

SIMBARASHE DUBE

Versus

THE STATE

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI, 20 APRIL 2023

Chamber Application for condonation of late noting of an appeal against sentence and extension of time within which to note an appeal.

MUZOFA J: Having considered that the applicant is not legally represented and that the State did not file any response, I found it necessary to give the reasons for my decision in writing. This could help the unrepresented applicant to appreciate the outcome of his application.

The applicant was convicted on his plea on two counts of armed robbery in contravention of s126 (1) (a) of the Criminal Code and one count for unlawful possession of a firearm in contravention of s4 (1) of the Firearms Act (Chapter 10:09). He was sentenced to 7 years imprisonment on each count of armed robbery. Of the total 14 years 3 years imprisonment was conditionally suspended for 5 years. Of the remaining 11 years one year was suspended of condition of restitution. On the third count he was sentenced to pay a fine of \$500-00 in default of payment 6 months imprisonment. The sentenced was handed down on the 20th of February 2019. This application was filed on the 13th of March 2023, almost fours after passing of sentence.

In terms rule 101 (2) of the High Court Rules, 2021 the applicant must have filed his appeal within 10 days of handing down of sentence. Since the applicant is unrepresented he

is required to seek leave to prosecute the appeal in person in terms of s36 of the High Court Act (Chapter 7:06). In this application he also seeks leave to prosecute the appeal in person.

Factual Background

It was on the 25th of January 2019 that the applicant set on committing the two armed robbery cases. On the first count around 10-00 am the accused boarded the complainant's motor vehicle a Toyota Wish along Kadoma Empress Road Zhombe. There were four passengers in the motor vehicle. Along the way he requested the complainant to stop so that he could relieve himself. When he returned he produced a pistol, pointed it at the complainant and demanded the car keys. When the complainant tried to resist he fired one shot at the complainant's seat. The complainant relented and surrendered his items and the motor vehicle to the applicant. The passengers escaped unhurt. The motor vehicle was eventually recovered in Kwekwe.

As if that was not enough, the applicant proceeded to Kwekwe presumably in the first complainant's motor vehicle. He must have had some problems with the car. He 'hired' the complainant on the second count to rescue him. The rescue mission was not to be. When the rescuer got to the scene to rescue the applicant, the applicant produced a pistol and threatened the complainant and demanded the motor vehicle. The applicant tied the complainant to a tree and made good his escape with the motor vehicle a Honda Fit registration number AEV 5491. The applicant was subsequently arrested on the 13th of February 2019 after tip off. The motor vehicle was recovered although the other items that were in the motor vehicle were not recovered.

After his arrest the applicant appeared the learned Regional Magistrate sitting at Gokwe Magistrates Court. He pleaded guilty to the charges.

In assessing sentence, the court considered both the aggravating circumstances, the seriousness of the offence, the way the offences were committed and the fact that the applicant traumatised the complainants and the passengers. In mitigation the court considered the pleas of guilty and how they assist in the quick disposal of cases and that the applicant was a first offender. The court then considered similar cases to draw some guide lines. The judgment is fairly detailed on the court's reasoning in coming up with the sentence it finally settled for.

The grounds of appeal

I reproduce the grounds of appeal verbatim for ease of reference.

- I. The court did not give respect to the weight of plea, in legal parameters a plea of guilty should have called for meaningful sentence reduction.
- II. The court misdirected itself by ignoring s279 A of the Criminal Procedure and Evidence Act since the two counts were concurrently charged, no judicial thesis was given that barred the court from passing a concurrent sentence.
- III. Since the applicant pleaded guilty he did not only show remorse and contrition but also saved time and expenses as well as speeding the administration of justice the court should have (sic) took that into account.
- IV. Applicant did not substantially benefit from the two offences and no substantial prejudice was caused to the complainants hence the sentence was harsh.
- V. Applicant prays that this honourable court set aside the sentence by the Magistrate or substitute it with a sentence mitigating special circumstances.

The grounds of appeal are inelegantly presented. However since the applicant is not legally represented, I can salvage what the applicant intended. My understanding is that the applicant impugns the sentence as excessive regard being made to the mitigation factors that he pleaded guilty, that he did not waste the court's time, that he was contrite and that he did not benefit from the crime.

Even after trying to make something out of the grounds of appeal, the notice of appeal is defective and fatally defective in that there is no prayer. A notice of appeal must indicate the prayer sought. It must be clear in its terms. The applicant's prayer is that the court set aside the sentence and 'substitute it with a sentence mitigating special circumstances' For all intents and purposes the statement is meaningless, it is as good as nothing has been said. In essence there is no prayer. The application is fatally defective. On this alone, the application can be dismissed as there are no prospects of the defective application being heard at all.

For completeness I deal with other issues in this application.

The law

In such an application the main considerations set out in *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S), *Ester Mzite v Damafalls Investments (Private) Limited* SC 21/18; *Vundla and Another v Innscor Africa Bread Company Zimbabwe (Private) Limited and Another* SC 14/22 .T These include the extent of delay and the explanation for the delay, balance of convenience and the prospects of success on appeal. The factors have to be considered cumulatively although the prospects of success weight the most. In the *Kodzwa* case the court stated that regardless of the prospects of success on appeal where there is a flagrant breach of the rules, particularly where there is no explanation for the delay the application must be dismissed.

Analysis

In this case the application is made after 4 years. The extent of the delay is long. His explanation is unreasonable. He says when he was lodged in prison, he was advised that he could not appeal since he pleaded guilty to the charges. It was only in 2020 that he learnt that he could note an appeal. Thereafter he had challenges in getting the record of proceedings. The applicant did not explain what challenges he faced, he simply said there was Covid and he was transferred to Kadoma Prisons. We appreciate the challenges that the COVID pandemic brought about but they did not span to 2023. Where a litigant has already failed to comply with court rules, he must explain in detail his failure. For instance even if the applicant is given the benefit of doubt that he learnt of his right to appeal in early 2020 he does not tell us what he then did. From 2020 to 2023 its about 3 years what he did during that period is unknown. He said there was COVID and nothing further. He does not detail the exact challenges he faced in accessing the record of proceedings. To generalise the problems to the COVID pandemic and the record of proceedings is inadequate especially in such a case where the delay in nothing the appeal in long. Finality to litigation is a major tenet in the delivery of justice. Thus, the in terms of r103 an appeal against sentence must be filed within 5 days of the passing of the sentence. The rationale there is to ensure timely resolution of the appeals so that there is finality to litigation. Once an appeal is not noted accordingly, there is a presumption that the convicted person has found peace with the sentence. To note an appeal after 4 years this case, then requires that the applicant satisfies the court on a balance of probabilities why the appeal was not noted on time. It is my considered view that the applicant has not traversed adequate reasons for the delay. The reasons are unreasonable.

In respect of the grounds of appeal, there are no prospects of success on appeal at all. The court a quo considered all the issues that are set out as grounds of appeal. The applicant was a dangerous person out there illegally armed with a pistol. This is evident from the way he committed the two armed robberies one after another. Armed robbery is a serious offence and these cases are now prevalent the public must be protected from such criminal elements. The sentence imposed by the court a quo was within its jurisdiction and it does not induce a sense of shock.

From the forgoing the application cannot be granted. It suffers a still birth with the defective notice of appeal. Then the appeal itself has no process of success. Condonation is not granted on the asking, in this case clearly the applicant was simply taking a chance there is no merit in the application.

Accordingly, the application is dismissed.