BOBBY FRANSCISCO
versus
THE STATE

HIGH COURT OF ZIMBABAWE
ZHOU J
HARARE, 13 & 14 July 2015

Bail Application

P Mbano, for the applicant
R Chikosha, for the State

ZHOU J: This is an application for bail pending determination of the applicant's appeal against a judgment of the Magistrates Court given at Chinhoyi in terms of which the applicant was convicted on a charge of rape as defined in s 65(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegation against the applicant upon which the conviction was sustained is that on a date unknown to the prosecutor but during the month of March 2014 and at House Number 3929 Coldstream Chinhoyi, the applicant had sexual intercourse with a female juvenile aged eight years who at law is incapable of consenting to sexual intercourse. The applicant pleaded not guilty to but was convicted of the offence following a full trial. He was sentenced to twenty years imprisonment. The applicant has appealed to this Court against both the conviction and sentence. The application for bail pending appeal is opposed by the respondent.

The principles which apply to an application for bail pending determination of an appeal are set out in numerous cases. In the case of *S* v *Dzvairo*2006 (1) ZLR 45(H) at 60 PATELJ (as he then was) said:

> "The principles governing bail pending appeal were very lucidly articulated in *S v Williams* 1980 ZLR 466(A) at 468E-H per Fieldsend CJ and *S* v *Tengende&Ors*1981 ZLR 445(S) at 448A-E and 449F-H per Baron JA. I paraphrase the principles enunciated in these cases as follows,
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> > "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. 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. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are prospects of success the more inducement there is to abscond. Where the prospect of success on appeal is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail.'"

The above principles have been consistently upheld and applied in this jurisdiction. See *S* v*Labuschgne*2003 (1) ZLR 644(S); *S* v*Manyange*2003 (1) ZLR 21(H); *S* v*Dzawo*1998 (1) ZLR 536(S) at 539E-F. The effect of the authorities cited above is to place the onus on the applicant to show that the administration of justice dictates that he be admitted to bail pending the determination of his appeal. The factors highlighted are not individually decisive. Rather, they must be considered together and weighed one against the other, and must be taken together with all the other circumstances of the case in order to reach a decision that is fair to the applicant without compromising the administration of justice.

This court is not sitting in an appeal to determine the correctness or otherwise of the judgment of the Magistrates Court. Accordingly, the inquiry into the prospects of success of the appeal does not look at whether the appeal should or ought to succeed. Rather, the appeal must have substance or must raise issues from which it can be concluded that the appeal is not a predictable failure or one that is manifestly doomed to failure. In the instant application the applicant has highlighted certain unsatisfactory features of the evidence of the complainant as well as that of the educational psychologist. In relation to the complainant, it is apparent from the record that at some point she mentioned other persons as having sexually violated her. At some point she even suggested that she had been injured while playing with a wheelbarrow. The complainant specifically mentioned the name of Ethan and Michael Mhondiwa as having abused her. In her evidence in chief she stated that the applicant told her to implicate Michael Mhondiwa. But during an interview with the psychologist after the request by the police the complainant was asked why she had initially implicated Michael as the one who had sexually

abused her. The report by the psychologist records that the "child did not respond". The issue of how and why she had implicated Ethan was not investigated at all, other than the suggestion in the judgment of the Magistrates Court that the other persons alleged by the complainant to have abused her "are just but mere children". Their ages are not stated and no evidence was led to show that they were not capable of sexually abusing the complainant. The magistrate does not appear to have approached the psychologist's evidence with caution given that the psychologist was engaged initially by the complainant's father on behalf of the complainant, and subsequently by the police but with a very limited mandate to "try to establish why the child had identified Michael Mhondiwa as her abuser in the initial interview". The drawings by the complainant to which so much weight appears to have been placed by both the psychologist and the magistrate do not depict scenes of sexual abuse. The first drawing, which contains handwritten notes, some of which were clearly not inscribed by the complainant, is not an illustration of sexual abuse. Rather, as Mr *Chikosha* properly conceded, it states something to the effect that the uncle has an ugly face, is dark in complexion, and thoroughly beats up others. On the same page is a drawing representing what is then stated (clearly not by the complainant) to be "Grandmother's Coldstream House". The next drawing is of two persons lying side by side on a bed. It is worrying that any weight was given to those drawings as they do not depict the complainant or any person being abused. The complainant contradicted herself as to where the abuse took place as well as whether she screamed or not. In one instance she said the applicant told her to remove her pants; in another instance she suggested that he removed them. The above are matters in respect of which valid concerns have been raised by the applicant in challenging the evidence led on behalf of the state. In my view, the appeal has prospects of success.

As for the sentence, the magistrate appears to have outlined the mitigating factors for the record but completely ignored them as the maximum penalty was then imposed with no portion of it suspended at all. As was held by the Supreme Court in *S* v *Dzawo* (*supra*) p 539G-H, "the noting of an appeal against sentence offers a wide scope for a different opinion". There are no unusual aggravating features upon which the suspension of a portion of the sentence could be justifiably discarded. Admittedly, if the conviction is to stand the applicant would in all probability be sentenced to an imprisonment term even if a portion of it is suspended. Thus the prospect of success in relation to the sentence imposed on its own would not have affected the overall view of the matter. However, when it is taken together

with the matters noted in relation to the conviction it certainly becomes a relevant factor in assessing the prospects of success of the appeal as a whole.

The authorities cited above show that 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, as was stated in*S* v *Dzvairo supra*, p 60.The court is enjoined to balance the applicant's liberty with the proper administration of justice. That is the reason why it is up to the applicant to tip the scales in his favour. See *S* v *Manyange* (*supra*) at 22 G-H; *S* v *Tengende and Others* (*supra*).This is a matter in which the applicant has been convicted of a very serious offence, and has been sentenced to a period of twenty years imprisonment which is quite considerable. The judgment of the Magistrates' Court was given on 22 October 2014. The applicant noted an appeal against that judgment on 31 October 2014. He had therefore been in detention for a period of more than eight months at the time that this application was filed. He, however, only filed the instant application on 30 June 2015. In view of the seriousness of the offence to which the conviction relates and the fact that the applicant has experienced prison life with its associated inconveniences, it seems to me that the risk of absconding cannot be ruled out notwithstanding the prospects of success highlighted above. Even if it was to be accepted that no evidence of the danger of absconding was placed before the court, the above factors weigh heavily against the release of the applicant on bail at this stage of the proceedings. The court notes that the transcribed record of proceedings is now available, and would rather urge that energy be expended on prosecuting the appeal itself rather than seeking release on bail at this stage. The application was made more than eight months after the judgment which is being appealed against. I believe that if the applicant had pushed for the determination of the appeal within that time it would have been heard or would be close to being heard. This, in my view, is a matter in which positive grounds for bail to be granted have not been established. The right to liberty must be balanced against the other factors pointed above.

In the result, the application for bail pending appeal must be, and is hereby, dismissed.

Mbano & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners