

SIMBARASHE MAKONDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 5 & 10 OCTOBER 2017

Bail pending appeal

N Chigoro, for the applicant
I Nyahunzvi, for the respondent

TSANGA J: This an application for bail pending appeal against conviction and sentence in a matter involving rape of a 16 year old mentally retarded girl. The accused, aged 21 received a sentence of 14 years of which 5 years was suspended on the usual conditions for the alleged rape. The primary thrust in his quest for bail hinges on prospects of success drawing on the argument that the trial magistrate should have canvassed more fully the issue of whether the complainant could be deemed to be incapable of consenting. The applicant and the complainant lived a few houses apart. On the day in question the complainant had gone to her neighbour's house to play and on arrival had been called by the accused who was friends with a tenant at that house. The applicant had called the complainant into his friend's room, who was not in the room at the time and had sexual intercourse with her. The court relied on the medical report which stated that the complainant was incapable of giving informed consent.

“(She) has a history of delayed developmental milestones. (She sat, crawled, walked and talked late). She cannot do simple mathematics. She needs assistance in activities of daily living (e.g. bathing, washing clothes, and cooking food).

(She) has mental retardation. She cannot give informed consent but she can testify in a victim friendly court”

The court equally examined the totality of the factual circumstances relating to the sexual encounter in view of complainant's condition and concluded that:

...the court is of the conviction that at the requisite time, the complainant's mind, owing to her mental state, did not appreciate the import of the sexual act in issue, and that therefore her "consent" was not proper consent.

The magistrate went further to state that:

"The evidence in my assessment is akin to a scenario in which one has sexual intercourse with an 11 year old girl with her consent. Such consent, on account of the victim's mental age, is incompetent and is not consent at law"

With sexuality being an inherent need of all humans, our law, in its wording, recognises the right of mentally retarded persons to sexual expression in that it will only make a finding of rape in circumstances where consent is truly absent. Section 64 of the Criminal Code Codification and Reform Act [*Chapter 9:23*] provides as follows:

"(3) A person who engages in sexual intercourse, anal sexual intercourse or other sexual conduct with a mentally incompetent adult person shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, unless there is evidence that the mentally incompetent person;
(a) was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct, and
(b) gave his or her consent thereto."

In my view there appear to be little prospects of success on the argument of consent. What is apparent from a reading of the record is that the applicant at all times denied that sexual intercourse had ever taken place. In denying rape, he relied heavily on arguments that there was no evidence to support rape as indicated by the fact that the complainant had not bled, had not screamed, and, had not disclosed the rape immediately. In the case of *Musumhiri v The State 2014 (2) ZLR 223* these stereotypical beliefs on the appropriate conduct of a rape victim were canvassed as being often unhelpful in resolutions of such matters given their neglect of social contexts and cultural expectations involving women and girl's sexuality. Moreover, the record clearly evidences a concerted effort on the magistrates' part to canvass the issue of consent on the complainant's part, which, given the totality of circumstances and complainant's mental condition was found to be absent.

The applicant's version was that sexual intercourse never took place and therefore in raising consent as his defence this appears now to be a distinct shift from his position at the trial in which he was steadfast in his denial of sexual intercourse at all with the victim. This was despite the medical report confirming that sexual intercourse had definitely taken place. His defence was also that one of the witnesses had a vendetta against him over nude pictures

pertaining to her that she had sent to complainant's uncle. This too had been found to lack credibility by the court as no effort whatsoever was made to place before the court the evidence which applicant said he had on his phone. What applicant seeks to put forward in his application for bail is therefore effectively a shift in defence on appeal.

Whilst the record does suggest that the complainant was compliant regarding the sexual act, the magistrate did address the issue fully as to why it reached its conclusion that the complainant did not have the mental capacity to consent. It was common knowledge during the trial from observing the complainant give her evidence and from other witnesses that the complainant is mentally retarded. The applicant was fully aware of the complainant's condition as they lived just a few houses apart. Such knowledge bears on whether the applicant knew or should have known at the time the victim's capacity to consent in that particular situation. Also the parties were hitherto not at all involved in any romantic liaison, again a fact which is important in assessing the consent to sex or otherwise in the case of a mentally retarded person. The lower court indeed addressed this aspect.

Factors that also make the mentally retarded vulnerable to abuse include the fact that they are regarded as weak and passive. They are also said to hold the view that everyone is their friend. Furthermore they are often conditioned to be compliant because of their dependence on others.¹ It is the existence of such realities that the magistrate took into account. The complainant had passively agreed to being summoned when called by the accused and had been compliant when asked to remove her clothes. In our context where proper sex education directed at young people is frowned upon and conversations are still somewhat reticent and half hearted, one can only imagine how this would definitely heighten the vulnerability of mentally retarded females to sexual exploitation in the absence of proper education equipping them to engage with sexual encounters from the position of what would constitute informed consent.

Although an accused has a right to appeal it must also be appreciated that the right operates against the backdrop of the validity of both conviction and sentence. It is not as if the conviction and sentence are contingent until confirmed on appeal. As such an order for bail pending appeal is generally made in exceptional circumstances where there are indeed

¹ See Elizabeth J. Reed, *Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, 83 Va. L. Rev. 799, at p 810 (1997)

real prospects of success when balanced with other factors such as the likelihood of absconding, the right to liberty and the likely delay before an appeal is heard. Given the observation that applicant denied rape at all times and that he now seeks to rely on a new angle and is unlikely to succeed, it would not be proper to grant him bail only to have him returned to prison to serve his sentence. Given the sentence imposed, the likelihood of absconding cannot be ignored. As such, applicant should prosecute his appeal whilst serving his sentence.

The application for bail pending appeal is accordingly dismissed.

Chigoro Law Chambers, Applicants Legal Practitioners
National Prosecuting Authority, State's Legal Practitioners