

THE STATE
Versus
VITALIS BETHE

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 14 December 2023

Chamber application for condonation of late noting of an appeal

MUZOF A J

On the 19th of August 2019, in Chambers I dismissed the applicant's application for condonation for late noting of an appeal and leave to appeal in person. The view was that there were no prospects of success of appeal. Written reasons have been requested for purposes of appeal. I provide them herein.

Backgrounds Facts

The accused was convicted on 2 counts of rape in contravention of s65 of the Criminal Code after a trial on 23 December 2013 by a Regional Magistrate sitting at Murehwa Magistrates' Court.

The State alleged that in the period from 12 January 2007 to 31 December 2008 and from the 1st January 2009 to 31 August 2021 on unknown dates the accused unlawfully had sexual intercourse with one Stella Garan'anga without her consent. The accused was Stella's stepfather.

Both counts were treated as one for sentence. He was sentenced to 20 years imprisonment.

The applicant failed to note his appeal within the stipulated time as envisaged by the Rules, he then filed this chamber application for condonation for late noting of an appeal, extension of time to file an appeal and leave to appeal in person.

The Law

For such an application to succeed, the following factors must be considered. The extent of the delay and the explanation thereof, the prospects of success should the application be granted. See *Read v Gardner & Anor 2019 (3) ZLR (S)*. Although in that matter the court was dealing with a civil matter, the same principles apply in criminal matters.

In that case the court opined that the factors must be considered cumulatively. It may be such that, the weakness in one factor may be alleviated by the strength in another. Although there is need to consider all the factors, strong prospects of success on appeal and a reasonable delay make a good combination for the granting of such an application.

The extent of delay and explanation

The accused was convicted on 17 December 2018. He was expected to file his appeal within 10 days. He failed to do so. His application for leave is dated 24 April 2019. The delay of about four months cannot be said to be unreasonable. The explanation is also reasonable. He was transferred from Murehwa to Chikurubi in Harare. The administrative challenges associated with retrieval of records of proceedings are not a secret especially for unrepresented accused persons. In this case, his situation was aggravated by his transfer from Murehwa Prison where his relatives could easily visit him

and take instructions. He was transferred to Chikurubi in Harare which was not easily accessible by his relatives.

Prospects of Success

In coming to its decision, the court found the complainant to be credible. The court found that although one Munyepwa was once arrested for raping the complainant. It is the applicant who caused Munyepwa's arrest. He was subsequently acquitted.

The court considered that although there was no timeous report, a reasonable explanation existed. The applicant threatened the complainant with death together with her mother. The complainant reported the matter to her paternal aunt. At that stage she felt safe to report since he was no longer in the custody of the applicant. The accused had taken her for school holiday. Her aunt had seen a pale child and asked if she had any problems. The complainant then disclosed her ordeal to her aunt.

A perusal of the record of proceedings reveals that the aunt questioned her on her health and not about the rape. Thus, the court a quo did not misdirect itself by accepting the report.

On the other hand, the trial court found the applicant's testimony inconsistent. He denied ever spending time alone with the complainant in Chitungwiza. His own witness confirmed that he would at times leave the applicant and complainant alone when she went out to the shops. The complainant actually said the aunt had gone to the shops when she was raped.

Secondly, the trial court found that the accused implicated initially Paul Munyepwa, that he raped the complainant, then Godfrey. In another breath he suspected that George Chanakira prevailed on the complainant to lie

against him. Finally, he blamed the aunt Emaculate Chihata that she influenced the complainant to lie against him. There can be no misdirection in this finding when the applicant was not consistent in his evidence.

In the whole, the trial court reasoned that, the applicant who was complainant's step father stayed with her. It seems her mother was not usually with them. The applicant therefore raped the complainant continuously. She was threatened. She did not report, rather she was influenced by the applicant to falsely implicate one Paul Munyepwa. The complainant found some peace to disclose to Emaculate her aunt when she was out of control and influence of the applicant. The complainant was young and impressionable.

Having said so, the intended appeal based on the grounds of appeal enjoy no prospects of success.

Although the applicant indicated in his notice of appeal that the appeal was against both conviction and sentence, no grounds of appeal against sentence were set out. I shall therefore deal with the appeal against conviction only.

The first, second, third and fourth grounds of appeal raise procedural irregularities. They raise that the applicant was not given time to prepare his for defence and that the trial court failed to comply with all procedural requirements during the trial. The law provides two procedures to impugn court proceedings. The appeal procedure and the review procedure. Although both procedures may result in the setting aside of the proceedings the appeal procedure addresses the substantive issues on the merits while the review procedure deals with procedural issues. Procedural irregularities are a preserve of an application for review. Herbstein and Van Winsen, in

their book *Civil Procedure of the Supreme Court of South Africa fourth edition* explain the distinction as follows,

“Where the reason for wanting the decision set aside that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however the real grievance is against the method of the trial, it is proper to bring the case on review”

See also *Pretoria Portland Cement Ltd v Competition Commission* 2003 (2) SA 385 SCA @35

It is highly undesirable to turn an appeal into a review thereby obliterating the line between the two procedures. An appeal court can in deserving cases only invoke its review powers in an appeal in terms of s29 (4) of the High Court Act (Chapter 7:06). This discretion is exercised in the interests of justice. That discretion is for the court or a Judge to exercise and not for a litigant to approach the court using an incorrect procedure. The four grounds of appeal would therefore be improperly before the court and cannot succeed as grounds of appeal.

The fifth, sixth and seventh grounds of appeal impugn the trial court’s findings on the credibility of the State witnesses. The grounds of appeal are unclear. It is trite that grounds of appeal must be clear and concise. There must be no rambling. For the unrepresented applicant as in this case the court can bend a bit if the rambling ground of appeal, at the end of it raises a point for consideration. This is done purely to achieve the ends of justice. Although the grounds of appeal are not clear, something can be deciphered from them. I shall consider them.

The grounds of appeal seem to raise issue with the delayed report, the inconsistencies in the state evidence and that the court accepted hearsay evidence. It is unclear which hearsay evidence the applicant referred to. As already stated earlier in this judgment the trial court set out its reasons for accepting the State witnesses’ evidence. It cannot be faulted.

In case the applicant referred to hearsay evidence from Emaculate who received the report from the complainant, it is now acceptable that the hearsay is admissible. Generally, under s253 (1) of the Criminal Procedure and Evidence Act (Chapter 9:07) hearsay evidence is inadmissible in court. The section is not cast in stone, there are exceptions to the rule. Evidence by the person who received a complaint from the complainant in sexual offences for all intents and purposes is hearsay evidence, however it falls in one of the exceptions to the rule against hearsay. The trial court did not misdirect itself by accepting the hearsay evidence.

Having set out the reasons for my decision I must comment on later developments after my decision. This matter was placed before me to provide reasons in November 2023 some 4 years after the order was issued. It appears something happened in those 4 years. In the record I noticed that the applicant filed another application to amend his application which I had already issued an order. He attached an affidavit sworn to by the complainant. In that affidavit the complainant recanted all that she said before the trial court and once again raised persuasion by Emaculate her aunt. A police officer also attached an affidavit setting out what transpired.

In short, the officer said the complainant stayed with Emaculate her aunt after the commission of the offence. One day she returned home late. She was chased from home. She went to live with her mother who was married to the applicant. When she was at her mother's place, she then filed the affidavit claiming that the aunt prevailed upon her to falsely implicate the applicant.

Equipped with such information obviously the applicant would have wanted his case to be heard. He then filed an application to amend the initial application which unfortunately had already been dismissed. This is the

tragedy that befalls unrepresented litigants. Obviously, he needs proper legal advice to place his issues properly before the court. At this point I am constrained to consider the affidavits since when I made my decision, the affidavits were not before me. Had the affidavits been before me by then my decision would have been different. I am now *functus officio* I cannot interfere with my decision. The view I express does not change the decision made. They are comments made in passing.

Otherwise, for the said reasons I had to make the following order:

The application is dismissed.