RICHMORE USAYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16 March 2021

1. **Bail application pending determination of application for condonation of late noting of appeal.**
2. **Application for condonation of late noting appeal.**

Applicant in person
A. Hunzvi, for the respondent

CHITAPI J: When the applicant files what he or she terms "application for condonation of late noting of appeal" that description of the application suggests that the applicant has noted an appeal late and applies that the late filing should be condoned. The position is that no valid appeal can be noted with such late noting being condoned by application made after the late noting of the appeal. In practice, this description of applications by applicants who are time barred from noting an appeal has somehow come to be accepted as the correct description of such applications. In my view an application which is described in an enactment should be so described in order that there is no confusion on its nature and purport. There is need to refresh on procedural dictates of such applications.

Where a convict who was convicted and sentenced by the magistrates court wishes to appeal against the conviction and/or sentence or both, the procedures for doing so are set out in the Supreme Court (Magistrates Court) (Criminal appeals) Rules, 1979 published as Statutory Instrument 504 of 1979. In circumstances where the convict is time barred to note an appeal, the convict's right of appeal lapses. The convict can however apply to appeal out of time. Part X1 of the appeal rules S.I 504/1979 is the part of those regulations which deals with the lapsing of the right of appeal and how such right can be revived. Since my intention is to refresh and correct mistakes made in the styling, description and handling of the application, it is convenient to quote Part X1 of those rules. They provides as follows:-

"PART XI
LAPSING OF RIGHT OFAPPEAL AND APPLICATION TO APPEAL OUT OF TIME
47. Lapsing of right of appeal
If a convicted person fails to note an appeal in terms of these rules within the time-limits prescribed thereby, his right to appeal against conviction and sentence shall lapse.
48. Application to appeal out of time
(1) Where the right of a convicted person to appeal against conviction and sentence has lapsed in terms of rule 47, he may apply to a judge of the Supreme Court for leave to note an appeal out of time by lodging an application, together with the documents referred to in subrule (2), with the Registrar, and giving for the purpose of service the address of the applicant or his legal representative.
(2) An application in terms subrule (1) shall be accompanied by—
(*a*) a draft notice of appeal complying with the appropriate provisions of these rules; and
(*b*) an adequate statement explaining why the appeal was not noted within the time prescribed by these rules.
(3) The Registrar shall give notice of an application in terms of subrule (1) to the Attorney-General, who shall, within four days of receiving such notice, inform the Registrar whether or not he wishes to oppose the application.
(4) Where the Attorney-General wishes to oppose an application in terms of subrule (1), he shall, within five days of receiving notice in terms of subrule (3), lodge with the Registrar and serve on the applicant at the address supplied in terms of subrule (1) his written arguments in opposition, and may, at the same time, submit a request that the matter be set down for oral argument.
[Subrule amended by s.i 12 of 1992]
(5) The applicant may, within five days of receipt of written argument served on him in terms of subrule (4), lodge with the Registrar and serve on the Attorney-General written arguments in reply, and may, at the same time, submit a request that the matter be set down for oral argument.
[Subrule amended by s.i 12 of 1992]
(6) The Registrar shall, as soon as possible, lay all the papers relating to the application in terms of subrule (1) before a judge of the Supreme Court, who may grant or refuse the application or order that the matter be set down for oral argument.
(7) If the judge orders in terms of subrule (6) that the application in terms of subrule (1) be set down for oral argument, the Registrar shall notify the applicant and the Attorney-General of the date of the hearing, and, after hearing the Attorney-General and the applicant, if he appears, or if he does not appear, on consideration of any written argument from the applicant, the judge may grant or refuse the application.
(8) If an application in terms of subrule (2) is granted, the judge of the Supreme Court who grants the application shall give such directions as he may think fit with regard to the future conduct of the appeal."
(Please note that the words supreme Court are to be construed as High Court.)

From the quoted provisions, it is to be noted that the application made in terms thereof where the right of appeal has lapsed is ("**an application for leave to note an appeal out of time**"). It must follow that where the application is granted, the appropriate order should read that the applicant is granted leave to appeal out of time. In terms of sub rule (8) of rule 48 as quoted, having granted leave to appeal out of time, the judge must then give further directions ancillary to the granting of leave to appeal out of time, on how the intended appeal shall be handled, notably in terms of giving the extended time for noting the appeal and such directions as the judge may consider necessary to make in the interests of justice. I am sceptical about the correctness of an order which reads that "**condonation of late noting of appeal is granted**" because one condones something that has happened. I will therefore

advisedly treat the application made by the applicant in relation to his wish to appeal consequent on the time bar operating against him as an application for leave to note appeal out of time.

I now address the substance of the matters I must determine. The applicant applies in case no. CON 354/20 for leave to note appeal out of time and in case no. B1856/20 for bail pending the determination of application CON 354/20. The applicant was on 11 December 2015 arraigned for trial before the Regional Magistrate at Harare on two counts of the offence of rape as defined in s 65 (1) of the Criminal Law (Codification & Reform) Act: [*Chapter 9:23*]. He pleaded not guilty. After a full trial however, he was convicted as charged and sentenced to 15 years imprisonment on each count marking a total of 30 years imprisonment. 5 years of the sentence in count 2 was made to run concurrently with the sentence in count 1. This left a sentence of 25 years of imprisonment from which a further 5 years was suspended for 5 years on condition of good behaviour. Leaving a sentence of 20 years imprisonment. I am not clear as to the reasoning and justification for ordering part of the sentenced in count 2 to run concurrently with the sentence in count 1. I do not develop this observation further because my determination does not fall to be decided on this point.

The details of the two charges were that during the period extending from June 2013 to December, 2013 the specific dates being unknown, the applicant twice raped the complainants, a 4 year old female juvenile at a house in Mount Pleasant, Harare. The complainant and the applicant's daughter of similar age were friends. The complainant was a daughter to a co-domestic worker of the applicant at the same house where they worked and stayed. It was alleged that the applicant called the complainant into his bedroom when the applicant's wife was away. He made the complainant to lie on the bed facing upwards. The applicant allegedly removed the complainant's pant, pushed her leg apart and inserted his erect manhood into the complainant private parts. The applicant then made "coital movements" whilst on top of the complainant and ejaculated sperm on the complainant. He wiped off his sperms from the complainant's private parts and ordered the complainant to go back into the kitchen. The complainant did not report the rape to anyone.

In relation to the second count, it was alleged in the State outline that –

"06. Accused number one (the applicant herein) called the complainant again into his bedroom on another date and made her lie in his bed and raped her again in the same way he did on the first time he raped her. Complainant went into the kitchen but did not tell anyone again."

I have quoted the details of the allegations in the second count deliberately because it is not advisable to simply allege that the second offence was committed in the same way as with the first offence. If the offences are separate, then separate and full allegations of how the second or any subsequent offence was committed should be detailed separately. There is an obvious danger in that at trial, the second offence is then dealt with as part of the first offence yet it will be a distinct offence. Also, one must appreciate that an adverse finding on for example how the offence was committed in count one will have a bearing on count 2 if the allegation is that the offence was committed in the same manner in both counts. The charging of more than one count of the commission of an offence in one indictment is for convenience but does not remove the duty of the prosecutor to treat each count as a distinct offence for purposes of leading evidence to prove each count. It will be apparent later in this judgment that the prosecutor and the magistrate were not on guard on the need to separately deal with the alleged two counts of rape for purposes of ensuring that each count was independently proved beyond a reasonable doubt to have been committed by the applicant.

Lastly in regard to the factual allegations, it was alleged that it was only in January, 2014 that the complainant became sick and her health deteriorated. She was medically attended to on 15 September, 2015 and the sexual abuse was discovered. The complainant on being tested for HIV retained a positive result. As opposed to the applicant who tested negative. The applicant submitted that his HIV negative test proves that he did have sexual intercourse with complainant.

It is convenient to dispose of the bail application first because it is an invalid application. There is no provision in law which permits a convict who has been convicted and sentenced by a magistrate Court and who is time barred to appeal and has applied for leave to appeal out of time, to apply for bail pending the determination of the application for leave to appeal out of time. S 123 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] provides that in the case of a convicted and sentenced person by the magistrates court, bail may only be applied for-;

(a) pending the determination of an appeal noted against conviction or sentence or both ; or

(b) pending the determination of an application for leave to appeal or extension of time within which to apply for such leave

(c) pending the determination by the High Court of a review of those proceedings to be placed before a judge of the High Court in terms of either s 57 or 58 of the Magistrates Court Act, [*Chapter 7:10*]

There being no provision for a convict who is time barred to note appeal to apply for bail pending the determination of an application for leave to appeal out of time, such application has to seek leave to appeal out of time first before the applicant can then apply for bail pending appeal after obtaining the leave and noting the appeal. Such application should and will be struck off the roll. The applicant has to seek leave to appeal out of time first before the applicant can then apply for bail pending appeal after obtaining the leave and noting the appeal.

In regard to the merits of the application for leave to appeal out of time, it must be accepted that this application is being made about five (5) years post-conviction and sentence. The period of delay is too long and requires cogent and reasonable explanation to justify and have it condoned.

The applicant averred that he could not afford legal representation for purposes of prosecuting his proposed appeal. He also averred that he experienced challenges in obtaining the record of proceedings. Even then he stated that he did not have resources to pay for the record. He stated further that he had resigned himself to his fate until High Court judges visited Chikurubi Prison on a routine visit and addressed the inmates. The judges encouraged those inmates intending to appeal to follow their rights. He also gathered from the address by the judges that the availability of a transcribed record was not a pre-requisite to filing an application for leave to appeal out of time since it would be up to the judge to make an order that the record be availed if considered necessary. Indeed rule 48 of the Supreme Court (Magistrates Court) Appeals, Rules S. I. 504 as quoted does not provide that the application shall be accompanied by a record of proceedings. The applicant also complained that after identifying a relative who was willing to pay for the record, the record could not be located at the Magistrate Court. In this regard, I directed the Registrar to follow up on the report that the record could not be located. The Registrar separately addressed a letter to the Clerk of Court

to forward copies of the record for purposes of determination of this application. The Chief Magistrate forwarded the original and a transcribed copy of the record as directed.

The determination of the reasonableness of the explanation for delay to note the appeal is determined upon a consideration of the circumstances of each case. The delay in this matter is appreciably a long one. The applicant averred he could not afford legal representation in order to be assisted to note appeal. The question which comes to mind, is, "Did the applicant need such representation before noting the appeal? The constitution provides in s 50 (1) (b) (ii) that upon arrest, the accused person must be permitted to engage legal representation at own expense. Upon appearing in court consequent on the arrest, the constitution in s 70 (1) (d) and (e) provides that the accused should be accorded the right and opportunity to choose a legal practitioner of the accused's choice at the accused's expense or to be represented by a legal practitioner assigned by the State if in a particular case, the absence of legal representation would likely result in a substantial injustice resulting. Section 191 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] provides for the right to legal representation on trial of the accused for any offence. Section 163A of the same enactment makes it mandatory for the trial magistrate upon commencement of a criminal trial in the magistrates court to advise the accused of his right to legal representation as provided for in s 191. In all criminal trials in the High Court, *pro-deo* counsel is appointed whom the accused may dispense with if the accused engages private representation. Under s 70 (5) of the Constitution, the convicted person has a right subject to reasonable restrictions which may be imposed by law to have the case reviewed by a higher court and to appeal to the higher court against conviction and sentence. The constitution is silent on any rights to legal representation post-conviction and sentence. There is of course the Legal Aid Act, [*Chapter 7:16*] in terms of which any person can apply for legal aid in connection with any criminal, civil or "other related matter." The court may recommend legal assistance in relation to a case before it.

The absence of explicit legislation to cater for convicts who require legal assistance for purposes of appeal is a *lacuna* that I respectfully commend to the executive in its wisdom to consider interrogating. Appeals are more technical to deal with on the part of the convict than trials which largely involve the leading of evidence and the court determining that evidence. An appeal is not a process where the appeal judges hear fresh evidence but it is

process in which the convict must demonstrate that his or her conviction, sentence or both are wrong. It would be in my suggestion, a plausible development were convicts to be provided for both access to legal representation at the stage of the convict having to make a decision on whether or not to appeal to a higher court. I do not consider the excuse that the applicant could not timeously note appeal because he lacked legal advice and representation as flimsy or unreasonable. The applicant however took too long a period wishing for legal representation. He did not explain the effects he made to seek legal representation. I have however also considered that the applicant faced a challenge of obtaining a copy of the record of proceedings. Indeed it took the intervention of the judge to have the record of proceedings provided through the further intervention of the Chief Magistrates Office. The applicant as a self-actor had a handicap of lack of legal representation, the record of proceedings and general lack of procedural and substantive laws on the noting of appeals. I would not have condoned the delay in failure to note appeal timeously on account of the lengthy period between the operation of the time bar and the making of this application. Cases which have been completed should be closed and it should not always be the norm that the court will countenance lengthy delays. Where there is a length delay, its condonation will be granted as an exception only in cases where the circumstances warrant the indulgence. In *casu,* the applicant's challenges appear to me to be genuine. There is nothing stated by the respondent to indicate that convicts are given assistance to note their appeal whenever they intend to.

If it is considered that the reasons for the delay were not very satisfactory, I was persuaded that the prospects of success of the appeal were high. This consideration would mean that the high prospects of success would persuade the court to act in the interests of justice and grant condonation. In this regard it was stated by BEADLE CJ in the case *Kuzsaba – Dabrowski et Luxer* v *Steel N.O* 1966 RLR 60 (A) at 64 as follows –

> "The more unsatisfactory the explanation for the delay, so much greater must be the prospects of success of the appeal be before the delay will be condoned and the converse must of course be equally true, the more satisfactory are the explanation for the delay, the more easily will the court be inclined to condone the delay provided it thinks there is prospects of the appeal succeeding."

See *Ngirazi* v *Saurosi & Anor* HB 84/16, *Maheya* v *Independent African Church* 2007 (2) ZLR 319 (8).

It is fortunate for the applicant that I am persuaded upon perusal of the record of proceedings and the inelegantly drawn grounds of appeal by the applicant that there are high prospects of success on appeal if the applicant pursues the appeal. The the grounds of appeal proposed by the applicant read as follows-

"**GROUNDS OF APPEAL**

1. The erred court was not considering that it was protracted (pro) trial because the applicant did not commit the crime since the complainant was HIV positive and the applicant HIV negative. The applicant refers you to the medical report.
2. The one count of rape where just informed and the applicant pleaded not guilty.
3. The count never assisted the applicant to have a meaningful cross-examination."

It is evident that the applicant from his poor command of the English language and atrocious grammar would need assistance to properly draw up the notice and grounds of appeal in addition to further representation at the hearing. I have taken a holistic view of the application in terms of which I have considered the whole record of proceedings together with the applicant's protestations on the correctness of the conviction and the applicant's lack of knowledge of the appeal procedures. Using this approach, it is clear that the applicant considers that he was convicted without sufficient evidence. He protests that the court *a quo* should have determined that the fact that the complainant tested HIV positive and him negative was indicative of the fact that no sexual intercourse took place between them otherwise he would also have tested positive.

The magistrate in dealing with the issue of the HIV status of the complainant and the applicant reasoned that the test results did not assist the applicant because it may well have been another person, Zanaka accused also of raping the complainant who was HIV positive and could have infected the complainant. The problem with such reasoning is that it opened the door to an influence that the complainant may have been raped by Zanaka and not by the applicant. This observation must be read against the background that the alleged rape was said to have been committed in 2013 but only reported in 2015 upon the complainant being observed by her mother to be unwell. The connection between the applicant and the medical report as evidence of rape was arguably not proven.

The applicant also averred that he was convicted on an unfounded allegation of rape. In regard to sufficiency of proof of commission of the offences, there was a contradiction

which was not resolved. The State allegations were that the two counts of rape were committed on different dates. However, the complainant's evidence was that the applicant "did it twice to me." There was no attempt at separating the two counts and leading evidence on one count even where the evidence on the first count dovetailed with the evidence on the other count. The prosecution of more than one charge under a single indictment is for convenience. Each count is a trial on its own so to speak from the view point of leading evidence. There was a conflation of evidence which makes it impossible to appreciate what evidence there was to convict the applicant on the second count. There is in my view very good prospects of success that the appeal court will find the second count not proved. If this be so, the sentence imposed on the second count would be set aside.

Under the circumstances, the interests of justice will be served by allowing the applicant to appeal to a higher court. However, from the ineloquent manner in which his proposed grounds of appeal are drafted, it is obvious that the task of prosecuting the appeal starting with the drafting of the grounds of appeal is beyond his capabilities. I am however not empowered at this stage to recommend legal assistance in terms of the Legal Aid Act because the applicant until he has a pending appeal, which can only happen if he has filed the notice and grounds of appeal, does not have a pending case whose nature may persuade the court to recommend legal aid. The applicant is therefore strongly advised to arrange for legal representation to assist him in noting and prosecuting the appeal. That is as far as I can go.

That said, the following order is made:

a) The applicant's bail application filed under case No B 1856/20 is a nullity as it is not provided for under the law.
b) The bail application No B 1856/20 is struck off the roll.
c) In case No. CON 354/20, the applicant is granted leave to note an appeal out of time in regard to his conviction and sentence under case No R 845/15.
d) The applicant shall note his appeal within 10 days from the date that the Registrar shall effect personal service of this order upon the applicant.
e) Additionally, the applicant is granted a certificate to prosecute his appeal in person.

National Prosecuting Authority, respondent's legal practitioners