REPORTABLE (36)

Judgment No. S.C. 45/02
Crim. Application No. 131/02

EDMORE MUSASA v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 7, 2002

Before ZIYAMBI JA, In Chambers, in terms of s 121(2)(a) of the Criminal Procedure And Evidence Act [*Chapter 9:07*]

The applicant was convicted by the regional magistrate, sitting at Chitungwiza, of the rape of a four year old girl. He was sentenced to undergo a term of ten years' imprisonment with labour, of which one year was suspended on the usual conditions of good behaviour. He noted an appeal to the High Court against both conviction and sentence and subsequently made an application to that court for his release on bail pending appeal. The application was dismissed by HLATSWAYO J. The applicant now appeals, with leave, to this Court in terms of s 121(2)(a) of the Criminal Procedure And Evidence Act [*Chapter 9:07*] against the decision of the High Court.

The principles by which this Court will be guided in applications of this nature are twofold. Firstly, the discretion lies with the trial judge:

> "Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the

> authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as *Rex v Milne and Erleigh (4)* 1950 (4) SA 601 and *R v Mthembu* 1961 (3) SA 468 stress the discretion that lies with the judge and indicate 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 my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter-connected because the less likely are the prospects of success the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the *onus* is on the applicant to show why justice requires that he should be granted bail." (emphasis added)

S v Williams 1980 ZLR 466 at p 468.

Secondly, this Court will only interfere if there is an irregularity, or misdirection or an improper exercise by the judge *a quo* of his discretion.

> "The next matter to be decided is whether this Court in hearing the appeal should treat it as an appeal in the wide sense, that is to say, that it is to be treated as if it were a hearing *de novo*. Once again that matter has been decided by the case of *The State v Mohamed supra* at 542 B-C where TROLLIP JA said that in an appeal of this nature the Court of Appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision." (emphasis added)

Per BECK JA in *S v Chikumbirike* 1986 (2) ZLR 145 (SC) at p 146.

I must therefore determine whether there is any irregularity or misdirection to be found in the decision of the judge *a quo* or whether his discretion was "so improperly exercised as not to have been judicially exercised".

The learned judge refused bail on the grounds that there were no reasonable prospects on appeal in respect of both conviction and sentence and that, notwithstanding any stringent conditions which he might impose, there was a risk that the applicant might abscond in view of the lengthy sentence which was imposed on him.

The misdirection alleged by the applicant is that the learned judge failed to attach due weight to the applicant's conduct on bail pending trial as a measure of his likely conduct in the event of his admission to bail pending appeal. I do not agree.

The learned judge, it appears to me, gave adequate consideration to the issue. He said at p 2 of the cyclostyled judgment:

"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 monetary and reporting conditions is unlikely to be an effective deterrent. Of course the likelihood to abscond is closely related to the prospects of success on appeal, to which I will turn shortly."

With regard to the prospects of success, the learned judge carefully considered each ground of appeal raised by the applicant in his notice of appeal (which does not form part of the papers before me but which appear clearly from the judgment and in any event were repeated in the grounds of appeal filed in respect of this application). He then proceeded to give reasons why he considered there were no prospects of success on appeal.

I can find no fault with his approach and I certainly do not find any misdirection therein.

It bears mentioning here that Mr *Mushangwe*, who appeared for the State, was of the opinion that there were prospects of success on appeal against conviction. He submitted that the learned judge misdirected himself in treating the application as though it was the actual appeal hearing when he was only required to consider the prospects of success. He submitted that children of tender age are given to fantasizing and on that ground the prospects of success were reasonable.

The approach of the learned judge was to take each ground of appeal and examine the judgment of the magistrate to ascertain whether there was substance in the criticism and whether there were prospects of success on appeal. In each case, the learned judge gave a thorough and detailed assessment of the evidence. It cannot be said that he misdirected himself. How else was he to determine the prospects of success?

As for the submission that children of tender age tend to fantasize, without professing to be an expert on the subject, it seems fair comment to say that a four-year-old girl is hardly likely to fantasize about a rape or sexual abuse. I am fortified in this by the expert opinion quoted by the learned judge at p 8 of the cyclostyled judgment:

> "There is certainly no psychological research or medical case study material which suggests that children are in the habit of fantasising 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 characterised 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 ejaculation, 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*."

Accordingly it has not been established that there was any misdirection or irregularity in the proceedings. It remains to be considered whether there was an improper exercise by the learned judge of his discretion.

The learned judge, after analysing the judgment of the learned magistrate, based his decision on the following:

> There was evidence that the complainant's hymen was attenuated and that there was injury to her urethra suggesting at least legal penetration; and
>
> There was evidence from the doctor that the injuries found on the complainant were highly suggestive of penile penetration and the possibility of the complainant injuring herself with a stick or other instrument was discounted.

The only remaining issue of substance was the identity of the person who raped the complainant. On this issue, the complainant told her mother that it was the applicant who raped her.

There was evidence, which was common cause, that the complainant had been in the applicant's room on the day she was raped and had been seen leaving the applicant's room by her mother, who had then beaten her for "going to other people's houses".

There was evidence that even then the mother had not suspected that anything was wrong. It was only two days later, after being asked by her mother why she had difficulty in walking, that the complainant had told her mother that the applicant had abused her.

The words used by the complainant to describe her ordeal were, understandably, childish but were understood by her mother, the police officer and the court to mean that the applicant had rubbed vaseline onto her vagina and had used a condom before penetrating her.

When one bears in mind the new approach to sexual cases, namely that:

> "… the cautionary rule in such [sexual] cases has no rational basis for its existence. … while a trial court must consider the nature and circumstances of the particular offence, in the end only one test applies, namely, was the accused's guilt proved beyond reasonable doubt, and the test must be the same whether the crime is theft or rape."

See *S v D & Anor* 1992 (1) SA 513 (Nm) at 517 A-B, per FRANK J (with whom STRYDOM JP agreed), approved by the Supreme Court of this country in S v Banana 2000 (1) ZLR 607 (SC) at p 614 where GUBBAY CJ observed:

"It is my opinion that the time has now come for our courts to move away from the

application of the two-pronged test in sexual cases and proceed in conformity with the approach advocated in South Africa. …

> I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I would emphasise that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully."

As well as the observations made by this Court in *S v Machowe* S-14-99 and by the High Court in various cases like *S v Madzomba* 1999 (2) ZLR 214 and *Joshua Mashave v The State* HH-96-2001 as to the unlikelihood of young complainants making serious allegations of this nature without any basis whatsoever, it seems to me that the learned judge cannot be faulted in the manner in which he exercised his discretion.

It was for these reasons that I dismissed the appeal.

Mufadza & Associates, applicant's legal practitioners