

FIRST GASURA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHIKOWERO J  
HARARE, 7 December 2020

### **Chamber Application**

*Applicant*, in person  
A. Bosha, for the respondent

CHIKOWERO J: This is an application for condonation for late noting of appeal against both conviction and sentence, extension of time within which to appeal and leave to prosecute the appeal in person.

The application and opposing papers were placed before me in Chambers.

I struck off the roll the application for condonation for late noting of appeal against the sentence, extension of time within which to note that appeal and leave to prosecute the appeal in person. I dismissed the application for condonation for late noting of an appeal against the conviction, extension of time within which to note that appeal and leave to prosecute the appeal in person. I made the order on 7 December 2020.

On 29 November 2021 the file was back on my desk. The applicant has requested reasons for my decision.

These are the reasons.

The applicant filed an application for condonation for late noting of an appeal against sentence only. The application was placed before MOYO J sitting at the High Court in Bulawayo. That application, under HCA (COND) 65/18, was dismissed on 10 August 2018. Copy of the court order is among the papers placed before me in this application.

It was incompetent for the applicant, on 16 September 2020, to file a fresh application seeking relief inclusive of that denied at Bulawayo on 10 August 2018. The applicant was forum shopping.

This is the reason why I struck off the roll the application for condonation for late noting of appeal against the sentence, extension of time within which to note that appeal and leave to prosecute the appeal in person.

I dismissed the application for condonation for late noting of appeal against the conviction, extension of time within which to note the appeal and leave to prosecute that appeal for three reasons each of which, standing alone, was decisive.

Firstly, there was an inordinate delay between the date of conviction and filing of the application. The applicant was convicted on 11 February 2016. The present application was filed on 16 September 2020. The delay exceeds four years. The delay is so inordinate that the application would fail on this ground alone, without even assessing the reasonableness or otherwise of the explanation for the delay and the prospect of success on appeal.

Secondly, the explanation for the delay was false. The applicant attributed the delay to logistical difficulties in acquiring the record of proceedings. He says it was only after a prison visit on 12 March 2020 by a Judge of this court that he became aware of how to obtain the record of proceedings. Thereafter, he obtained the record and filed the application on 16 September 2020. This explanation is false because in 2018 the applicant already had the record of proceedings. That is why he was able to file, at the Bulawayo High Court, the application for condonation for late noting of the appeal against sentence only. The reasonableness or otherwise of the explanation for the delay does not arise because the explanation itself is manifestly false.

Thirdly, there is no prospect of success in the intended appeal against the conviction. The Magistrates Court sitting at Gokwe convicted the application of two counts of rape as defined in s 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] because there was overwhelming evidence against the applicant.

The court found that the two complainants were credible witnesses. The two were biological daughters of the applicant. The elder was 9 years old at the time of the commission of the offence. The younger was 6 years old. The court's finding that they had no reason to falsely incriminate their own father is, in my view, unimpeachable. They described how the applicant, who slept with them in the same hut, would, at night, undress them and proceed to have sexual intercourse with each of them. They demonstrated the act of sexual intercourse using the anatomically correct dolls. They explained that they did not disclose the offence because they

believed that the applicant would carry out his threat to chop off their heads and throw the same into a toilet pit. The applicant had divorced his wife. He was the only person staying with the complainants at the material time. The complainants were candid with the court. They said that besides the applicant a grade three boy, Alloys, had also placed his penis into their vaginas. The applicant did not meaningfully cross-examine the complainants. Their detailed evidence remained intact.

The medical reports also reflected that there was definite evidence of penetration.

The appellant's defence that there was bad blood between him and his wife and between him and his father-in-law was, in my view, proved to be beyond reasonable doubt false. Neither his wife nor his father-in-law fabricated the charges. The applicant himself accepted that the offences were committed. The only issue at the trial was whether it was the applicant who had committed the offences. The offences came to light through information supplied by an organization called Channels of Hope, working in conjunction with the Department of Social Welfare. In the circumstances, there is no prospect of success in predicating the appeal in the argument that his father-in-law and the applicant's ex-spouse coached the complainants to falsely incriminate him.

In any event, the applicant himself accepted, as way back as 2018, that there is no reasonable prospect of success in an appeal against the conviction. That is why he had, then, sought condonation for late noting of an appeal against sentence only. His apparent change of mind is nothing but evidence of forum shopping.

These, then, are the reasons for the decision rendered on 7 December 2020.

*The National Prosecuting Authority, respondent's legal practitioners*