KNOWLEDGE MASHOPO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 13 September 2022

**Application for condonation of late noting of appeal**

**In Chambers:**

**CHINAMORA J:**

**Introduction**

On 21 October 2019, the applicant was convicted (after a full trial) by a Regional Magistrate at Marondera for contravening section 65 of the Criminal Law Codification and Reform Act (Chapter 9:23) ("rape"). He was sentenced to 18 years imprisonment, 2 years of which were suspended for 5 years on condition that he does not during that period commit an offence of a sexual nature for which he is sentenced to a term of imprisonment without the option of a fine. The applicant did not appeal against conviction and sentence within the time allowed by the law. He has now filed a chamber application for condonation for the late noting of appeal against both conviction and sentence, together with a request for leave to prosecute the appeal in person.

**Grounds of appeal proffered**

The application is largely incoherent and fraught with phrases that do not make sense. For example, one ground (ground 4 of his draft) reads: *"The guilty recording exposed on record that has shot cut denounced at law and worse makes it difficult for appellate court to ascertain the questions asked".* There is confusion added to ground 1 by the addition of the following sentence: *"It cannot be disputed that the case was prematurely evaluated considering the fact that the applicant is a garden boy".* The court is left wondering how being a garden boy constitutes a ground of appeal. Be that as it may, what can be gleaned from the applicant's draft notice are the following grounds of appeal:

Ad conviction

1. The court *a quo* erred and grossly misdirected itself in convicting the appellant of rape when there was no evidence to support that conviction.
2. The court *a quo* erred and misdirected itself in believing the complainant's testimony yet the complainant had a number of opportunities for her to report the rape but did not do so.
3. The court also believed that the complainant was a vulnerable person being abused willy-nilly, yet the complainant did not turn back after the abuse but kept going straight to church without disclosing the whole issue to her brothers.
4. The medical compiler failed to give a factual assessment abuse due to lapse of time after the abuse.

Ad sentence

1. The sentence imposed by the court *a quo* is manifestly excessive so as to induce a sense of shock, considering that the applicant is a family man with responsibilities.
2. The court *a quo* erred at law in failing to suspend anything on account of the accepted mitigating factors, the court having imposed a sentence above the mandatory minimum of 10 to 15 years.

The applicant then explains why the application was filed late.

**Reasons for delay**

In his application, the applicant avers that he was ill-advised that rape matters cannot be appealed against. Additionally, he asserts that he did not have what he calls "appealing ideology", whatever that high sounding term means. He proceeds to explain that lack of the said ideology is attributable to ignorance, and that the court failed to provide him with the record. The applicant suggests that he has prospects of success on appeal.

**Factual background**

The facts leading to the conviction of the applicant are that, on 5 May 2019, the applicant left the homestead where he was employed as a general hand in the company of the complainant, Deon Chikawa (aged 4 years) and her two siblings (Takudzwa Chikawa and Max Chikawa) on the pretext that he was taking them to church. Along the way, the applicant

advised the two siblings to walk ahead of him, while he carried the complainant on his back. He then went into the bush where he forcibly had sexual intercourse with the complainant. The complainant's mother went to church and found Takudzwa and the complainant there. After church as they were going back home, Ms Gweshe noticed that the complainant was having difficulty walking and examined her when they got home. She also noticed blood stains on the complainant's buttocks and vagina. When she asked her what had happened, she told her what the applicant had done to her. On 6 May 2019, the complainant's mother went with the complainant to the police and made a report, leading to the applicant's arrest. The complainant was medically examined at Mutoko Hospital. The medical report showed that there were fresh hymenal tears, redness of the labia minora and majora, and a tear on the vestibule.

**Principles for granting applications for late noting of an appeal**

The requirements for an application for the late noting of an appeal to succeed are well settled in this jurisdiction. In *Kombayi* v *Berkhout* 1988 (1) ZLR 53 (S) the court held that the factors that should be considered are:

(a) the length of the delay
(b) the reasonableness of the explanation
(c) the prospects of success on appeal.

See also *Fuyana v Moyo* SC 54-06

**Analysis of the case**

The sentence was handed down on 21 October 2019. The application was lodged on 28 October 2020, a year later. I consider the delay in noting the appeal to be an inordinate one. Applicant says he was ill-advised that rape matters cannot be appealed against. However, he does not sate the source of such advice. In addition, the applicant submits that he did not have the appealing ideology, which concept he has not explained. I am not satisfied that the applicant was advised by some anonymous person that he was precluded from appealing because it was a rape matter. In this context, I take judicial notice of the fact that in prisons there is a welfare office from which the applicant could have sought advice. In my view, the applicant must observe that applications for condonation are not just there for the taking. I find that there is no reasonable explanation given for the delay. In fact, it is evident that the applicant has approached this matter very casually.

In an application for condonation for the late noting of an appeal and applicant must demonstrate that there are prospects of success. The test for prospects of success was well articulated in *S* v *Chikumba* HH-724-15. In that case the court held that the prospects of success exist where an appeal is free from predictable failure. The appeal must not be hopelessly doomed to fail. The question is therefore not whether there is room for difference of opinion *vis-à-vis* the impugned conviction or sentence. In this matter, the applicant avers that the conviction is irregular because the trial court misdirected itself in ruling that the witnesses were believable yet they did not corroborate each other. An appeal court rarely interferes in matters of the assessment of evidence by a lower court. The applicant further states that since the court was aware that he was serving 12 years for another rape in a conviction imposed at Gweru Regional Court, the court *a quo* was supposed to order that the sentences should run concurrently. This on its own is not a misdirection. There is no rule of thumb that such sentences should run concurrently. A reading of the record reveals no such misdirection.

As regards the analysis of the analysis of the evidence by the court *a quo*, in my view the trial magistrate properly applied his mind to the evidence presented to him. The trial court's findings, which are well reasoned cannot be faulted. The state succeeded in attaining the threshold of proof beyond reasonable doubt. The applicant's defence that he had no sexual contact with the complainant was clearly false in view of the clear evidence of the complainant. The discrepancies in the evidence of the state witnesses was so insignificant that the requirement of proof beyond reasonable doubt was met. In so far as sentence is concerned, the applicant cannot choose what sentence he thinks ought to be imposed. Rape is a serious crime that violates and traumatizes the victim. The complainant in this case was tricked into unwanted sexual intercourse. She felt violated hence her early report to her aunt. There was no reason for her to concoct a false story of rape. The sentence of 15 years with 5 years suspended is within the range of sentences imposed for rape cases. A lessor sentence would have been inappropriate in the circumstances.

A finding that there is no reasonable explanation for the delay in noting an appeal and that there are no prospects of success leads to an inevitable outcome that this application should not find favour with the court.

For the foregoing reasons, the application is hereby dismissed.

*National Prosecuting Authority*, respondents' legal practitioners