

BONGANI MKHWANANZI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 21 September 2023

Application for condonation

C.C. M. Nyathi, for the applicant
K.M. Nyoni, for the respondent

DUBE-BANDA J:

[1] This is an application for condonation for the late filing of an application for leave to appeal against conviction and sentence. With the consent of the parties, I determined this application on the papers.

[2] The applicant and his co-accused who is not part of this application were indicted before this court on a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) act [Chapter 9:23]. It being alleged that on 16 January 2021 they struck the now deceased on the head with a metal bar intending to kill him or realizing that there was a real risk or possibility that their conduct may cause his death continued to engage in that conduct despite the risk or possibility.

[3] After a contested trial the two were convicted of murder and each sentenced to 30 years imprisonment. Aggrieved by both the conviction and sentence, the applicant filed this application, seeking condonation to file an application for leave to appeal.

[4] In an application for condonation the court has a discretion which it must exercise judiciously. The legal principles a court is to take into account in considering whether or not to exercise its discretion to condone a party's non-compliance with the rules of court are well established. The first principle is that an application for condonation must be brought as soon as the non-compliance has been detected. See *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises Pvt. Ltd* 1998 (2) ZLR 249. Second, the factors that have to be considered in such an application are these: the length of the delay, the explanation of the delay, and the applicant's prospects of success in the contemplated process sought to be filed. See *Bennyview Estates (Pvt) Ltd v Zimbabwe Platinum Mines (Pvt) Ltd & Anor* SC 01/05; *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 B-E; *Mhora v Mhora* CCZ 522. There is some interplay between the obligation to provide a reasonable and acceptable explanation for the non-compliance with a rule of court and the reasonable prospects of success on the process sought to be filed. See *De Klerk v Penderis and Others* (SA 76 of 2020) [2023] NASC 1 (01 March 2023).

[5] An application for condonation may, however, be refused where an applicant has provided a good and acceptable reason for his or her non-compliance but has failed to satisfy the court that there are reasonable prospects of success on the process sought to be filed. An application for condonation may also be refused because the non-compliance with the rules has been glaring, flagrant or inexplicable. In such an instance, the court may decide on the condonation application without having regard to the prospects of success of the process sought to be filed. See *De Klerk v Penderis and Others* (SA 76 of 2020) [2023] NASC 1 (01 March 2023); *Kombayi v Berkhout* 1998 (1) ZLR 53 (S).

[6] Regarding the extent of the delay, the record shows that the applicant was convicted and sentenced on 21 January 2022. This application was filed on 26 July 2023, resulting in a delay of approximately one year five months. The delay is inordinate. The explanation for the delay is that at the trial the applicant was legally represented by pro-deo Counsel. After conviction and sentence, he was taken to serve his imprisonment, and he was later advised of the appeal procedure by other prison inmates. He attempted to file an application in June 2022, and it was returned to him because of the restrictions caused by COVID-19 regulations. Further the record shows that on 14 March 2023 the applicant without legal representation filed an application for leave to appeal to the Supreme Court. The application for leave to appeal was placed before me, and I directed the Registrar to appoint Counsel to assist the applicant. Counsel was appointed and this application was filed through the appointed Counsel.

[7] In the circumstances of this case, the concession by the respondent's Counsel that the applicant proffered a reasonable explanation for the delay in filing this application is understandable and was correctly made. I accept that he has proffered an acceptable explanation for the delay in filing this application. However, this finding is not dispositive of this matter.

[8] The inquiry now turns to whether the application for leave to appeal against conviction and sentence has prospects of success. The conviction of the applicant was based on the evidence adduced at the trial. Although the court found it proved that he was hired by Mlamuleli Ncube to attack the Nomalanga Sibanda who was in the company of the deceased, the conviction of the applicant turned on the evidence of the part he played during the attack. The evidence shows that the applicant and his accomplice pre-planned the murder of the deceased and carried out a vicious attack on him. The deceased was attacked when he was in a bending position folding his trousers to cross the river. It was the applicant who struck him on the head with an iron bar and the brain matter oozed from the head. The iron bar was about a meter long. The deceased fell to the ground. The applicant testified that after he struck deceased as he did, he realized that he might die as a result of the injuries he had sustained.

[9] The doctor who conducted a post mortem on the remains on the deceased observed that the skull bones were fractured with a 2cm to 3 cm depression. The brain was damaged and the axe could have penetrated for about 6cm deep into the brain. The sagittal sinus was severed with haemorrhage and the brain was traumatised and fragmented. The doctor concluded that severe force was used to cause these injuries. It was concluded that the cause of death was severe brain traumatic injury, head injury and severe axing.

[10] The evidence shows that the applicant and his accomplice mounted a violent and vicious attack on the deceased. Striking a human being on the head using a lethal weapon and with so much force, fracturing the skull and damaging the brain leads to one conclusion i.e., an intention to kill. The circumstances of this case cannot by any stretch of imagination amount to a conviction of culpable homicide, particularly for the applicant. He struck the deceased with an iron bar on the head and inflicted the injuries that caused death.

[11] In my assessment of the evidence on record, it is very unlikely that his application for leave to appeal against conviction will succeed. There would be no useful purpose to allow this application when the application for leave to appeal itself will just suffer a still-birth. He has no prospects of success on the application for leave to appeal against conviction.

[12] Regarding sentence, it is by now established law that sentencing is pre-eminently within the discretion of the trial court. The court of appeal has limited power to interfere with the sentencing discretion of the trial court. A court of appeal can only interfere; where there was a material irregularity; or a material misdirection on the facts or on the law; or where the sentence was startlingly or disturbingly inappropriate; or induced a sense of shock; or is such that a striking disparity exists between the sentence imposed by the trial court and that which the court of appeal would have imposed had it sat in the first instance; or irrelevant factors were considered and when the trial court failed to consider relevant factors. See: *S v Ramushu & Ors* SC 25/03; *S v Anderson* 1964(3) SA 494 (AD) at 495 D-H; *S v Rabie* 1975(4) SA 855 (AD) at 857 E.

[13] It is very unlikely that his application for leave to appeal against sentence will succeed. I say so because the mitigating factors in favour of the applicant pale into insignificance when consideration is given to the nature of this crime. The evidence shows that an extraordinary degree of violence was deployed against a defenseless human being, who had done no wrong, and who was merely working for himself and his family. The violence that preceded the killing the deceased was such as to place this crime in the category of the most serious. The post mortem report gives graphic details of the injuries suffered by the deceased. His skull was fractured and fragmented and brain matter oozed out. No word and no warning preceded the attack. He was taken by surprise. He was attacked by the applicant with a dangerous and lethal weapon as he was in a bending position folding his trousers to cross the river. On the facts of this case the applicant has no prospects of success on the application for leave to appeal against sentence.

[14] There will be no useful purpose to accede to this application, when the intended application for leave to appeal itself is unlikely to succeed. It is for these reasons that this application must fail.

In the result, it is ordered as follows:

The application for condonation for the late filing of an application for leave to appeal be and is hereby dismissed.

Masamvu & Da Silver-Gustavo Law Chambers, applicant's legal practitioners
National Prosecution Authority, respondent's legal practitioners