

**MBONISI NYATHI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 24 JULY & 6 DECEMBER 2012

*M. Ncube with C.M. Dube* for the applicant  
*W. Mabhaudi* for the respondent

Application for bail pending appeal

**NDOU J:** This is an application for bail pending appeal against conviction. The applicant was convicted by a Bulawayo Regional Magistrate for rape as defined in section 65 of Criminal Law (Codification and Reform) Act and sentenced to 18 years imprisonment half of which was suspended on the usual conditions of good future behaviour. He has appealed against both conviction and sentence. The state has opposed the application primarily on the basis that there are no prospects of success on appeal against both conviction and sentence. It is trite law that bail pending appeal, unlike bail pending trial has the effect that the presumption of innocence no longer applies – *S v Williams* 1980 ZLR 466 (A). In *S v Kilpin* 1978 RLR 286 MacDonald CJ had this to say:-

“It is wrong that a person who should properly be in jail should be at large and nothing is more likely to encourage frivolous and vexatious appeals.”

*In casu*, the main thrust of the applicant’s case (on appeal) is that he was not properly identified by the complainant. The applicant and the complainant are neighbours. The complainant knew the applicant well enough to identify him. The offence took place in broad daylight at around 7 am. The complainant identified the applicant by name during the trial. The second witness, Talent Ncube, who was in the complainant’s company on the fateful day, also identified the applicant as the person who took away the complainant. There is no question of mistaken identity of the applicant. The only issue is whether these children are deliberately lying against him. The issue of credibility is the province of the trial court. The medical report produced during the trial indicates that the hymen was torn and the doctor opined that penetration was very likely. The trial court had to determine the complainant’s assailant in light of such medical evidence. As alluded to above the applicant was identified as the assailant.

An 18 year old offender should never be heard to be complaining when a sentence of 18 years imprisonment, with half thereof suspended, for raping a 4 year old child. If anything, the sentence is very much on the lenient side.

In light of the foregoing, the application is devoid of any merit and it is accordingly dismissed.

*Cheda & Partners*, applicant's legal practitioners

*Criminal Division, Attorney General's Office*, respondent's legal practitioners