KNOWLEDGE MASHOPO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 25 January & 16 February 2023

Application in condonation of late noting of appeal and extension of time to note appeal

Applicant in person
F Kachidza, for the respondent

CHITAPI J: The applicant then a 24 year old adult male was on 22 October 2019 convicted by the court of the regional magistrate at Marondera of the offence of rape. It was alleged that on 5 May 2019 at Plot 4 Village 13, Hoyuyu, Mutoko, the accused had forced unlawful sexual intercourse with a 4 year old female girl who is in law incapable of consenting to sexual intercourse. The offence is created by s 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The brief facts of the case were that the applicant was employed as a domestic hand at the homestead of the complainant's parents which is near the place where the offence took place. On 5 May 2019 the applicant advised the complainant's mother of his desire to attend church on that day. The complainant's mother did not respond to the request. The applicant unbeknown to the complainants' mother gathered the complainant and her two siblings and proceeded with them to the local business centre. On the way the applicant then instructed complainants' two siblings to proceed to the business centre and he remained with the complainant whom he lured into the bush. The applicant then raped the complainant by inserting his penis into the complainant's vagina as the complainant lay on the ground. After the rape the applicant then carried the complainant on his back and followed the complainant's two siblings to the business centre.

On catching up with the complainant's siblings, the applicant instructed the complainant and her siblings to proceed to church whilst the applicant proceeded to the business centre. The

complainant's mother followed to church and found the complainant and her siblings already at church. It was after the church service in the afternoon that the complainant's mother noticed that the complainant appeared to have difficulties in walking. The mother did not suspect anything untoward. She decided upon arrival home to examine the complainant and ascertain the cause for her to walk with difficulties. The mother then noticed blood stains on the complainant's buttocks and blood coming out of the complainant's vagina. The mother asked the complainant what had happened and the complainant revealed the rape. The mother sought confirmation of the alleged diversion by the applicant from the road onto the bushes with the complainant as confirmed by the complainants' sibling. The complainant's mother then made a report to the police on the following day, 6 May 2019 and the accused was arrested.

The applicant was convicted as charged despite his denial that he committed the offence in question. The accused denied that he ever carried the complainant nor was he in the complainant's company on the day. He outlined in his defence outline that he went to the business centre intending to proceed to Murewa. He outlined that the complainant's mother made up the allegations to fix him because she owed the applicant money in unpaid wages. The applicant was sentenced to 18 years imprisonment with 2 years thereof suspended on condition of future good behaviour.

The applicant has applied to the court for condonation of late noting of appeal and extension of time to note appeal. He did not note the appeal timeously within the time limits prescribed in the rules. The approach of the court to determining applications of this nature was restated by CHITAKUNYE AJA (as then he was) in the case *Rinos Terera* v *George Lentaigne Ingram Lock and 3 others* SC 21/93. The learned judge referred to the Supreme Court judgment in *Viking Woodwork (Private) Limited* v *Blue Bells Enterprises (Private) Limited* 1998(2) ZLR 249(S) at 251 in which the point was made that applying for condonation where there has been non compliance with rule(s) of court was trite and that such application had to be made without undue delay from the date of the failure of compliance. The learned judge also indicated that the applicant was required to be candid with the facts in order to attract the court's empathy.

The learned judge also referred to the judgments of the Supreme Court in the cases of *Kodzwa* v *Secretary for Health and Another* 1999(1) ZLR 313(S) and *Bessie Maheya* v *Independent Africa Church* SC58/07. The judgments list without exhaustion the factors which the

court should generally take into account in determining applications for condonation of failure to comply with the sales of court. The factors apply irrespective of whether the matter in which there has been non compliance is civil or criminal. The factors set out therein are as follows with non being more important than the other and the court being required to consider them cumulatively and not individually:

(a) degree of non compliance.
(b) the explanation for the non compliance.
(c) the prospects of success.
(d) finality to litigation and judgment.
(e) convenience of the court
(f) avoidance of unnecessary delay in the administration of justice.

In the case of *Mapfoche* v *State* HH 438/18. CHIRAWU-MUGOMBA J noted that the right of a litigant to note appeal or to have proceedings concerning him or her reviewed was now, in terms of the constitution, an entrenched right in terms of the constitution. The learned judge did not however specifically refer to the exact section in the constitution which confers the right. Section 70(5) provides for that. It reads as follows:

> "70(5) Any person who has tried and convicted of an offence has the right, subject to reasonable restrictions that may be prescribed by law to –
> a) have the case reviewed by a higher court; or
> b) appeal to a higher court against."

It is necessary to note that the right set out above is subject to regulation and qualification through legislation. Thus the conferment of the right by the constitution does not make it a special right which should be treated or viewed as anything more special than any other right of a litigant which is provided for by law because in the final analysis what must be realised is the interests of justice. The case of *Mapfoche* is a good read because the learned judge quoted several authorities on condonation which I refer to by reference and will not individually list them as no over emphasis of the approach of the court to condonation applications is necessary.

The applicant was required by the rules to note his appeal within ten days of the date of sentence. He was sentenced as already noted on 22 October 2019. The applicant ought to have noted the appeal by 11 November 2019. He only filed this application on 29 November 2022. The delays falls shy of three years which is a substantial period. The applicant has submitted that the

advent of the COVID 19 pandemic disturbed court processes and given that he was in prison he could not easily note the appeal. I do take judicial notice of the pandemic and its effects upon the courts administration operations which were occasionally closed or curtailed. The applicant avers that the delay is not long because this application was made a year after the end of the pandemic. A year is not a short period. If one considers the statutory period given for noting an appeal that period is ten days from the date of sentence. The respondents counsel was however persuaded to accept that the applicant had given a reasonable explanation for the delay. I will give the applicant the benefit of doubt and accept that the delay has been reasonably explained. It would be unreasonable for the court to seek to lay down any rules on how parties should have conducted themselves in the face of a global pandemic which placed everyone at risk of serious illness and sure death.

The state counsel opposed the application on the principal ground that the applicants proposed appeal did not enjoy prospects of success against both conviction and sentence. In relation to conviction counsel submitted that the complainant despite her tender age of 4 years gave a detailed account of how the applicant raped her. It was submitted too that the medical report compiled by the doctor who examined the complainant was decisive in its conclusions that penetration had been effected. The applicant consented to the production of the medical report as a prosecution exhibit at his trial. Details recorded on the report apart from the conclusion of penetration were observations by the examining doctor of fresh hymenal tears, redness of labia minora and majora and a tear on the vestibule.

The only issue for decision by the trial court as properly identified by the Regional Magistrate was the identity of the rapist. In other words, the court had to determine whether or not the state had proved beyond a reasonable doubt whether or not it was the applicant and no other person else who raped the complainant. The Regional Magistrate believed the evidence of the complainant and her mother as well as that of the complainant's sister who corroborated the complainant's story that she was walking in the company of the accused the complainant and another child called Maxwell on their way to church. The complainant's sister corroborated the complainant's evidence that the applicant ordered her and Maxwell to walk ahead whilst the accused and the complainant remained behind. She subsequently saw the accused coming to a place where she and her friend had waited for the applicant who came carrying the complainant

on his back before putting her down on approaching the church. The witness testified to having seen the accused divert into the bush after she had been ordered by the applicant to walk ahead. The witness was candid and admitted that she did not witnesses the applicant committing anything untoward on the complainant.

The Regional Magistrate was impressed with the evidence of state witness which he found to be truthful and credible. He was properly directed to treat the evidence of the complainant and her sister with caution given their tender ages of the complainant 4 years old and the complainant's sister 8 years old.

In regard to the applicants evidence. The applicant offered what amounted to an alibi. He denied that he was ever with the complainant or her siblings and averred that he was at the relevant time at Corner Store intending to commute to Mrewa. The court noted that despite the applicants' assertion that he was at Corner Store, he had asked the complainant in cross examination why she had not responded when he asked her for permission to go with the complainant and her siblings to church. The applicant had therefore brought himself into the trail of events of the fateful day. The court found that the applicant had created the issue of being at Corner Store and that he did not interact with the complainant and her siblings as an after thought defence. The court found that there was no motive on the part of witnesses to lie against the applicant. The applicant's claim that the complainant's mother may have falsely implicated the applicant because the applicant was owed arrear wages was dismissed because firstly the applicant did not raise the issue with the complainant's mother in cross-examination and secondly, the date of payment of wages was not yet due. The court found the applicant to be untruthful and correctly convicted him in my view.

In relation to sentence the court considered all relevant factors which are proper to consider in assessing sentence. The applicant was in my view lucky to be sentenced to 18 years imprisonment as a heavier sentence in the region of 20 years could still not have been too excessive or harsh. The rape of minors let alone of the age of the complainant who cannot appreciate a sexual act is outrageous and revulsive. If one considers that the maximum penalty for rape is imprisonment for life depending on the circumstances of each case, a sentence of 18 years with 2 years suspended for good behaviour is not so excessive as to induce a sense of shock. The applicant with prison remission of sentence would at best serve just under 12 years imprisonment.

A consideration of the proposed grounds of appeal against conviction show that they are not based on the court's findings. The applicant seeks to attack the medical report yet it was produced by consent. The medical report was not an issue at trial and does not become an issue on appeal. The applicant further seeks to attack the evidence of rape and averred that the applicant suffered from vaginal ulcers and bled from them. Again this was not an issue. The issue as correctly identified by the court *a quo* in the light of the applicant's defence was the identity of the rapist. The grounds of appeal do not attack the finding of the court *a quo* that it was the applicant who perpetrated the rape. In relation to sentence the applicant seeks to argue on appeal that the sentence is so excessive as to cause a sense of shock given the applicant's age and other mitigatory features. This issue has already been dealt with. The sentence was in fact lenient and the court *a quo* took into account all factors relating to the commission of the offence and personal to the accused which it was required to consider in assessing sentence.

In the absence of prospects of success, the interests of justice demand that there should be finality of litigation in this matter. There is no merit in the application. The following order is issued.

IT IS ORDERED THAT

"The application be and hereby dismissed"

National Prosecuting Authority, respondent's legal practitioners