

DERECK NKALA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 30 JANUARY 2020

Chamber Application

TAKUVA J: This matter was placed before me by the Registrar as a chamber application. After perusing the papers I issued the following order:

- “1. The application for condonation of late noting of an application for review is thereby dismissed.
2. The application is riddled with lies and has no prospects of success.”

This order is dated 23rd May 2018. Subsequently on 7 June 2018, accused’s lawyers Rubaya and Chatambudza wrote to the Registrar requesting reasons for the decision. These are they;

The accused is a serial robber who in mitigation described his nefarious escapades as “piece jobs”. Unfortunately he did not exhibit the same candidness to his legal practitioner.

The background facts of this matter are that the accused was jointly charged with 2 others on two counts of robbery/carjacking as defined in section 126 of the Criminal Law (Codification and Reform) Act Chapter 9:23. The applicant was convicted after a full trial and sentenced as follows:

- | | | |
|----------|---|-----------------------|
| “Count 1 | - | 10 years imprisonment |
| Count 2 | - | 10 years imprisonment |

Of the total 20 years imprisonment 5 years imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving dishonesty and or violence against the persons for which he is sentenced to imprisonment without the option of a fine.”

Aggrieved by the conviction and sentence applicant filed this application for “condonation for late filing of court application for review in terms of Rule 256 of the High Court Rules 1971.”

The applicant’s legal practitioner swore to an affidavit while the applicant himself filed an unsigned and unsworn draft founding affidavit. The applicant filed this application on 23 June 2017 following his conviction on 4 March 2015 a period in excess of two years. In the legal practitioner’s affidavit it was contended that applicant failed to file his application for review within 8 weeks of the decision due to lack of financial means. It was further averred that the delay is not inordinate and this court ought to afford him an opportunity to bring his case before it on review.

As regards prospects of success, it was stated that he has bright prospects of success in that his case is not hopelessly devoid of merit as it is genuinely intended to test the validity of the proceedings of the trial court. The basis upon which applicant believes the court *a quo* committed gross irregularities is outlined in the legal practitioners affidavit as:

- “5.1 The court *a quo* proceeded to convict and sentence him in respect of the first count yet the recording of the plea of guilty was irregular. The police officers who arrested him assaulted him upon his arrest. They threatened to further assault him if he did not tender a plea of guilty to the charges. They were also present in the court room during the recording of the plea and every subsequent appearance of the applicant at court.
- 5.2 The State failed to prove beyond a reasonable doubt that the applicant had indeed violently accosted the complainant and stole his property. The two robberies occurred at night according to the evidence of the State witnesses. The type of identification that the State relied on was dock identification which is fallible. The court *a quo* misdirected itself by admitting the evidence of identification in circumstances where no prior identification parade was conducted for the State witnesses before testifying in court.

- 5.3 The court *a quo* fell into error when it failed to treat sentences in both counts as one for the purpose of sentence. The final sentence imposed on the applicant therefore became disturbingly severe in the circumstances. As such the exercise of the sentencing discretion by the learned magistrate is irrational and therefore appealable.” (my emphasis)

The Law

O33 r259 of the High Court Rules 1971 states:

“259. Time within which proceedings to be instituted

Any proceedings by way of review shall be instituted within 8 weeks of the determination of the suit, action or proceedings in which the irregularity or illegality complained of, is alleged to have occurred:

Provided that the court may for good cause shown, extent the time.” (my emphasis)

Where an applicant does not make an application within the 8 week period he/she must first make an application for condonation of the late filing of the application. This should be done as soon as he realises that he has not complied with the rules. If he does not seek condonation as soon as possible, he should give an acceptable explanation not only for the delay in making the application for review but also for the delay in seeking condonation. It is also trite that in the event of flagrant breaches of the rules, the indulgence of condonation may be refused, no matter what the merits of the application are. See *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S).

In *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) it was held that the grounds on which condonation may be granted are well established, the court has a discretion to grant condonation when the principles of justice and fair play demand it, and when the reasons for non-compliance with the rules have been explained by the applicant to the satisfaction of the court. The fact that there is a reasonable prospect of success is important but not necessarily decisive. In the case of a flagrant breach of the rules, particularly when there is no acceptable

explanation for it, the indulgence of condonation maybe refused, whatever the merits of the case maybe.

In *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290C-E McNALLY JA (as he then was) said;

“It is the policy of the law that there should be finality to litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or to appeal out of time and for other relief arising out of delays either by the individual or his lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* – roughly translated, the law will help the vigilant but not the sluggard.”

Bearing these principles in mind I now turn to consider the applicant’s application for condonation. The applicant was sentenced on 2 April 2015 and he filed this application on 20 June 2017 a period of 26 months after conviction. I consider this delay to be inordinate. Moreover the explanation given as to why the application was not made within 8 weeks is in my view unsatisfactory. The reason applicant raised is that he could not raise the fees required by his lawyers and had to be bailed out by his mother who works in Botswana. This explanation remained unsubstantiated in that his mother did not file a supporting affidavit confirming this version. There is no explanation why, if the mother had been informed of the time-frames, she could only raise the funds after 26 months.

In any event, the applicant has no prospects of success on the merits because he was properly convicted of both counts of robbery. There are no procedural irregularities at all. The grounds for which the review is sought are non-existent. In respect of both counts, there was no plea procedure to talk about as applicant pleaded not guilty and a full trial was conducted. The allegation that applicant was tortured until he offered a plea of guilty is a figment of his imagination because the record of proceedings indicates otherwise. The State called six

witnesses who included the two complainants. The rest of the witnesses dealt with applicant in one way or the other in connection with the vehicles. In my view, the alleged irregularity relating to the recording of a guilty plea is a lie.

The second ground is equally without merit. Here, the applicant's contention is that the state relied on "dock identification" to convict him. The court ought not to have relied on this type of evidence, so the argument went. While dealing with the evidence of identification, the court *a quo* reasoned thus;

"In analysis – the court finds the evidence of identification to be rather tenuous. It was at night in both incidents when the robberies were committed. The complainants would have needed to have their evidence of identification tested by an identification parade after the arrest of the accused. In the case of the 2nd accused for instance the only complainant who claimed to have seen him says that the 2nd accused sat in the front passenger seat with a cap –placed over his eyes. Then he insists in the same breath that it is him that he saw robbing him. Such evidence has to be treated with caution. In the case of the 1st accused even if the evidence of identification by the complainant is also that weak, at least there is other evidence to buttress the fact of him being the perpetrator. The unchallenged evidence of Kudakwashe Vincent, Milton Thompson and Law Gandashanga confirmed the 1st accused as the robber in both counts. The 3rd accused certainly did not commit a robbery, either directly or through some conspiracy."

I am in complete agreement with the conclusions reached by the court *a quo*. After analyzing the evidence, the court *a quo* convicted the applicant (accused 1) on both counts of robbery, acquitted accused 2 due to insufficient evidence, convicted accused 3 of theft in respect of count 2. In view of the evidence on record, the court *a quo*'s conclusion that there is overwhelming independent evidence linking applicant to the two robberies is unassailable. In fact, applicant had employed one of the State witnesses one Vincent Kudakwashe Ngoro as a driver of one of the stolen vehicles. Applicant would collect the money from its hire at the end of every day in Harare. The Applicant even swore to an affidavit falsely claiming ownership of one of the Honda Fit motor vehicles. He attached a copy of his passport to the agreement of sale. Applicant was paid the purchase prices for both vehicles from the two buyers. More importantly, Applicant lied to the buyers that accused 3 was in possession of the registration books for the motor vehicles. One of the buyers, one Law Gandashanga actually phoned accused

3 who falsely confirmed Applicant's version. This is the basis upon which accused 3 was convicted.

The allegation that the court *a quo* relied on inadmissible evidence is unsustainable in the circumstances.

The 3rd and final ground relates to sentence. The contention being that the court *a quo* exercised its sentencing discretion irrationally by failing to treat sentences in both counts as one for purposes of sentence. It is trite that when an accused is convicted of two or more offences, it is preferable that he should be sentenced separately for each offence especially where the offences are entirely different. This is so because the imposition of a globular sentence often causes difficulties on appeal or review. Consequently, one globular sentence for two or more offences should only be considered where the offences are of the same or a similar nature and are closely linked in time.

In casu, while it is true that the offences are of the same nature, there are not closely linked in time. The 1st count was committed on the 4th of December 2014 while the second was committed on 15 December 2014. I am not persuaded that by considering the two counts separately the court *a quo* exercised its sentencing discretion irrationally or irregularly resulting in the imposition of a severe sentence.

In the circumstances, the application is hereby dismissed.