TIBELLO TLOU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 5 December 2017

S Simango, for the applicant
B Murevanhema, for the respondent

Bail Application

MUSHORE J: The applicant applied for bail pending trail. The applicant is awaiting trial on a charged of rape in terms of s 65 of the Criminal (Codification and Reform) Act [*Chapter 9:23*]. I dismissed the application.

Circumstances surrounding the charge are that sometime in October 2017, the applicant (a 35 year old male) was conveying school children in his commuter omnibus from school to home. Complainant (aged 7) years) was one of those children. It is alleged that when the applicant dropped the children off, he told complainant not to disembark. Accused then drove complainant to a bush area nearby. He got into the back passenger seat where complainant was seated, pulled up her uniform, removed her pants and raped her. After he had raped complainant, he wiped the bloodstains off the seat, and told complainant to go home. He told her not to report the rape. Sometime later, when complainant's mother was bathing her, she noticed that complainant's private parts were different. When she asked her daughter that is when complainant told her mother what happened. A report was made to the police leading to the applicant's arrest. A medical report was done. The report was not made part of the record neither was the form 242.

Accused's defence was an outright denial that he had ever been alone with complainant. He denied that he had raped her. However, he admitted that he knew complainant as a pupil whom he used to drive from school.

His application for bail was predicated open his denying that he raped complainant; and that he had co-operated with the Police and that he has lived a crime-free life. He said he had

witnesses who could verify that he had never been alone with the complainant without providing the names of the witnesses.

The respondent stated that whilst it had no objection to the applicant being admitted to bail, its concession would depend on the following.

> "(That) ..applicant is enjoined to proffer an alternative address to allay fears of interference. The respondent has considered the age of the complainant and that she is a school pupil. The risk of interference has to be minimized."

Section 117 to grant bail provides that the denial of bail "s*hall be in the interests of justice"*. Such a determination is made by a consideration of all interests, and not solely upon the interests or rights of the applicant alone. Whilst it is true that the applicant has a right to be presumed innocent, the interests of justice can best be evaluated by a proper application of the peremptory provisions of the Constitution.

Section 46 of the Constitution enjoins me to:

> "46 (1) give full effect to the rights and freedoms enshrined in the Declaration of Rights".

Section 86 (1) of the Constitution directs the courts to recognize that where there are existent rights, such rights *"must be exercised reasonably and with due regard for the rights and freedoms of other persons"*.

Section 46 (2)of the Constitution requires the courts to be cognizant of the Declaration of Rights, *" when developing the common law and customary law, every court must promote and be guided by the spirits and objectives of this Chapter."*

The complainant, being a minor, is accorded special rights by the Constitution. Section 81 (3) provides complainant with *" adequate protection by the courts, in particular by the High Court as their upper guardian."*

Further 81 (2) deems that:-

> "81 (2) A child's best interests are paramount in every matter concerning the child."

When interpreting legislation, a determination by the Court shall not:

> "47 '… preclude the existence of other rights and freedoms that may be recognized or conferred by law, to the extent that they are consistent with this chapter.'"

> Thus the interest of justice in terms of s 117 (2) when a refusal to grant bail is arrived at, must be measured within the confines of the peremptory provisions of the Constitution cited above."

My dismissal of the application was reposed upon my finding that admitting the applicant to bail at this juncture would:-

> "Section 117 a (2) (iii) and (iv)
>
> "undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system."

This is a Third Schedule Offence which is not only serious, but rampant to the extent that the courts are enjoined to include the perceptions of the public of the judicial system insofar as whether there is a properly functional judicial system.

Furthermore, I apprehend that the complainant would be most definitely intimidated in hearing that the applicant is out on bail. Although the applicant's counsel suggested that the order sought should also prohibit the applicant from driving his commuter omnibus, it is my view that such prohibition would not in itself reduce the risk of complainant being intimidated and ultimately adversely influenced.

Beitbridge is a small community which is assumedly why the respondent averred that it feared that there was a risk of interference of the child if the applicant remained at the same residence.

Accordingly, and having examined all the above facts, I determined that the applicant was not a proper candidate for bail. In the result, I dismissed the application.

Nyikadzino, Simango and Associates, applicant's legal practitioners
B. Murevanhema, respondent's legal practitioners