

TOGARASEI MASHUMBA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 3 March 2020

### **Chamber Application for Condonation**

TSANGA J: This is a chamber application for condonation of late noting of appeal and leave to appeal in person. It has been placed before me as the judge who, together with two assessors, tried and convicted him of murder with actual intent. He received a sentence of 23 years imprisonment on the 8<sup>th</sup> of August 2019. He was legally represented during his trial and sentence.

The right to appeal from the High Court in criminal matters is enshrined in s 44 of the High Court Act [*Chapter 7:06*]. In terms of Order 34 rule 262 of the High Court Rules, 1971, the right to appeal must generally be exercised within the time frames set out there in. At the conclusion of the sentence hearing, there was no oral application made that the now applicant wished to appeal against conviction or sentence or both. There was equally no application made under special circumstances made within 12 days of the sentence since no oral application had been made.

Thus the application for condonation has been made for failure to observe the time frames set out in the rules for exercising the right to appeal. The explanation given by the applicant for the delay is that he was not familiar with appeal procedures. This does not adequately or logically explain his delay. He was legally represented and therefore given that this is trite, his lawyer would have most certainly notified him that he had a right to appeal even though he claims that he was not told.

In any event, even if the length of the delay is not inordinate since this application is date stamped 28 October 2019 though it has just been placed before me on the 3<sup>rd</sup> of March 2020, and, even if his explanation is accorded the benefit of the doubt, the legal position whether or not condonation will be granted, materially hinges on prospects of success. In essence, there must be reasonable prospects of success and substance in the application for

condonation to be granted. As explained by Reid Rowland in his book on criminal procedure<sup>1</sup>:

“There must be a reasonable prospect of success, that is, there must be substance in the argument. It is not enough merely to make out an arguable case, for there are few cases which are not “arguable” in the wide sense of the word (even if the argument is a tenuous one that requires some ingenuity).”

An application without substance will therefore not be granted.

*In casu* the applicant says that the court did not take into account the defence of provocation. This is not true. The court addressed the provocative act put forward by the accused which was that he struck the deceased thrice on the head with an axe after she told him she was no longer interested in him. They had been lovers. In other words, she provoked him by ending their relationship as lovers. As the court clearly stated in the judgement, a woman wanting to end a relationship cannot be an act of provocation that justifies killing within the ambit of s 239 (1) (a) or (b) of the Criminal Law Codification and Reform Act [Chapter 9:23].

Applicant also says that the doctor was not called to support her report that the issue of the applicant being mentally unstable came from the applicant and her finding that he was mentally sane. Again, the judgment clearly addressed this issue on page 7 of the typed judgment. The accused was sent for mental examination at the start of the trial at the request of his lawyer. He was examined and found to be mentally sane. The medical report was admitted by consent and the trial proceeded. Section 18 (4) of the Criminal Code is clear on the onus to prove mental illness at the time of the commission of the offence. The accused did not call anyone during his defence to substantiate his mental illness and to provide contrary evidence to that in the report that he was sane and was not a sufferer of mental illness.

There are absolutely no prospects of success on appeal on the grounds of appeal laid out by the applicant that would justify condoning this application. There is no need to waste the appellate court’s time. Condonation cannot be granted simply to humour him when there are no prospects of success. The judgment also speaks volumes of the applicant’s constant shenanigans regarding avoiding facing justice in this matter. The accused should serve his sentence.

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<sup>1</sup> John Reid Rowland “*Criminal Procedure in Zimbabwe*” (Legal Resources Foundation Harare, 1997) Chapter 27 at p 11p

The application for condonation of late noting of appeal and leave to appeal in person is dismissed as there are no prospects of success on any of the grounds put forward by the applicant.