VINCENT CALVIN CHIKASHA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE,10 March 2021

**Bail application pending determination of condonation application for late noting of appeal and application for condonation of late noting of appeal**

Applicant in person
*A.Bosha*, for the respondent

CHITAPI J: This judgment will dispose of bail application No B 1907/20 and application for condonation of late noting of appeal CON 420/20. The background facts to the two applications is that the applicant together with his two co-accused appeared before the regional magistrate at Marondera Magistrates Court facing three counts of robbery as defined in s 126 (1) (a) (b) of the Criminal Procedure and Evidence. The details of the charges were, firstly, that in count one, it was alleged the three acting in common purpose and by intentional and unlawful use of violence and stabbing the complainant with a knife to induce submission forced the complainant to relinguish possession of his Honda Fit vehicle which they then stole on 29 July, 2018 at Cyclone Mine, Goromonzi. In the second count, the same three accused allegedly used the same *modus operandi* of using a knife to stab the complainant twice to induce submission to part with his Honda Fit vehicle on 15 July, 2018 at the same place, Cyclone Mine, Goromonzi. They stole the Honda Fit, $35-00, a Nokia 1280 phone, sneakers and a black wallet belonging to the complainant. Thirdly, it was alleged that on 6 July, 2018 at the same place, Cyclone Mine, Goromonzi the applicant and his two accomplices threatened to stab the complainant with a knife and thereby induced submission of the complainant to part with His Honda Fit which the trio stole. The applicant and his two accomplices therefore robbed three different complainants of their honda fit vehicles.

The trio was legally represented at their trial. The applicant and second accused were found guilty on each of the three counts. The applicant and one accomplice were each sentenced to ten (10) years imprisonment on each count making a total of thirty (30) years imprisonment. Of the thirty (3) years aforesaid, 10 years was suspended for five (5) years on conditions of future good behavior. The third accomplice an 18 year old then was acquitted on the third count and convicted on the first and second counts. He was sentenced to four (4) years imprisonment on each count making a total of 8 years imprisonment. Of that total, four (4) years suspended on conditions of future good behavior. The applicant and his accomplices were convicted and sentenced on 21 September, 2018.

The applicant did not immediately appeal against the judgment and sentence. On 9 September, 2018, the applicant filed as a self-actor, an application for bail under case No B 1479/20. It was not clear from the application what the nature of the bail sought was. On 13 October, 2020 after ascertaining that the applicant was a serving prisoner MUSAKWA J struck the application off the roll and endorsed on the record-

> "Applicant has not yet been granted leave to appeal in person as well as condonation of late noting of appeal."

Following the removal of his application from the roll, the applicant on 28 October, 2020 filed a chamber application case NO CON 420/20 for condonation of late noting of appeal and for leave to prosecute appeal in person. On 30 October, 2020 the State representative Mr *Bosha* filed a brief response in which he indicated that he required the transcribed record, charge sheet and state outline to enable him to respond to the application. The applicant followed up the chamber application aforesaid with filing on 9 November, 2020 under case NO B1907/20 an application for bail pending the determination of the condonation application. When the bail application was set down before me in bail court, it turned out that the record of proceedings filed by the applicant was incomplete because there was no judgment and sentence. I issued a directive to the Registrar to obtain from the Clerk of Court, the missing transcript of the judgment and sentence. These were availed. It was then resolved with the consent of Mr *Bosha* that he would respond to both the condonation and bail applications. I then called for the condonation record to deal with the same

at the same time with the bail application. This is how the applications B1079/20 and CON 420/20 were consolidated for purposes of judgment.

It is convenient to first dispose of the bail application "pending condonation". There is no consignable application for bail pending the determination of a condonation application for the late noting of appeal. The only cognizable applications for bail after conviction and sentence by a magistrates court are set out in s 123 (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] which reads as follows:

"**123 Power to admit to bail pending appeal or review**

(1) Subject to this section, a person may be admitted to bail or have his conditions of bail altered-
   (a) …..
   (b) In the case of a person who has been convicted by a magistrate and who applies for bail-
      (i) Where the record of a case is required or permitted in terms of section 57 or 58 of the Magistrates Court Act [Chapter 7:10] to be transmitted for review; pending the determination of the review; or
      (ii) Pending the determination by the High Court of his appeal; or
      (iii) Pending the determination of an application for leave to appeal or for an extension of time within which to apply for such leave, by a judge of the High court or by a magistrate within whose area of jurisdiction he is in custody."

The above are the limited circumstances wherein bail after conviction and sentence by the magistrates court may be applied for. In relation to this application, the applicant has to have a pending appeal before he can apply for bail pending that appeal. It is for this reason that when the applicant made an earlier application for bail before MUSAKWA J in case No B 1479/20, the learned judge in removing the application from the roll noted that condonation of late noting of appeal and leave to prosecute appeal had to be sought first. The position as it must be understood is that in relation to a person who is convicted and sentenced by a magistrate who intends to appeal but is time barred and such appeal does not require leave to appeal to be granted first before noting the appeal, there is no provision for applying for bail before condonation of the late noting of appeal is granted and the appeal noted. Once condonation has been granted and the appeal has been noted and is pending, the appellant can properly apply for bail pending the noted appeal in terms of subpara (ii) of para (b) of subs (b) of s 123 (1) of the Criminal Procedure and Evidence Act. Resultantly, the applicants bail application is a nullity. That being the case, the application is struck off the roll.

I now deal with the condonation application. An application for condonation and leave to note appeal out of time is not granted as a mere formality. It is an indulgence which may only be granted for good reason which the applicant must establish. There are certain factors which the court will consider in determining whether to grant condonation or not. The overriding consideration is the interests of justice. In 6the case of *Turnbull-Jackson* v *Hibiscus Coast Municipality & Ors*, 2014 (6) SA 592 (CC), a constitutional court of South Africa judgment it is stated in para 23 of the judgment as follows

> "In this court, the test for determining whether condonation should be granted or refused is the interests of justice. Factors that the court weighs in that enquiry include: the length of the delay; the explanation for, or cause of, the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises, the prejudice to the other party or parties; and the effect of the delay on the administration of justice. It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation."

In Zimbabwe, the approach is much the same as in South Africa. In the case of *Vigour Busilizwe Fuyana* v *Ntombaza Moyo* SC 54/06, the learned Chief Justice CHIDYAUSIKU CJ listed three factors to be considered in determining whether condonation should be granted. They were listed as, a reasonable explanation for the failure to note the appeal within the prescribed period, some prospects of success on the merits, and the *bona fides* of the application. In the case of *Wilfred Takaona Mapfumo* HH 564/16, factors which the court considers in such applications are articulated. The bottom line though is that the usual factors which the court considers must be considered as a whole and no single factor is singularly decisive of the application. The impact of the factors will be informed by the circumstances of each case.

The delay in filing this application is inordinate being about two years post-conviction and sentence. Where the delay is long as in this case, the reasons for and/or cause of delay should be cogent, compelling or strong. The applicant averred in his application that it took him about two years to file the application because at first he was so affected in his mind by the lengthy prison term imposed that his life was over and was resigned to that thought. When he disabused himself of the thought that his life was over, the applicant averred that being in custody he faced challenges of obtaining stationery on which to write his appeal documentation. He then faced the hurdle of

obtaining the record of proceedings. In that regard he stated that he could not locate any relative to help him to follow up on record transcription and payment thereof.

The applicant was nineteen years old on his conviction and sentence. He was unemployed but still an errant youthful offender. The court should not take for granted that inmates at prison especially unrepresented ones can easily access necessary stationery or competent assistance to note appeals. I have experienced in bail cases of requests made by the convicts for what they call "writing paper". The lack and shortage of stationery is a reality and may depending on the circumstances of each case amount to a reasonable explanation for delay. The process of appeal is not a walk in the path but a specialized procedure which requires competence and understanding of the same. Without in house counsel at prison who can assist in that regard, the unrepresented convict who may intend to appeal becomes a victim of lack of knowledge on how to go about and drafting a valid notice and grounds of appeal. It becomes the duty of the judge in such a scenario to assist the unrepresented convict to the extent possible without turning into his legal representative to have the appeal to at least he noted so that in due course it is enrolled for hearing. The convict has a constitutional right, subject to reasonable restrictions to appeal to a higher court against conviction and sentence. The assistance which the court may give to the unrepresented accused must be such as would enable that convict to bring the proposed appeal before the court and not its actual prosecution save to the extent that the court may record that counsel be appointed to represent the convict in terms of the provision of the Legal Aid Act [*Chapter 7:16*].

I also noted that the applicant only obtained a copy of the record though incomplete on 3 September 2020 as evidenced by the Chikurubi Maximum Security Prison official stamp franked thereon. The applicant filed the condonation application another two months later after receipt of the record. The applicant did not in his written application explain the further delay of two months after obtaining the record of proceedings. The record however was incomplete and during argument the applicant indicated that his request for the judgment and sentence were not attended to until he filed the condonation application without having sight of the reasons for conviction and sentence. Indeed, I had to make an order that the reasons aforesaid should be availed. In all the circumstances I will accept that given the disadvantage of manoeuvring to comply with noting of

appeal procedures and obtaining a transcribed record, the causes of the delay in the circumstances of the applicant may be condoned.

In regard to prejudice which may be suffered by the State, it is accepted that there needs to be finality in litigation. The State should not be bogged down with one case only and should be allowed to put closure to completed cases so that it concentrates on other pending cases. The State's recourse both financial capital and human capital are limited. Therefore, it is important that convicts follow their appeal and review rights timeously as provided for in the rules. In my view, the prejudice to the State which is inherently present in every case where there is a delayed noting and prosecuting of an appeal will be watered down if the intended appeal has prospects of success. This is so because constitutionally every agency of government in terms of s 44 of the Constitution has a duty to protect, promote and fulfill rights given in the declaration of rights, of which the right of appeal and review are part. The same argument and considerations apply to the issue of the prejudice to the due administration of justice which should not be unnecessarily bogged down by endless litigation.

In relation to the prospects of appeal against conviction I considered the proposed grounds of appeal. The grounds may be summarized as that:

(i) The magistrate erred in count one in failing to make a funding that the robbery charge was made up by the complainant who had failed to pay the repair costs to his motor vehicle to the applicant who is a mechanic and had repaired the vehicle.

(ii) The magistrate failed to assist the applicant in prosecuting his defense case. I must note that this ground would be difficult to advance since from the record, the applicant was legally represented.

(iii) The magistrate should not have convicted the applicant because without an identification parade having been held by the police, it was a misdirection to make a finding that the alleged perpetrator of the robberies in counts two and three was the applicant.

(iv) The magistrate failed to consider that the vehicle in count two was recovered after an accident in which the applicant was not involved and that, that fact showed that the applicant had no connection with that vehicle.

As against sentence, the applicant did not attack the sentence on any notable ground. He simply regurgitated his dissatisfaction with the conviction. The grounds of appeal against sentence should be aimed at how the sentence was arrived if there is a misdirection in that regard, or the severity of the sentence in the circumstances of the case and of the applicant.

I carefully considered the record of proceedings and the reasons for judgment and sentence. The magistrate was critical of the State's evidence of identification of the applicant and his accomplices as the culprits who committed the robberies. No formal identification parade was carried out as noted by the magistrate who further noted that the offences were committed at night. The magistrate also dismissed the dock identification of the applicant and his accomplices as unreliable. There is evidence that the applicant and his accomplices were assaulted by the police. The trio alleged that they were forced to make confessions. The magistrate proceeded in terms of s 258 (1) of the Criminal Procedure & Evidence Act whose provisions are to the effect that whilst a confession may not be admissible in evidence, evidence obtained in consequence of such confession is admissible. The magistrate then considered the effect of s 70 (3) of the constitution which provides for the exclusion of evidence which may render a trial unfair. The magistrate went on to admit the evidence. I consider that the issue of whether or not such evidence should have been admitted is an issue which may successfully be argued on appeal in applicant's favor.

Against sentence, even though the draft appeal grounds are inadequately drawn, I can still express my opinion on the sentence. The applicant in any event has the opportunity to file a properly drafted notice and grounds of appeal if condonation is granted. It is not very clear from the record other than that the applicant had previous convictions and was the ring leader why there is so much disparity in sentence between the applicant who was 19 years old and the third accused in the trial who was 18 years old. The third accused on the counts on which he was similarly convicted with the applicant was sentenced on each count to eight years imprisonment with four years suspended on conditions of good behavior. This meant that the third accused's sentence in total was sixteen years with eight years suspended, effective eight years and that of the applicant 20 years with little suspended if one takes into account that the 10 years suspended sentence was based upon the global total of 30 years imprisonment. Ordinarily accomplices are sentenced

similarly unless there is good reason to differentiate them. Even the extent of the differentiation must be justified. There is room for the appeal court to reach a different decision on sentence.

In the circumstances, the two applications are disposed of as follows:

(a) The applicants bail application filed under case no. B 1907/20 is struck off the roll.

(b) In regard to application CON 420/20;

i. The applicant is granted leave to note of appeal out of time and extension of time within which to note the appeal.

ii. The applicant shall note his appeal within ten (10) days of the date that this order is served upon him by the registrar.

(c) Copies of this judgment shall be filed in both case numbers CON 420/20 and B 1907/20.

*National Prosecuting Authority*, respondent's legal practitioners