TINASHE MWAZHA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 01 August 2023.

Condonation of failure to comply with the rules

Applicant in person
F I Nyahunzvi, for the respondent

KWENDA J: I dealt with this application on the 1st of August 2023 and dismissed it after hearing oral argument by the parties. I gave my judgment *ex tempore*. These are the written reasons for my decision, at the request of the Registrar.

On the 4th of June 2015, the applicant was convicted of murder with actual intent by this court siting at Masvingo. The presiding judge, BERE J, found that the murder was committed in extenuating circumstances arising from intoxication and provocation thereby sentencing the applicant to imprisonment for 25 years.

In March 2023, after eight years after conviction and sentence, the applicant decided to appeal against both the conviction and sentence. The law required him to seek leave to appeal either immediately, upon being sentenced or within twelve days of sentencing. He was, therefore, almost ninety-six (96) months out of time. Realising that he was out of time, the applicant filed this application on the 5th of March 2023, seeking leave to appeal to the Supreme Court out of time. In terms of rule 94 of the High Court Rules, 2021, where a convict failed to apply for leave to appeal to the presiding judge immediately after sentencing, he or she may submit the application to the judge within twelve days, failure of which, the prisoner requires is required to file an application for condonation together with the application for leave to appeal. The applicant, inappropriately, called the process before me, an application for leave to appeal to the Supreme Court out of time. It was, however, clear from his submissions that the applicant was seeking

condonation of his failure to comply with the rules and leave to appeal to the Supreme Court and intended to prosecute the appeal in person.

In terms of the rules, aforestated, the application ought to have been placed before the judge who presided at the trial. It was placed before me, perhaps, because the trial judge left the service and I could properly deal with the application in terms of r 94(7) of the High Court rules, 2021.

In an application for condonation of failure to comply with the rules I must consider the degree of non-compliance and other factors that ensure that justice is done. The other factors include the length of the delay, the explanation for it, prospects of success on appeal and any other consideration, especially possible prejudice to the interests of justice. See *Chimpondah & anor* v *Muvami* 2007 (2) ZLR 326 (H).

The applicant explained that at the time of his conviction on 4 June 2015 he was unaware of his right to appeal. He later heard his inmates talking about appeal procedure. He decided to appeal but it took him time to acquire the record of proceedings due to some disturbances which occurred at Chikurubi-Maximum Prison. There was also a delay in the production of the record and his relatives had difficulties in raising money for transport costs. He submitted that had high prospects of success on appeal against both conviction and sentence.

As against conviction, the applicant submitted that he ought to have been convicted of culpable homicide and not murder. He submitted that his defence met the requirements of s 239 ,which is that a person charged with murder shall be guilty of culpable homicide if, as a result of the provocation either he or she does not have the intention to kill or realisation that he will kill the person as a result of his actions or if he or she has the aforestated intention or realisation but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control. He submitted that the trial court ought to have found that he was intoxicated and therefore lacked the intention to kill. He submitted that he could not possibly formulate the intention to kill in his state of intoxication. He submitted, further, that at the age of 21 years he could not possibly formulate the intention to kill. The trial court had infringed upon his right to a fair trial because it asked him too many questions, more than the prosecutor. He submitted that his conviction was likely, therefore, to be quashed and substituted with a conviction for culpable homicide.

As against sentence, the applicant submitted that he was likely to succeed because the trial court did not place sufficient weight on youthfulness, intoxication and provocation as mitigating factors. He prayed that in the appropriate sentence for murder in the circumstances of his case was imprisonment for 15 years. In the event that his conviction for murder was quashed and substituted with a conviction for culpable homicide, the appropriate sentence was imprisonment for 7 years, with 2 suspended on conditions of good behaviour. his sentence be reduced

The application was opposed by the State on the grounds that the delay in applying for leave to appeal was inordinate and the applicant had not adequately explained the long delay. According to the State, the applicant was not likely to succeed on appeal because the evidence against him was overwhelming. The court found the State witnesses credible and gave cogent reasons for arriving at that conclusion. The sentence imposed by the trial court was justified in view of the pre-planning.

I find that it is clear that the delay in applying for leave to appeal is, indeed, too long. A delay of 8 years is not easy to explain. In this case did not give details of when he acquired knowledge of the right to appeal, the time that it took to secure the record of proceedings and when he eventually got the record. His submissions are too scanty in that regard. I therefore found that the long delay has not been adequately explained. There ought to be finality to litigation in the interests of justice.

Most of the facts leading to the applicant's conviction were common cause. When the applicant fought with the deceased, they were restrained and peace prevailed. It was during that period of peace that the applicant sneaked into the kitchen and took a knife which he concealed on his person. He took the knife with him when he left the bottle store on his way home, which means he had the intention to use it but did not want people to know that he had armed himself with the knife. The court believed the state witnesses who said that the applicant lured the deceased to a secluded place on the pretext that he wanted to talk things over with the deceased. The witness said the applicant was not under attack and thus could not have been defending himself. Although he may have nursed a grudge against the deceased arising from their earlier fight and may have been provoked at the critical moment, the provocation was not so severe that it negated the intention to kill. In terms of s238 (2) if a court finds that a person accused of murder despite being provoked he or she still had the intention to kill or realisation that his actions will result in death

or the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control then the accused shall not be entitled to a partial defence. The court may only regard the provocation as mitigatory. That was the situation in this case.

The applicant has no intention to contest the trial court's finding on credibility.

The applicant was moderately drunk. That was not a defence to the charge available to the applicant such circumstances. In terms of s221 of the Criminal law (Codification and Reform Act *[Chapter 9 :23]*, if a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility, was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realisation; such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed.

Even if he was very drunk he would not escape the punishment he received because in terms of s222 of the Criminal law (Codification and Reform) Act if a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility and it is proved that the accused was voluntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime originally charged; and the effect of the intoxication was such that the accused lacked the requisite intention, knowledge or realisation; he or she shall be guilty of voluntary intoxication leading to unlawful conduct instead of the crime originally charged and liable to the same punishment as if he or she had been found guilty of the crime originally charged; and intoxication had been assessed as a mitigatory circumstance in his or her case.

The applicant's submission that he could not, at law, formulate the intention to kill has no basis in our law.

The sentence of imprisonment for 25 years was justifiable. The crime was premeditated. The applicant went away after stabbing the deceased and did not render assistance to the deceased. The court made the observation that the type and size of the knife used by the applicant was such that it was very lethal. Contrary to the applicant's assertion, the court did take into account the applicant's youthfulness.

In the result I concluded that the applicant had no prospects of succeeding on appeal.

The combined effect of the long delay in applying for leave to appeal, inadequacy of the explanation for the delay and lack of prospects of success on appeal was such that I was unable to exercise my discretion in the applicant's favour whereupon I dismissed the application.

National Prosecuting Authority, respondent's legal practitioners.