

MERRYWARD MARARA

Versus

THE STATE

And

NATIONAL PROSECUTING AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 3 JUNE 2021

Application for late noting of appeal

Applicant in person
B. Maphosa for the respondent

MAKONESE J: The applicant appeared before a Regional Magistrate at Bulawayo on the 4th of November 2020 facing a charge of rape as defined in section 65 of the Criminal Law Codification and Reform Act (Chapter 9:23). Applicant was sentenced to 15 years imprisonment of which 5 years imprisonment was suspended for 5 years on the usual condition of future good conduct.

The applicant now applies for condonation for the late filing an appeal. A further application for leave to prosecute the appeal in person is made to this court. The state opposes the application.

Basis for the application

Applicant avers that the delay was occasioned by his desire to engage a legal practitioner to represent him in noting and prosecuting the appeal. Applicant contends that due to financial constraints he was unable to secure the services of a lawyer of his choice. Applicant goes further to state that his explanation is reasonable in the circumstances, and he has realistic channels of success on appeal. Applicant was represented throughout the trial in the court *a quo*, however he is now applying for condonation and seeks the leave of this court to prosecute the appeal in person.

Factual background

The facts leading to the conviction of the applicant are that a nineteen year old complainant Tsitsidzashe Dhliwayo was at a shrine at a bushy area in Westgate, Bulawayo on 30th September 2018. Applicant who was a self-proclaimed prophet raped complainant and had sexual intercourse with her without her consent. Applicant had lured the complainant to a secluded pit where he ordered her to go lie down facing upwards, claiming that he was exorcising evil spirits that were tormenting her. Complainant reported the matter to her aunt soon after the incident. In his defence applicant denied having sexual intercourse with the

complainant. The court *a quo* accepted the complainant's narration of events and duly convicted the applicant.

Principles for granting applications for late noting of an appeal

The factors that have to be considered in an application for the late noting of an appeal have been established in several cases. In *Kombayi v Berkhout* 1988(1) ZLR 53 (S) the court held that the test to be applied is:

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

The sentence was handed down on 4th November 2020. The application was lodged on 25th March 2021. There has been an inordinate delay in noting the appeal. The applicant was defended from the onset and throughout the trial. He now avers that he is a self-actor. He asserts that the court *a quo* made a misdirection by taking the side of the witness who contributed each other and were unreliable. Applicant says he was financially constrained to engage the services of a legal practitioner. Applicant must observe that applications for condonation are not just there for the taking. The applicant has filed a detailed application for condonation with decided cases in support of his application. An application of this nature was most likely made with the assistance of a lawyer. Indeed in several such cases, applications are made by convicted persons from prison and all the applicant must show is the genuine desire to lodge an appeal. It has become a lame excuse for several litigants to simply allege that they lacked the financial resources to engage lawyers. This is the case in this application. There is no reasonable explanation given for the delay. The delay is inordinate.

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 lesser 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