

DISTRIBUTABLE: (107)

MUNYARADZI KEREKE
v
THE STATE AND FRANCIS MARAMWIDZE

SUPREME COURT OF ZIMBABWE
HARARE: 4 AUGUST 2021 & 12 OCTOBER 2021

T. W. Nyamakura with *L. Madhuku*, for the applicant

E. Makoto, for the first respondent

C. Warara, for the second respondent

CHAMBER APPLICATION

Judgment No. SC111/21
Chamber Application No. SC 259/21

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MWAYERA JA: On 4 August 2021 after considering all documents filed of record and having been orally addressed by counsel, I issued an order admitting the applicant to bail, and indicated that I would avail written reasons for my disposition. The reasons are captioned herein.

THE PARTIES

The applicant was convicted by the Regional Magistrates for rape of an 11 year old complainant. He approached this Court, legally represented by counsel of record seeking bail pending appeal.

The first respondent is the State represented by counsel of record. The second respondent is the legal guardian of the complainant represented by counsel of record who instituted a private prosecution culminating in the conviction and sentence of the applicant. Worth noting is the fact that Mr Makoto for the State submitted on behalf of the State that the latter would be bound by the court's decision. He initially sought to be excused but conceded that the State was properly cited as an interested party even though the matter arose from private prosecution. The criminal matter squarely falls in the domain of the State for not only prosecution but enforcement and or discharge of the order as occurred in this case. It was submitted by Mr *Makoto* that the State had no meaningful submissions to make for and against the application but that there was no prejudice in the citation of the State as a party to the proceedings.

FACTUAL BACKGROUND

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The applicant was, at the instigation of a private prosecution, arraigned before the Regional Magistrates Court on one count of indecent assault and one count of rape. The applicant was acquitted of the indecent assault charge and convicted of rape. The applicant was duly sentenced to 14 years imprisonment of which 4 years imprisonment were suspended on the usual conditions of good behaviour. Dissatisfied with the Regional Magistrate's decision the applicant lodged an appeal against both sentence and conviction in the High Court.

The High Court upheld the Regional Magistrate's finding that the applicant raped the complainant. He, armed with a pistol used threats to sexually violate the 11 year old niece of his wife. The High Court, like the Regional Magistrate, held that the complainant and other state witnesses' evidence inclusive of the medical evidence clearly proved that the

applicant had raped the complainant in violation of s 65 of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]. In short the High Court in dismissing the applicant's appeal found nothing amiss with the manner in which the trial court handled the matter. It held that the conviction was anchored on the evidence adduced and the sentence imposed was in sync with sentences in cases of a similar nature. The applicant was not deterred by the dismissal of his appeal. He applied for leave to appeal. The application was dismissed by the High Court on 10 December 2020. He thereafter approached this court with an application for leave to appeal which application was granted on 8 July 2021, culminating in the present application for bail pending appeal.

SUBMISSION BY PARTIES

The applicant's counsel Mr *Nyamakura* submitted that the applicant is a family man with heavy responsibilities since he has more than one wife and twenty children. He submitted that this background when viewed in conjunction with the fact that at the time of filing of the application the applicant had served the larger part of the sentence and was only left with twenty months, minimises the temptation to abscond. It was further submitted that since the application was being made at the tail end of the sentence there is no inducement to abscond and that the interest of justice will not be prejudiced by granting the applicant the chance to prosecute his appeal while out of custody. On the issue of prospects of success it was submitted on behalf of the applicant that he enjoyed reasonable prospects of success on appeal. The applicant's counsel submitted that the court *a quo* in upholding the conviction of the applicant by the Magistrate court paid no attention to the totality of the circumstances and evidence.

Mr *Nyamakura* further drew attention of the court to the defence of *alibi* he raised before the trial court as not having been properly assessed. He further raised concern in the inconsistencies in the complainant's evidence on how the sexual violation occurred. The applicant also took issue with the finding of the trial court that defence witnesses had been coached because their statements were commissioned by the same lawyer. There was no evidence of how the witnesses were coached and whether the act of commissioning statements by the same lawyer conclusively meant witnesses were coached. Mr *Nyamakura* submitted that the applicant was not at the alleged scene of crime at the relevant time and led evidence in support of his defence of *alibi*. The defence witnesses were consistent that the applicant could not have committed the offence of rape since he was not at the scene of crime. He contended that considering the totality of the state and defence evidence the applicant enjoyed reasonable prospects of success on appeal and thus the applicant ought to be admitted to bail. It was further submitted that this Court in granting the applicant leave to appeal in SC 86/21, had traversed the question of whether or not there are prospects of success and concluded that the appeal has good prospects of success.

The Respondent's counsel Mr *Warara* submitted that the application for bail pending appeal should be dismissed because the applicant did not meet the requirements. He contended that the applicant, by virtue of having many wives and having given various addresses in the High Court bail applications, should be viewed as a person with no permanent residence. This factor would mean that if he is admitted to bail, chances of absconding are high. Mr *Warara* submitted further that even without a passport the applicant could take advantage of the porous nature of our borders and evade justice. He submitted that the applicant having experienced the rigours of prison was likely to abscond. The respondent

argued that the 20 months left of his sentence is not a short time such that if the applicant is released on bail his chances of returning to prison voluntarily are remote.

Mr *Warara* also raised concern that the applicant wields influence which would enable him to roam out freely without completing his prison term. He was said to have influence on the prison system as he had been allowed to personally interact with his family and had caused three senior prison officers to offend against the law. To buttress the alleged influence on the system Mr *Warara* highlighted that it took a private prosecution for the applicant to be brought to book as he used his influence to manipulate the system and public officials including the police to frustrate the complainant's case.

Mr *Warara* further submitted that although this Court in SC 86/21, in granting leave to appeal, considered prospects of success, there are outstanding factors which militate against admission of the applicant to bail pending appeal. He stressed that there was no certainty as regards the applicant's residence and that there is no explanation of how the new property he offers as security came into existence. He submitted that there were no prospects of success on appeal as the defence of *alibi* was rebutted and it was found that the witnesses were coached. He however acknowledged the fact that prospects of success on appeal is a factor considered in granting leave to appeal and that the court in granting leave to appeal made a finding that the evidence of the witnesses who are alleged to have been coached has to be tested.

THE LAW

The factors that fall for consideration in an application of this nature are fairly settled and can be summarised as follows:

1. Prospects of success on appeal.
2. The likely delay in hearing the appeal.
3. The likelihood of abscondment.
4. The interest of administration of justice.

In an application of this nature it is important to note that the bail is being sought after conviction. It is essentially different from an application for bail pending trial in which the presumption of innocence operates in favour of the applicant. Bail in the latter scenario, is a matter of right and is only denied where there are compelling reasons warranting deprivation of liberty. In bail pending appeal the applicant is a convict and as such has the *onus* to show positive grounds for his admission to bail. The position was ably stated by PATEL J (as he then was). In *S v Dzvairo* 2006 (1) ZLR 45 H at 60E-61A

“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”. See also *S v Tengende* 1981 ZLR 445 (S) at 448.

It is important to note that the burden of proof in bail pending appeal lies on the applicant who has to show that the interests of justice will not be frustrated by his admission to bail. Section 115 (C)(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is instructive on the issue of onus. It states in Subsection (2)

“Where an accused person who is in custody in respect of an offence applies to be admitted to bail.....(b) after he or she has been convicted of the offence, he or she shall bear the burden of showing on a balance of probabilities that it is in the interest of justice for him or her to be released on bail”.

It is apparent that in exercising its discretion whether or not to admit the applicant to bail pending appeal the court has to consider all the factors cumulatively in order to come up with a just decision. The applicant has already been convicted. He must tip the scale in his favour by demonstrating that there are reasonable prospects of success on appeal and that his release on bail will not jeopardise the interest of the administration of justice. The applicant has to demonstrate that in the event of him not prosecuting the appeal successfully he will not abscond but avail himself to fulfil the societal interest of having matters finalised to their logical conclusion.

APPLICATION OF THE LAW TO THE FACTS

In the present case the applicant is seeking to be admitted to bail pending appeal on the basis that there are reasonable prospects of success on appeal. He contends that the test for reasonable prospects of success was ably and appropriately discussed and accepted by this court when leave to appeal was granted. I do not propose to revisit the finding of this Court on the issue of reasonable prospects of success on appeal. Suffice to mention that the applicant ably demonstrated that there are realistic prospects and not remote prospects of success. The unsatisfactory aspects of evidence in the record *a quo* such as the unclear circumstances under which the offence was committed, inconsistencies in complainant's description of how and where the rape occurred, the defence of *alibi* raised and the dismissal of defence witnesses' version without testing their veracity on the basis that statements were commissioned by the same commissioner of oaths all point to an appeal with some substance. It is my considered view that there are reasonable prospects of success on appeal in this case.

The reasonable prospects of success on appeal when viewed in conjunction with the other factors which fall for consideration in applications of this nature go a long way in showing that it is in the interests of justice that the applicant be considered for bail.

The applicant has served a considerably large period of the sentence pursuant to conviction and sentence. At the time of lodging the application he can safely be said to be at the tail end of the sentence. Left with only 20 months of the sentence, the applicant having been granted leave to appeal on the basis that the appeal is reasonably arguable with real and reasonable possibility of success on appeal, has little incentive to abscond. I am alive to the fact that the applicant has tasted the rigours of prison and that he appreciates prison life but considering he is left with just some months of imprisonment there is minimal inducement to abscond. The applicant is a family man of fixed abode. That he has several properties and wives is not an indication that he is likely to abscond and evade justice. In fact the circumstances of the matter are such that the applicant has more to lose by absconding. The proposed bail consideration and the sureties that have been offered go a long way in allaying the fears of absconding moreso considering that the applicant has reasonable prospects of success on appeal and that he has served more than 70 per cent of the sentence imposed. It is common cause that there is considerably long delay in hearing of appeals. A number of factors including the current backlog escalated by the COVID 19 pandemic contribute to the delay. Considering the possible delay, in the event of the applicant prosecuting the appeal with success, if he is not admitted to bail, the appeal will be finalised after he would have completed serving his term of imprisonment. The appeal will purely be academic much to the detriment of the administration of justice.

The second respondent's counsel argued extensively that the applicant has influence on the justice delivery system. However the facts of the case do not buttress the existence of such influence. If he had influence of such magnitude as sought to be portrayed then one wonders how the applicant served more than seventy percent of the prison term imposed. The feared influence considering the successful prosecution and sentence already served is not real and does not constitute a threat to the administration of justice. Upon considering the circumstances of this matter, bail pending appeal requirements and the proposed stringent bail conditions, the scale tilts in favour of the applicant being admitted to bail. It is apparent that the applicant enjoys reasonable prospect of success on appeal. The sentence left is a short imprisonment term which when viewed with the totality of the circumstances minimises chances of abscondment. The interests of the administration of justice will not be prejudiced by admission of the applicant to bail.

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Accordingly it is on the basis of these considerations that the applicant is admitted to bail on the following terms:

IT IS ORDERED THAT:

1. The Applicant be and is hereby admitted to bail pending appeal on the following conditions:
 - 1.1 The Applicant is ordered to pay an amount of ZWL\$500 000 (five hundred thousand dollars) to the Registrar of the High Court.
 - 1.2 The Applicant is ordered to report once every Friday between 0800hrs and 1700hrs at Borrowdale Police Station in Harare.

1.3 The applicant is ordered to reside at Number 5 Lealous Gardens, Glen Lorne Harare until his appeal is finalised.

1.4 The applicant shall surrender as surety for due performance of his bail conditions, the title deeds of the following properties:

1.4.1 Title Deed number 0003366/20 for an undivided 10 percent share number 5 in a certain piece of land situate in the District of Salisbury called Stand 4056 Glen Lorne Township of Stand 3084, Glen Lorne Township measuring 4 315 square metres. The property is owned by Nineteen Twelve Family Trust.

1.4.2 Title Deed Number 0008161/2008 for a piece of land situate in the district of Salisbury called Stand 151 Carrick Greagh Township of Carrick Greagh of Section 4 of Borrowdale Estate measuring 4000 square metres. The title deed is registered in the name of Property Leaders Contractors (Private) Limited.

1.5 The Applicant shall deposit, contemporaneously with the original title deeds, duly executed consents to stand as the applicant's surety from Trustee of Nineteen Twelve Family Trust and Property Leaders Contractors (Pvt) Ltd pending the conclusion of the Appeal in SC 259/21. The applicant, and by consent, the applicant waives his right to obtain a passport and shall not apply for a new passport with the Registrar General's Offices Zimbabwe.

2.0 The Registrar of this Court is directed to transmit this order to the Registrar General on the date of issuance of this order.

Lovemore Madhuku Lawyers, applicant's legal practitioners
National prosecuting Authority, 1st respondent's legal practitioners
Warara and Associates, 2nd respondent's legal practitioners

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