IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL APPEAL N0.33 OF 2016
(BAIL APPLICATION)

ALLAN WILLARD.....APPELLANT

-AND-

THE REPUBLIC.....RESPONDENT

Coram: Hon. Justice M L Kamwambe
Mr Salamba of counsel for the State
Mr Maele of counsel for the Appellant
Mr Phiri...Official Interpreter

RULING

Kamwambe J

This is a summons for bail pending appeal taken under section 355 (1) of the Criminal Procedure and Evidence Code. The application also seeks stay of sentence.

The appellant appeared before the Mwanza First Grade Magistrate Court charged with the offence of defilement contrary to section 138 of the Penal Code. The particulars of the charge averred that the Appellant from the 8th of May to 17th June, 2016 at Chikolesa in the District of Mwanza had unlawful carnal knowledge of Beatrice Peter a girl under the age of 16 years. At plea taking the Appellant admitted having carnal knowledge of the girl but denied

that the girl was under 16 years of age. The Appellant did not cross examine any of the three prosecution witnesses and the court found him with a case to answer. In his defence the Applicant opted to remain silent. Subsequently, he was convicted and sentenced to 10 years imprisonment.

Section 355(1) of the Criminal Procedure and Evidence Code provides as follows:

> "Subject to this Code, neither a notice of intention to appeal given under section 349 nor a petition of appeal under section 350 shall operate as a stay of execution of any sentence or order, but the subordinate court which passed the sentence or made the order, or the High Court, may order that any such sentence or order be stayed pending the hearing of an appeal and if the Appellant is in custody that he may be released on bail, with or without sureties, pending such hearing"

Case authorities will show that there are two tests for granting bail pending appeal. They do not need to exist together at all cost. However, in considering whether to grant bail or not the court exercises its discretionary powers which ought to be exercised judicially. Some of the known Malawian case authorities which unfortunately reflect that the two considerations should exist concurrently are **Chakufwa Chihana v Republic** Criminal Appeal No. 9 of 1992 **and Suleman v Republic** [2004] MLR 398 (SCA) .The Walton case on the other hand suggests that they be in the alternative. These are:

1. . Likelihood of success of the appeal/review
2. Risk that the sentence will have been served by the time the appeal is heard.

Since the court considers both tests let it determine as it deems fit in the circumstances whether to grant bail or not in the existence

of one or both tests. I am convicted in this because you may have a situation where there is no real risk that the sentence will have been served by the time the appeal is heard because, for instance, l0 years of imprisonment lie ahead, yet, there is a high likelihood of success of the appeal. In such a situation I would grant bail on the basis that there is a likelihood of success.

In our present case, the Appellant has just started serving a 10 year imprisonment sentence, and therefore there is no risk that the sentence will have been served by the time the appeal is heard. As such, according to the proposition of law in Malawi it would be futile to consider whether there is a likelihood of success because they must exist together. On the corollary despite the risk not being there, it is fair and just to consider the likelihood of success of the appeal in its own right, and if it is in the affirmative, grant bail. Not doing so would amount to absurdity. I observe that Chatsika JA in the Chihana case stated very well by saying:

> *" ...it* seems *that where it appears, prim* a *facie, that the appeal is likely to be successful* ***or*** *where there is* a *risk that the sentence will be served by the time the appeal will be heard, the test will have been satisfied."*

By the use of the word 'or', it meant the two factors to be applied disjunctively or in the alternative. But what followed soon thereafter is quite out of sync and cannot easily be explaine. It says:

> "*I think that the two factors must exist concurrently in order for the condition to be satisfied."*

Again by the use of the words ' I think ' the learned judge was not sure and was merely expressing an opinion, which of course did not represent the **case of Watton** (l979) 68 CR App R 293, 296 which he cited.

CRIMINAL DIVISION

The issue at hand is whether it is imperative for the court to point out to the defendant that he has a benefit of a statutory defence as exemplified by the Botswana cases cited by the Appellant. The statutory defence reads as follows:

> *"Provided that it shall be* a *sufficient defence to any charge under this section if it shall be* made *to appear to the court, jury or assessors before whom the charge shall be brought that the person* so *charged had reasonable cause to believe and did in fact believe that the girl was of or about the* age *of sixteen years."*

It is almost similar to the provision in Botswana. The lower court omitted to explain the provision to the defendant and did not consider it in his judgment, yet the defendant said that she told him she was 15. The Applicant was unrepresented in the lower court. We hardly have local cases covering statutory defences. This is an opportunity to deal with one. In a foreign case of **Mfwazala v The State** 2007 (3) BLR 476 (HC) Mosojane J put it this way:

> *"There is* no *hint from the record that he was aware of the special defence set out in s 147 (5) of the Penal* Code. *State counsel quite properly, in my opinion, did not support this conviction. The subsection provides that it shall be a defence to* a *charge of having had carnal knowledge of* a *girl under the* age *of 16 years, if it appears to the court trying the accused, that the accused had reasonable cause to believe* and *did in fact believe that the complainant was of or* above *the* age *of 16 years. It* does *not appear on the record that the learned magistrate adverted his mind to this pro vision. It was heard in* ***Gare v The State*** *[2001] I* BLR *143 that in view of the Appellants probable ignorance of this special* defence, *the existence and meaning thereof should have been explained to him by the magistrate and that* as *this had not been* done *it could not be said*

that the appellant was given a fair trial. The same view was heard in ***Matlakatibe v The State*** *[2004] 1 B.L.R. 44. I hold likewise in this particular* case."

Without risking to delve into the appeal, suffice it to say that the statutory defence provision would be rendered useless if unrepresented accused persons were left in the dark as to its existence and eventually got such accused persons incarcerated. The law would be seen to be favouring the financially able who are represented. This would militate against constitutional provisions of ensuring fair trial and one against discrimination. In view of this, it appears prima facie that the appeal has a prospect of success. I order that bail is granted on the following conditions:

1 . To surrender travel documents if any.
2. To furnish two sureties close relations to be bonded in the sum of MK300, 000.00 each but not cash.
3. Applicant to be bonded in the sum of MK30, 000.00 cash.
4. Not to travel outside Mwanza district without informing the police.
5. To report at Mwanza police station every week on Fridays for the first six months thereafter fortnightly.
6. To file the appeal within two weeks. It is so ordered.

Pronounced *in Open Court this 16th day of November, 2016 at Chichiri, Blantyre.*

M L Kamwambe
JUDGE