

MISHECK MUSARURWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 28 January 2025

Bail Pending Appeal

P Kawonde, for the applicant
F Kachidza, for the respondent

WAMAMBO J: This matter is an application for bail pending appeal. Before the Regional Court applicant was the first accused of the three accused in that matter. They faced four counts of rape as defined in Section 65 (1) of the Criminal Law (Codification and Reform Act) Chapter 9:23. The allegations were that the accused person's raped female minors aged four, eight and 11 years old.

Applicant was a tenant at complainants' grandmother's house. The grandmother resided with the complainants. The Court *a quo* found the three accused guilty as charged on three of the four counts. The discovery of the commission of the offences was made by one of the victims' mothers. The mother Rumbidzai observed one of the victims inserting fingers into a baby's vagina. This discovery led to a can of worms whereby applicant and his co-accused were at that stage pointed as the alleged perpetrators.

The Court *a quo* examined and analyzed the evidence of the medical reports of the victims, the victims' young ages, how the offence came to light and the defence of alibi raised.

Dissatisfied with the conviction the applicant and his co-accused filed a notice and grounds of appeal. Applicant is applying for bail pending appeal. In such an application I ought to consider prospects of success on appeal, like hood of abscondment and the right to liberty considering possible delays before the hearing of an appeal.

The grounds of appeal are formulated as follows:-

“A d Conviction

1. The court *a quo* erred by failing to give effect to the provisions of section 173(b) of the Criminal Procedure and Evidence Act [Chapter 9:07] in that it should have been clear by the nature in which the charge was laid that there

was in it a vagueness as to the time of the commission of the offence which would have had the effect of prejudicing appellants in the conduct of their defence.

2. The court *a quo* erred in holding that the State had proved its case beyond reasonable doubt. The evidence of State witnesses who did not testify in favour of the state was not given due weight.
3. The court *a quo* erred by taking a simplistic boxing match approach to an otherwise complex matter. It was inadequate for the alleged victims of the crime to merely identify the accused persons. It was imperative that the evidence should have pointed to the accused only as the persons who could have committed the offence which was not done.
4. The court *a quo* erred in relying on the evidence of the State witnesses which was manifestly unreliable.

Ad sentence

5. The sentence imposed by the court *a quo* is excessive and induces a sense of shock.”

I should point out that Mr *Kawonde* for the applicant submitted that he was not relying on ground 4 in this application

In oral submissions Mr *Kawonde* attacked the judgment as not having considered section 146 and 173 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which require clarity on the time and place of the commission of the crime. He submitted that a charge stretching the alleged period of commission for a period of two years is too long and is vague.

Ms Kadudza for the respondent averred that grounds 2 and 4 are vague. I agree that the first part of the second ground is an example of what a ground of appeal should not be. The second part does not disclose which witnesses did not testify in favour of the State. Upon a first reading of the ground it could suggest that witnesses who were against the State case were not called. That does not seem to make much sense. It was only when counsel addressed me that they referred to particular witness who gave testimony.

I am cognisant that I am only dealing with bail pending appeal and not the appeal. My finding on ground 2 is that it is needed vague in the circumstances. That leaves ground 1 and 3.

On ground one this Court on appeal will delve extensively and substantively into section 146 and 173 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]

At this stage however I am of the considered view that because the offences were committed over an extensive period the couching of the charge is proper.

Both sections 146 and 173 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] do not limit the period to be endorsed on the charge sheet as to when the offences were committed.

Although Ms *Kachidza* did not impugn ground 3 on account of it being vague it would appeal to me that the appeal court may well find it argumentative and imprecise. The evidence however is clear that the victims identified the applicant sufficiently clearly in the circumstances. Applicant was not a stranger to the victims but a well-known tenant at the houses they resided at.

The description of how the offence was committed over a long period was also supported by medial evidence. I am satisfied that the judgment by the court a quo considered the circumstances of the case judiciously and that in the circumstances there are no prospects of success on appeal.

The sentence imposed is 45 years imprisonment of which 10 years were suspended on condition of good behaviour.

For raping minors under twelve years old over a considerable period of time in the sordid and brutal manner described by the victims the sentence is within the confines of precedent

In the circumstances I find that there are no prospects of success on an appeal against sentence

Likelihood of abscondment is heightened by the lengthy prison terms. There might be no motivation to turn up for a lengthy term of imprisonment to be potentially confirmed on appeal. Such confirmation is likely in the circumstances of the gravity of the offences and the young and vulnerable victims it was perpetrated upon.

Criminal appeal matters are currently set within a reasonably short period. I foresee no prejudice to the applicant caused by any delays. I find the application without merit and order as follows:

The application for bail pending appeal be and is hereby dismissed.

Kawonde Legal Services applicant's legal practitioners.

National Prosecuting Authority respondent's legal practitioners.