PRINCE SHIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 13 February 2019 & 20 February 2019

Chamber application for condonation and extension of time within which to appeal, and for leave to prosecute appeal in person

Applicant in person
W Baladane, for the respondent

CHIKOWERO J: Applicant appeared before the regional magistrate sitting at Chitungwiza, on 6 April 2018, facing one count of aggravated indecent assault as defined in s 66 (1) (a) (i) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

The precise allegations were that on 21 February 2018 and at 10257 Unit H Seke, Chitungwiza, the applicant, a male person, unlawfully and with an indecent intent inserted his finger into Shalom Sharon Tanyaradzwa Zibako, a female person's vagina knowing that she had not consented to it or realising that there was a real risk or possibility that she might not have consented to it.

Pursuant to applicant tendering a plea of not guilty, the matter proceeded into trial.

The result was applicant's conviction on the charge preferred against him.

He was sentenced to 12 years imprisonment of which three years were suspended for five years on condition applicant does not within that period commit an offence involving assault of a sexual nature upon another and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

On 25 January 2019 the applicant filed the three-in-one application which is the subject of this judgment.

He wants to appeal the conviction and sentence. It was on 6 April 2018 that applicant was convicted and sentenced.

The test in applications of this nature is well settled. I refer to only one decision of this court. In *Albert Costa Charira* v *The State* HB 88/09 that barometer was put across in these words:

> "The factors to be considered in an application for extension of time within which to note an appeal are aptly captured in *Criminal Procedure in Zimbabwe* by J.R Rowland. At 27-19 the author stated:
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> > "The first is the length of the delay. The second is the reason advanced for the delay. The third is the chance of the appeal succeeding. The greater the length of delay and the less satisfactory the reason for the delay, the greater must be the chance of success. Where the delay is short and the reason for it is convincing and satisfactory, the chance of success need not be so great; it may be enough to have an arguable case."

I turn to examine the application in light of this legal position.

THE LENGTH OF THE DELAY

Clearly the delay was inordinate.

Applicant was convicted and sentenced on 6 April 2018.

The present application was filed on 25 January 2019.

That is slightly more than nine months after conviction and passing of sentence.

For me to grant the application, therefore, the reason for delay must be satisfactory and the prospect of the appeal succeeding great.

THE REASON FOR THE DELAY

Applicant states that he had no knowledge of his rights of appeal, neither did he appreciate the procedures to be followed as well as the time limits involved, among other requirements.

It was only when he was advised by those in the know that the ignorance ended.

Further, applicant states that the delay was due to lack of resources.

I have a number of difficulties with this explanation.

Firstly, applicant filed his application from Chikurubi Maximum Security Prison

I take judicial notice of the fact that several of these applications are filed by self-actors, from within the confines of the prison walls.

The application itself is so well presented that it cannot be ruled out that applicant received advice from persons in prison custody not only about the procedures and time frames relating to

noting appeals but also in crafting this application. This leads me to my second difficulty with his explanation.

Since the passing of sentence applicant has always been in prison. He has not disclosed the date when he was apprised of his right to appeal to enable me to decide whether he could have noted the appeal timeously but brought the present application earlier than he did.

The glaring shortcoming pervading this application is that it does not disclose any dates. I have already referred to the undisclosed date when applicant became aware of his right to appeal and the procedures necessary to realise that right.

It is unexplained how the lack of resources co-exists with applicant's ignorance of his legal rights.

In any event, the preparation and filing of the application by applicant himself is evidence that he did not need resources to hire a lawyer in order to protect his right to appeal. KUDYA J in *Clemence Nyoni* v *The State* HH 142/11 referred to an applicant, self-acting, filing a "bush appeal."

Because applicant deprived me of vital information, I am not satisfied that the lengthy delay between the passing of sentence and the filing of the application has been satisfactorily explained.

In other words, I am not satisfied that applicant did not deliberately refrain from timeous noting of appeal. I am also not convinced that this application could not have been filed much earlier, before the delay became inordinate.

THE PROSPECT OF SUCCESS OF THE APPEAL

In so far as the proposed appeal against conviction is concerned, applicant seeks to impugn the findings of fact and credibility made by the court *a quo*.

In *Pharoah B Muskwe* v *Douglas Nyajina, Munhuwei G.T and Minister of Local Government, National Housing and Urban Development* N.O SC 59/14 GARWE JA set out the approach of an appellate Court in such cases as this. This is what His Lordship said at pages 13 to 14 of the cyclostyled judgment:

> "Finally, it must be mentioned that what the appellant sought to impugn are the findings of fact and credibility made by the court *a quo*. The approach of the Court in matters such as these is now well settled. I cite two cases in this respect. The first is *Susan Rich* v *Jack Rich* SC 16/01 in which EBRAHIM JA cited with approval the remarks in Hoffman and Zeffert: *The South African Law of Evidence*, 4 ed at p 489, that:

> "There are no rules of law which define circumstances in which a finding of fact may be reversed, but as a matter of common sense the appellate Court must recognize that the trial court was in some respects better situated to make such findings. In particular, the trial Court was able to observe the demeanor of the witnesses, and courts of appeal are therefore very reluctant to disturb findings which depend upon credibility. The appeal Court has rather more latitude in criticizing the reasons which the Court a quo has given for its decision. The reasons given for accepting certain evidence may be unsatisfactory, e g they may involve a clear non sequitur. Alternatively, it may be plain from the record that the reasons are based upon a false premise, e.g. a mistake of fact, or that the trial judge has ignored some fact which is clearly relevant. Errors of this kind are generally referred to as misdirections of fact. Where there has been no misdirection of fact by the trial court, the appeal court will only reverse it when it is convinced that it is wrong."

I have read through the entire record of proceedings. I examined the proposed grounds of appeal in light of the judgment *a quo* and the evidence.

My conclusion is that there are completely no prospects of success *vis-à-vis* an appeal against conviction.

Complainant's evidence was not dented under cross-examination. Although she could have tailored her testimony to fit the crime of rape, had she wanted to, she was content to say all that she was positive of was that applicant inserted his fingers into her vagina. Beyond that, she only felt that he also inserted about 3 – 4 cms of a thing which appeared to have a skin into her vagina, and then she felt wet.

I have no difficulty with the magistrate's acceptance, as true, the evidence of all the State witnesses.

There was no fabrication to talk about. The witnesses did not have an opportunity to concort a false allegation against the applicant.

Their evidence is confirmed by the contents of the Medical Report, produced by consent.

That exhibit reflects that there was definite evidence of penetration. The Doctor's comment was that penetration was effected.

Further, complainant's evidence that the applicant forcibly kissed her and injured her in the process is also borne out by the Medical Report. Her upper lip was swollen.

The defence witness was not always in the same room with the applicant. Applicant took advantage of the former's absence to commit the offence. The complainant was alone and vulnerable during the night of the commission of the offence.

The applicant gave evidence in support of his defence outline. He suggested, among other things, that complainant wanted to have sexual intercourse with him.

This was so, he contended, because she entered into his room with pieces of paper one after the other, written:

"You miss being fucked again bitch"

"I love you Michael" "dick" and in shona "mboro" meaning "penis".

He also stated that complainant said she wanted to be kissed, latched onto him, kissed him, wrapped her legs around his waist, forcefully tried to hold his penis whereupon he pushed complainant off him and pushed her to the door. Complainant then left the room. The applicant remained in his room.

This version of events was, in my view, what is commonly referred to as tit for tat.

I am not surprised that the court below rejected it as false. It does not explain the injuries noted in the Medical Report.

The applicant's suggestion that the family members injured her so as to bring false allegations against him was, in my mind, correctly rejected as flimsy and far-fetched. I do not perceive an appeal court disagreeing with the court *a quo* in this regard.

To crown it all, the applicant attempted to commit suicide that night when the police came to arrest him.

The non-production of complainant's pant as an exhibit did not, in the circumstances, detract from the cogency and sufficiency of the evidence on which the applicant was convicted.

I consider that the applicant was fortunate that he was not charged, and therefore not convicted, of the offence of rape. He cannot push his luck too far.

On sentence, I fail to see anything resembling a misdirection on the part of the court *a quo*. The sentence is within the range provided for by the Legislature.

The complainant was an 11 year old girl. He was in a position of trust. He was more than twice her age. His own age and status as first offender, among other factors of mitigation were properly considered in passing sentence.

The discretion on sentence lies with the magistrate, not with an appeal court: *Joseph Mudziwapasi* v *The State* HH 218/14. I remain unconvinced that there is any prospect of an appeal court interfering with the exercise of that judicial discretion if regard is had to the circumstances wherein such discretion can be interfered with.

In this regard GARWE JA continued in *Pharaoh B Muskwe* v *Douglas Nyajina and Others* (*supra*) at p14 by saying:

> "The second is *Charuma Blasting and Earth Moving Services (Private) Limited* v *(1) Isaac Njainjai* (2) *Timothy John Walter Pres* (*3) The Registrar of Deeds 2000*(2) ZLR 85. At p 91 D-F SANDURA JA stated as follows;
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> > 'The circumstances in which this court can interfere with the exercise of a judicial discretion were clearly set out by Gubbay CJ in *Barros and Anor* v C*himphonda* 1999 (1) ZLR 58 (S).
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> At p 62 F-63A, the learned Chief Justice said:
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> > 'The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first-one which clearly involved the exercise of a judicial discretion, see *Farmers' Cooperative Society (Reg)* v *Berry* 1912 AD 343 at 350-may only be interfered with on limited grounds. These grounds are firmly entrenched.
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> > It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the material for so doing.'

The application cannot succeed. The delay was inordinate. The explanation for delay is not satisfactory. The prospect of the appeal succeeding is non-existent.

In the circumstances, I order that

1. The application for condonation for late filing of the Notice of appeal against conviction and sentence in CRB CHT R28/18 and for extension of time within which to appeal be and is dismissed.
2. The application for leave to prosecute the appeal in person be and is dismissed.

National Prosecuting Authority, respondent's legal practitioners