ANOLD CHIBANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 26 November, 2019

Application for Condonation of Late of Appeal and Extension of Time to Note Appeal

Applicant in person
K. Kunaka for the State

CHITAPI J: It is not usual for a judge to compose a full written judgment in an application for condonation of late noting of appeal as such applications are commonly styled. I do so because of matters arising which need ventilation. Such applications should be properly headed "application for condonation of late noting of appeal and for extension of time within which to note the appeal". In such applications, the applicant will have failed to note the appeal within the time limits given for the applicant to do so. Therefore the applicant seeks to be condoned for the applicants' failure to timeously note the appeal. Once condonation is granted, the applicant would then require that the time which was available for noting the appeal having expired, such time be extended. The applicant is given a second bite of the cherry to comply with the rules and note the proposed appeal within the extended time given. In this regard, there have been numerous orders made by judges of this court in which the applicant is given an extension of time to file the appeal of a period which exceeds the legislated time for appeal. It is not unusual to find orders giving applicants extended times to note appeals of anything beyond 14 days, 21 days or even 30 days.

I considered it necessary to express my own view on the practice of granting of extensions of time to note an appeal which exceed the normal days set for the noting of the appeal. I find myself in respectful disagreement with adopting such a practice because it basically is irreconciliable with legislative intent. The noting of appeals in criminal cases from the magistrates

court is regulated by the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules, 1979. S.I 504/1979. The rules govern the noting of appeals by legally represented accused persons, self-acting accused person and appeals by the Prosecutor General. The appeals may be against conviction, sentence or both. The same rules regulate the issuance of a certificate to a self-acting appellant to prosecute the appeal in person and the procedure to follow where the certificate to prosecute the appeal in person has been refused. Significantly, the rules provide for lapsing of appeals and applications to appeal out of time. There should therefore be no confusion and with respect contradictory orders which this court may grant in applications made for condonation of late noting of appeal and extension of time within which to appeal. I revert to the issues l have noted later in this judgment.

In this application, the applicant is self-acting and was a self-actor in the court *a quo*. The court *a quo* was the regional court sitting at Kadoma. The applicant appeared before the learned regional magistrate on 14 September, 2017 facing 2 counts of rape as defined in section 65 (1) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. It was alleged against him in the charge that on 6 May, 2017 at Edinadale Farm Forest, Chegutu, the applicant had forced sexual intercourse twice with the complainant, a 10 year old juvenile, deemed in law to be incapable of consenting to sexual intercourse. The accused was then aged 23 years old. He was said to be a neighbour who stayed in the same farm compound as the complainant and her parents. The brief facts of the case were that the accused person requested of the complainant, her company to walk him to the complainant's aunt's homestead within the same farm to buy some vegetables. The aunt apparently kept vicious dogs and the applicant was afraid of a possible attack by the dogs. The complainant agreed to accompany the applicant. The route which they used passed through a forest. It was enroute to the complainant aunt's homestead and within a forest area that the accused was alleged to have forced the complainant to remove her pant on threats of killing her if she refused to do so. The applicant forced the complainant to the ground and raped her once. The time was around 12 noon when this incident occurred. The applicant was alleged to have committed the second act of pare of the complainant around 12.30pm as the two neared the complainant's aunt's homestead. This time the applicant was alleged to have ordered the complainant to remove her pant, and she obliged. He then raped the complainant once and threatened the complainant not to tell anyone. The case only came to the fore after the complainant's aunt noticed that the

complainant had difficulties in walking. When the aunt inquired of the complainant what the problem was, the complainant then revealed that she was raped by the applicant twice in the forest. The applicant was convicted on both counts following a full trial on 15 September, 2017, the trial having commenced on 14 September, 2017. He was sentenced to 18 years imprisonment for both counts which were taken as one for sentence purposes. Four years of that sentence was suspended on conditions of good behaviour. The applicant is serving an effective 14 years imprisonment term.

Following conviction and sentence, the record of proceedings was forwarded to this court for automatic review in terms of section 57 (1) of the Magistrates Court Act, [*Chapter 7:10*]. The proceedings were placed before an Honourable Judge of this court who, acting in terms of s 29 (2) (a) of the High Court Act, [*Chapter 7:06*] confirmed the proceedings as being in accordance with real and substantial justice on 29 July 2017. It is always a challenge for a judge who is faced with subsequent processes as the current application wherein the judge must of necessity re-review the proceedings again and rule on matters which *inter-alia* include issues which the reviewing judge would have considered in certifying the proceedings as being in accordance with real and substantial justice. The challenge manifests itself where the second judge finds himself or herself in disagreement with the first judge as to the propriety of the proceedings. In such a case, the second judge would basically be debating the correctness of a colleagues' judgment. Since applications for condonation as the one before me are invariably made after the automatic review, it would perhaps be good practice to have the application for condonation being determined by the same judge who reviewed the matter so that such judge may reconsider his or her earlier position in the light of submissions made by the accused as applicant thus avoiding having two judges express contrary decisions on the propriety of the same proceedings. On automatic review, the accused does not have a right to make representations on review. An accused who is legally represented does not have the benefits of an automatic review. Such accused's legal practitioners can however request for the review and submit a statement outlining reasons for review. I do not see good justification for not providing for a self-acting accused the right to submit a statement on automatic review. If the automatic review is meant for his or her benefit, then there is no logical reason for not providing the self-accused room to submit a statement on review just as much as the represented accused person can do so.

In my consideration of this application, I unfortunately find myself in disagreement with the first reviewing judge on the findings that the proceedings were in accordance with real and substantial justice. With much respect, I would not have certified the proceedings as having according with real and substantial justice. I can express this contrary view without offending the principle of concurrent jurisdiction that one judge cannot overrule another with the same jurisdictional powers because I am considering the matter within the parameters of representations by the applicant in his application, whereas the first judge did not have the benefit of applicant's submissions. My reasons for a contrary view will become apparent as I further this judgment. I have set out the facts of the matter and now consider the manner in which the trial was conducted.

At the commencement of the trial, the learned regional magistrate straightaway caused the charges to be put to the applicant who understood and denied them. Pleas of not guilty were recorded. Facts were read and recorded as having been understood by the applicant. The learned magistrate recorded that the provisions of ss 188 and 189 of the Criminal Procedure & Evidence Act were explained to the accused and understood. The explanation given should have been recorded so that the reviewing judge appreciates that there was full compliance with the provisions of the sections quoted. Section 188 (b) places a duty on the magistrate as follows:

> "(b) the accused shall be requested by the magistrates to make a statement, if he or she wishes, outlining the nature of his defence and the material facts on which he relies, and it he is not represented by a legal practitioner, his or her right to remain silent and the consequences of exercising that right, shall be explained to him."

The quoted provision is an integral requirement for a fair trial which is guaranteed under s 69 (1) of the Constitution. The provision was amended by s 36 of Act 2 of 2016 are part of the legislative endeavour to align the laws on trial procedure with the constitution. Section 70 (1) (l) provides that the accused person has the right "to remain silent and not to testify or be compelled to give self-incriminating evidence." A failure to comply with the peremptory provisions of s 188 will vitiate the fairness of the trial. Section 189 on the other hand provides that an accused's statement made in terms of s 188 (b) may be used against him in deciding whether or not the accused is guilty of the offence charged or any competent verdict possible on the charge. The section further provides that the statement made in terms of s 188 (b), save where it amounts to an admission of any allegation made by the State, shall not be taken into account or considered in deciding an application for discharge of the accused at the close of the state case made in terms

of s 198 (3) of the same enactment. Lastly s 189 allows the court to make adverse inferences from the failure of an accused who has elected to make a statement in terms of s 188 (b) to mention material facts relevant facts which he would have been reasonably expected to mention. Section 189 therefore is permissive of what the court may do in consequence of the exercise of the rights of the accused given in s 188 (b). There is no specific provision which requires the magistrate to explain the provisions of s 189. However, it should always be the practice where the accused is not represented to explain as the magistrate recorded that he did, the provisions of both ss 188 and 189 because they are not just related but s 189 is consequential on s 188.

I made the point that the explanation given must be recorded so that the nature of the explanation is appreciated on review or appeal. Where proceedings are on tape or recorded and the magistrate decides not to record the explanations in long hand, he should record or indicate that the explanation is on tape so that if issue is raised on it, a transcript of the record can be obtained. Proceedings in the Regional Court are always recorded on tapes unless for good reason, the recording facility is not available and the proceedings are recorded in long hand. For purposes of this application I do not consider it necessary to belabour the point or direct that a transcript be provided. It suffices that I made note that the explanations must be recorded. I did not find it necessary to belabour the point because there is yet another material procedural error which the learned regional magistrate committed. The error impacts on the propriety of the proceedings as well.

Again, in an endeavour to align the laws on criminal procedure with the constitution, the legislature by virtue of s 34 of Act No. 2 of 2016, enacted s 163A of the Criminal Procedure & Evidence Act, which provides as follows:

> "**163A Accused in magistrates court to be informed of section 191 rights**
> (1) At the commencement of any trial in a magistrates court, before the accused is called upon to plead to the summons or charge, the accused shall be informed by the magistrate his or her right in terms of section 191 to legal or other representation in terms of that section.
> (2) The magistrate shall record the fact that the accused has been given the information referred to in subsection (1), and the accused's response to it."

Section 191 provides as follows:

> "**191 legal representation**
> Every person charged with an offence may make his defence at his trial and have the witnesses examined or cross-examined –
> (a) by a legal practitioner representing him; or

(b) in the case of a accused under the age of sixteen years who is being tried in a magistrates court, by his natural or legal guardian; or
(c) where the court considers he requires the assistance of another person and has permitted him to be so assisted, by that other person."

There is nothing on the record to show that the learned regional magistrate complied with the peremptory provisions of s 163A. The applicant was not made aware of his rights to legal representation. Such omission constituted a serious misdirection which impacts of the question whether or not the applicant received a fair trial. The omission by the learned regional magistrate to comply with the provisions of s 163A necessarily meant that he did not even consider the provisions of subs (4) of s 191 in terms of which the court has a discretion to allow another person other a legal practitioner to represent the accused. The learned regional magistrate's omission undoubtedly casts doubt on the propriety and validity of the proceedings.

In relation to the further conduct of the trial, the applicant's defence was that he knew nothing about the offences and did not commit them because he was in fact staying in Karoi and not at Edendale Farm Chegutu as alleged. He denied raping the complainant and proffered an *alibi*. He persisted in this alibi in the cross examination of the complainant and the one other State witness who testified, being the complainant aunt. The applicant maintained the alibi in the defence case. The applicant requested for time to call a witness to testify on the *alibi*. Note is made that the applicant was in custody. The learned magistrate rolled over the case to the following day to "enable the State to assist the accused to call his defence witness."

On the next day, the defence witness was not in attendance. The learned magistrate who properly acted in the interests of justice in ordering the State/prosecutor to assist the applicant to call the defence witness, then misdirected himself gravely in closing the proceedings on the basis that the applicant had been given ample time to call the defence witness and failed to do so. The record shows that the prosecutor submitted to the trial court that he tried to telephone the defence witness but the phone call did not go through. The prosecutor then prepared a subpoena which, according to the prosecutor was served but the witnesses indicated that she could not afford to come to court due to "financial problems." The learned magistrate then proceeded to deliver judgment. The learned magistrate denied the applicant the protection of the applicant's right to a fair trial in proceeding to deliver judgment without having heard the evidence of the defence witness.

It is necessary to briefly discuss the duty of the court and State to assist the unrepresented accused in a criminal trial to call a defence witness. In *S* v *Garande* HH 46/02 and *S* v *C* (A juvenile 1997 (2) ZLR 935 (H) it is emphasized that a trial magistrate is under a duty to assist the unrepresented accused and ensure that the relevant evidence in a case is called. See also *S* v *Musindo* 1997 (1) ZLR 395 where the magistrate misdirected himself in not allowing the accused the opportunity to call in his defence, a state witness subpoenaed by the state but not called to give evidence for the accused at his request. The court has a duty to conduct a trial in a manner which is procedurally fair to both the accused and the state. Substantive and substantial justice is at the end of the day what the court strives to attain. In relation to the calling of a defence witness, the Criminal Procedure and Evidence Act provides as follows in s 229 (3)

> "3. When the accused desires to have any witnesses subpoenaed and satisfies the prescribed officer of the court that:
> (a) he is unable to pay the necessary costs and fees;
> (b) such witnesses are necessary and material for his defence;
>
> the prescribed officer of the court shall subpoena the witness."

A prescribed officer in terms of subsection 1 of s 229 means:

> "the registrar, assistant registrar or clerk of court or any officer prescribed by rules of court"

Where the prescribed officer is not satisfied on the matters set out in subsection 3 (a) and (b) of s 229, the accused may seek the intervention of the judge or magistrate and a ruling will be made thereafter. Where a witness has been subpoenaed including a defence witness, such witness is bound to attend and remain in attendance until excused by the court or at the end of the trial. A witness who disobeys a subpoena is dealt with in accordance with the provisions of s 237 in more or less the same manner as a defaulting accused. Such witnesses may have a warrant for his or her arrest issued and upon arrest is brought to court where a default enquiry is conducted with attendant consequences set out in the said s 237.

In the present case, the court made an order for the applicant to be assisted. The subpoena was served as reported by the prosecutor. The learned magistrate did not follow up on the subpoena nor enquire as to the witness' default. The learned magistrate's held that the "applicant had been given sufficient time to avail his defence witness. Such finding was an illogical one with all due respect. The applicant was clearly not given sufficient time to avail the defence witness. The court had directed the state to assist in calling the witness. The state caused a subpoena to be issued. The

subpoena had the force of law. Following the witness' default, the default needed to be enquired into and the subpoena retired through the arrest of the witness, a default enquiry being held and a decision made on the witness' default. The applicant was in any event in custody and the trial had been postponed to the following day. It could not be reasonable to hold that the applicant had had sufficient time to avail his defence witness. The learned magistrate by directing that the state should assist to avail the witness had shifted the burden of causing the witness to attend upon the state. To then hold it against the applicant that the witness was not available yet the state had subpoenaed the witness amounted to a misdirection. Quite clearly therefore, the applicant was denied the opportunity to properly conduct his defence by denial of the chance to adduce evidence from his witness. The applicant had the right of protection against a miscarriage of justice.

In addition to the misdirection aforesaid, the learned magistrate committed another irregularity in holding that his findings on the credibility of the complainant disproved the applicant's *alibi*, that the applicant was not at the scene of the crime. The *alibi* evidence was only partly led by the applicant when he alleged it. In regard to onus where a defence of *alibi* is raised, the learned magistrate correctly referred to the decision of this court in the case *S* v *Munuwa* HH 47/02 to the effect that the State has the duty to disprove the accused's *alibi* defence beyond a reasonable doubt. The Supreme Court case of *Mapfumo & Ors* v *State* 1983 (1) ZLR 250 (S) at 253 is the clear authority that the accused in a criminal trial has no onus to prove his defence and does not even have to allege a defence and establish it. Once there is some material whether adduced by the defence or arising from the prosecution case which suggests that a cognisable defence may be available, the court has a duty to consider such defence. In *casu* the fact that the learned magistrate did not consider the merits of the defence was grossly irregular. A defence is not dispensed with by state evidence. The defence should be disproved by the state evidence.

Following on the above, it must follow that the applicant has good prospects of success on appeal based on the irregularities and misdirections committed by the trial court. The state counsel based her opposition to the application on the basis that the case was decided on credibility of witnesses, an area which is the preserve of the trial court, not to be lightly interfered on appeal in the absence of other misdirection. I have noted the misdirections and discussed them. If the appeal court will be persuaded to agree with me on the misdirections which I have perceived, then it will not be bound by the trial courts'findings of credibility.

The applicant explained as the reason for delay in the filing of the appeal his lack of knowledge on how to go about noting the appeal. He also averred that he did not have anyone from outside prison to assist him to raise money to pay for the record until the time he filed this application.

In his proposed grounds of appeal, the applicant faulted the judgment of the trial on various grounds, notably that:

(a) the court did not properly assess the cause for delay in the reportage of the rape.

(b) his *alibi* defence was not rebutted

(c) his witness evidence was not received

In view of my findings on the irregularities and misdirections apparent in the proceedings which render the prospects of success on appeal very bright, I do not consider it necessary to deal with the rest of the grounds of appeal against both conviction and sentence singularly.

I now advert to the appropriate order to grant in the application. If the proceedings had not been previously reviewed and certified as according with real and substantial justice, I would have sought the views of another judge on review and set aside the proceedings for procedural irregularity and given leave to the Prosecutor-General to institute a fresh trial as he might decide obviously before a different magistrate. The proceedings cannot however be reviewed twice at this level. Only the appeal court may adopt the next review route if the Prosecutor General does not support the conviction, otherwise the case must now be disposed of on appeal.

I next deal with the applicant's prayer that he should be granted a certificate to prosecute his appeal in person. In view of the findings I have made on the merits of the proposed appeal, I acceded to the grant of the certificate to appeal in person. I now deal with the extension of time to note the appeal consequent on the condonation which I propose to grant. The applicant was required if inclined to appeal to note his appeal within 10 days of the date of sentence. He failed to do so. He cannot expect or be entitled to be given an extension of time which exceeds the days given in the rules for appeal. In my view the condonation if granted must be construed as a process or procedure which gives the applicant the opening to comply with the rules. If the rules provide that an appeal is noted within 10 days of the date of sentence, then the applicant's window should not exceed the 10 days as to do so would amount to making a parallel law on what the rule maker set out as the days allowed for an appeal to be noted. The applicant can always apply for the

extension of the period. There is however no justifications on an initial application for condonation to grant the applicant more time than provided in the rules. The effect of the grant of an application for condonation is to say to the applicant, "Your failure to appeal as the rules provide is condoned. You should now comply with the rules and note your appeal within the time given in the rules." To give an extension which exceeds the statutory appeal days would be a misnomer or non sequitur. I will therefore not grant an extension which exceeds the maximum period allowed for noting the appeal. I will however make an order that ensures that the extended days are counted from the date that the applicant is given the order personally.

In all the circumstances of the matter therefore, I make the following order:

(a) The application for condonation of late noting of appeal and extension of time to note appeal is granted.

(b) The applicant should note his appeal in terms of rule 26 of the Supreme Court (Magistrates Court) Criminal Appeals Rules S.I. 504/1979: that is to say, within 10 days of the applicant being availed a copy of this order by the Registrar.

(c) The Registrar shall cause the applicant to be brought before him and serve a copy of this judgment on the applicant and record proof of such service on record.

(d) The applicant is granted leave to execute his appeal in person

National Prosecuting Authority, respondent's legal practitioners