an all-night prayer. The applicant came to the prayer and invited people

to go to his home which he referred to as “Jerusarema,” for more prayers. He said complainant should also come. When they got to his residence, he started calling people one by one to “receive prayers”. He also called the complainant on her own and had sexual intercourse like what he did on the first count. He repeated the threat to break the clay pot if she disclosed the incident to anyone. She did not disclose the incident to anyone.

The complainant got pregnant from the applicant’s escapades and that is how the offence came to light. The complainant revealed that the Bishop was responsible for the pregnancy and her father reported the matter to the police and the accused was charged with rape. At the end of the trial, the magistrate believed the complainant’s evidence as a true account of what happened, despite the fact that she did not report the rape to anyone when it happened.

The trial magistrate is the one who listened to all the evidence and observed the witnesses as they testified and at the end of it all, he was satisfied that complainant’s account was true and that the State had proved its case beyond reasonable doubt. It will therefore be difficult for an appeal court to interfere with the trial court’s finding which is based on the credibility of witnesses when it does not have the privilege of hearing the witnesses and seeing their demeanour.

The applicant’s own defence was a bare denial. He said the complainant was fabricating the charges. The question is why would the complainant, a young unsophisticated rural girl, fabricate such allegations against her own Archbishop? The applicant in his evidence, admitted that complainant was an unsophisticated rural school girl. He admitted that he was very powerful in the church. He admitted that the complainant respected her. He admitted having clay pots in the church or tabernacle. He said the clay pots were special objects of the church. All his admissions above tend to corroborate the complainant’s evidence.

The fact that the complainant was attending church services showed that she believed in her church and its leadership. So if the Archbishop did not rape her, why would she pick on him as the culprit? Complainant’s evidence also indicated that the applicant paid four herd of cattle to her parents as damages through his family and the village Head was also involved. The defence did not seriously dispute this piece of evidence during the trial. The defence could have called the village head to refute the allegations, but they chose not to.

I therefore do not see any misdirection by the trial magistrate which will warrant interference by an appeal court. In view of the evidence adduced at the trial; my view is that

the appeal has no prospects of success. Even the sentence of 18 years, 3 suspended, is a fair sentence for two counts of rape of a 15 year old school girl who ended up dropping from school as a result of this rape and pregnancy.

It should be noted that in bail pending appeal applications, bail is no longer a right as in a bail pending trial. There is no longer a presumption of innocence. The applicant is merely asking the court to exercise its discretion in his favour. The application is inviting the Court to restore to the applicant a right to liberty that has been taken away through the due process of the law while conviction is still extant in that it has not been set aside.

As pointed out in *S* v *Tengende*, 1981 ZLR 445 (S) at 448,

> "…..bail pending appeal involves a new and important factor, the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for doing so. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal; the proper approach is that in the absence of positive grounds for granting, bail will be refused."

See also *Munyaradzi Kereke* v *Francis Maramwidze* HH 632/16, where, on p 3 of the cyclostyled judgment, Zhou J had this to say;

> "the principles applicable to an application for bail pending appeal are settled in this jurisdiction. They differ significantly from those which apply where admission to bail is sought pending trial. That distinction is apposite given the fact that where bail is sought after conviction and sentence the presumption of innocence which is encapsulated in s 70 (1) (a) of the Constitution of Zimbabwe no longer applies. Also s 50 (1) (d) which gives an arrested and detained person the right "to be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention," equally has no application."

I cannot give a better summary of the approach to bail pending appeal than what ZHOU J said above.

In *S* v *Dzvairo* 2006 (1) ZLR 45 H at 60E-61A, PATEL J (as he then was) had this to say;

> "Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail, it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. "

In the same paragraph referred to above, Justice PATEL went a step further;

> "Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour."

In the present case, the applicant was convicted of two counts of the very serious charge of rape. According to the principle enunciated above, that factor of being convicted of a serious offence, may lead to the refusal of bail.

> "It is also necessary to balance the likehood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospect of success is weak, the length of the sentence imposed is a factor that weighs against the granting of bail." Continued Justice PATEL in *S* v *Dzvairo* (*supra*).

In the present case, the conviction is of two counts of rape, a very serious offence as aforesaid. The sentence is long, 18 years, three suspended, effective 15 years. I have already indicated that my view is that there are no prospects of success in applicant's appeal. So if the applicant is released on bail, the length of his sentence may induce him to abscond since there are no prospects of the appeal succeeding and the long custodial sentence being set aside.

The applicant's case for bail pending appeal is based mainly on the complainant's delay in reporting and other alleged inconsistencies. However, as pointed out by Justice ZHOU in the *Munyaradzi Kereke* v *Francis Maramwidze supra;* the evidence of the complainant has to be considered in its totality and not piece meal or in isolation from the rest of the evidence, including that of the accused person. In this instance the applicant's defence was a bare denial as opposed to an affair which was belatedly hinted at by his defence lawyers. The suggestion of an affair by the defence lawyers is an indication that they accept the complainant's evidence of sexual intercourse having taken place as opposed to the accused's bare denial.

Consequently, the application for bail pending appeal is dismissed. The applicant should prosecute his appeal whilst serving his sentence.

M.C Mukome legal practitioners, applicant's legal practitioners
National prosecuting authority, State's legal practitioners