

AUXILLIA MUNGWAIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16 February 2023

Application for Condonation of the late noting of application of and explanation for leave to appeal

Applicant in person
R Chikosha, for respondent

CHITAPI J: The applicant applies for condonation of late noting of an application for leave to appeal to the Supreme Court and for leave to appeal under the following background. The applicant together with the co-accused at trial was convicted by the senior magistrate, at Harare on 26 March 2012 upon a charge of bribery as defined by s 170(1)(a) of the (Criminal Law Codification and Reform) Act [*Chapter 9:23*]. The details of the charge in brief were on 24 January, 2012 the applicant with her accomplice or either of them, being prosecutors in the employ of the Attorney General Office obtained, as agents of their employees, an amount of US\$1000-00 from another person as a gift or consideration to facilitate the release of an accused person contrary to their duties. In the alternative the applicant and her accomplice were charged with the offence of Criminal Abuse of office as defined in s 174(1)(a) of the same Act. They were acquitted on the alternative charge. The applicant and her accomplice were upon conviction sentenced to 24 months imprisonment with 12 months suspended on condition of restitution.

To put matter into the context, facts of the case as alleged by the state were that the applicant and her co-accused were employed and working for the Attorney General's Office as public prosecutors stationed at Harare Magistrates court and were friends. An accused one Shinewell Mutendereki was in custody and appearing in court 3 on a charge of theft of Trust

Property. The applicant was the prosecutor for that court. The applicant's co-accused was the prosecutor for court 13. The applicant was alleged to have demanded or agreed to accept US\$1000-00 from the accused's sister so that she facilitates the release of the accused person who was in custody.

The accused's sister had approached the applicant to enquire whether or not the accused could be released if the complainant in the theft case was to be reimbursed the amount involved. It was alleged that the applicant asked the complainant to raise the sum of US\$1000-00 and pay the applicant for the applicant to assist. The complainant however reported her right to a family friend who advised the complainant to report the matter to the police.

The police arranged for a trap on 24 January, 2012. The complainant as part of the trap proceeded to the applicant's office with the money. The applicant then directed her to proceed to the accomplice's office and hand it over to the accomplice. The accomplice received the money and placed it in her drawer. The money was recovered from the accomplice's table drawer consequent on the trap.

The applicant and her accomplice were, after conviction each sentenced to imprisonment of 24 months of which 12 months imprisonment was suspended on conditions of future good behavior. The two appealed against both conviction and sentence to the High Court. On 30 June, 2021 and by judgment No HH 329/21, the appeal by the applicant was dismissed whilst that of the accomplice was upheld. The applicant was not satisfied with the judgment on appeal. She seeks leave to appeal to the Supreme Court against the High Court appeal judgment aforesaid in whole. The applicant seeks to appeal upon proposed grounds of appeal set out in the draft grounds of appeal. The grounds of appeal read as;

“Grounds of Appeal
AD CONVICTION

1. The court *a quo* grossly erred and misdirected itself in confirming the conviction of the appellant by the magistrates court when the co-accused was given a benefit of doubt and acquitted in circumstances that warranted equal treatment, more particularly so in that:
 - a) The court accepted that there was no direct evidence pointing to then second appellant's knowledge of the true nature of the money the witness had told her she had been instructed to leave with her for, thereby absencing evidence of the nature of the money left which was subject matter of the charge.

- b) The court accepted that the then second appellant had met the threshold of a reasonably possibly true defence case warranting an acquittal and yet failed to objectively consider that the appellant had also met the threshold as no reasons were proffered, put differently, the court disregarded the appellant's reasonably possibly true defence case and in so doing by implication sought to reverse the onus in criminal proceedings.
2. The court *a quo* grossly erred and misdirected itself in confirming the conviction of the appellant when the state had not proved its case beyond reasonable doubt, more particularly so in that:
 - a) The court *a quo* accepted the reliance on circumstantial evidence by the magistrate court that the complainant came in, when reliance on that circumstantial evidence was a basis for believing that the two were acting in concert, however the court subsequently misdirected itself in disregarding that analogy for the then second appellant and confirms the circumstantial evidence against the appellant, which goes to the root of the acceptance of the said evidence in the absence of a conviction for the then second appellant.
 - b) The court accepted that the appellant was arrested pursuant to a police trap which was irregular, which would render the complainant's evidence inadmissible, however in its misdirection the court proceeded to confirm the conviction based on inadmissible evidence.

AD SENTENCE

1. The court *a quo* grossly erred and misdirected itself in confirming the Magistrate court's sentence of the appellant of 24 months imprisonment when alternative sentences were not objectively assessed , more particularly so in that for a sentence of 24 months, the court was not supposed to impose a direct sentence of imprisonment before objectively assessing other alternative sentences."

Under case No 197/21 the applicant applied for condonation and under Case No 1898/21 for leave to appeal. From a procedural point of view Case No CON 198/21 ought not to have been filed before the condonation Case No CON 197/21 was determined. It was however resolved that the application be rolled into one with Case No CON 198/21 being determined only if condonation was granted in Case No CON 197/21. The respondent opposed the application in part. Counsel for the respondent consented to the applicant prayer for condonation of late filing of the application for leave to appeal. The applicant explained that during the period that the judgment was handed down and the subsequent period up to 27th July, 2021 she was indisposed with Covid 19 like symptoms. The Covid 19 period was undoubtedly a very difficult period for every living human being where it was best to play it safe. The courts have generally and rightfully been sympathetic with litigants who did not follow their rights and were out of time and failed to act and follow their rights for fear of Covid 19 pandemic. The concession by the respondent's counsel that the late making of this application be condoned was therefore understandable and fairly made. Counsel however submitted that notwithstanding the satisfactory explanation for the condonation delay be dismissed for want of prospects of success.

It must follow that the decision which I will come to on the prospects of success in relation to whether or not condonation is granted answers that same issue in the application for leave to appeal. Counsel for the applicant relied on the grounds as repeated in the grounds of appeal in Case No CON 198/21 to argue that the proposed appeal enjoyed prospects of success. The thrust of the applicants contentions were that she ought to have been given the benefit of doubt as was done in regard to the accomplice. She further contended that there was in respect of her, no direct evidence to link her to the commission of the offence. She also contended that the circumstantial evidence in as much as it was found not to lead to the inference of guilty as the only reasonable inference on the facts in relation to the accomplice equally applied to her. The applicant's further submission was that the trap evidence ought not to have been used as evidence against her because the trap itself was irregular.

The respondent's counsel contended that the appeal court judgment could not be impugned because the court did not misdirect itself in rejecting the applicant's defence and that the trial court had not placed any *onus* upon the applicant to prove the innocence. Counsel further averred that the trap evidence had not been challenged and that the court was correct to find that the applicant's accomplice was a victim of circumstances created by the applicant.

The law applicable in an application for condonation is well documented in the case of *Bennyview Estates (Pvt) Ltd v Zimbabwe Platinum Mines (Pvt) Ltd and Anor* SC 01/05, MAKARAU JA (as she was then) stated as follows of condonation:

“Condonation is an indulgence granted when the court is satisfied that there is good and sufficient cause for condoning the non-compliance with the Rules. Good and sufficient cause is established by considering cumulatively the extent of the delay, the explanation for that delay and the strength of the applicant's case on appeal or the prospects of its success. This is trite.”

In casu, the delay and explanation for it has been dealt with. In relation to the submission made on behalf of the applicant and of the respondent, I record that I have carefully read the appeal judgment. The learned appeal judge noted that the applicant had made a;

“strong submission against the reliance by the court on an irregular police trap. Even if that trap was irregular *se (sic)* the fact of the matter is that Caroline made a report to the police which led to

the arrest of second appellant immediately after she had accepted money on behalf of the first appellant....”

There is with respect some substance in the appellant’s criticism of how the police trap was irregularly conducted. The trial court and a *fortiori* the appeal court did not make a definitive finding on the legal validity of the impugned police trap and whether the evidence of the police trap had been excluded in drawing the inference of guilt. It was important to make the definitive finding because the court was required to indicate that it had or had not relied on the impugned trap. It was a piece of evidence which required that it be regarded or disregarded. The failure to do so was arguably a misdirection because it is not clear what influence such evidence had on the verdict reached and again a *fortiori* upon the dismissal of the appeal.

Further in relation to the evidence linking the applicant to the offence, the judgment noted that the applicant had denied any link with the money. The court noted that there was evidence led that the applicant had been to the accomplice’s office before the complainant handed money to the accomplice who was acquitted. I did not find anywhere in the judgment wherein the court dealt with why the applicant’s denial should have been dismissed as false let alone beyond a reasonable. It is my view that the effect of such failure may well bring about a different result in the Supreme Court on appeal.

In the case of *Chikukwa v State* SC 75/20, the Supreme Court quoted the judgment of the High Court in the case *State v Ncube* HB 61/03 wherein the following was stated:-

“a courts judgment in a criminal trial should contain a brief summary of the facts found proved and the trial court’s appraisal of the credibility of each witness stating what evidence was accepted or rejected and giving reasons for its decision. What is required is a complete and meaningful judgment touching on all material evidence led at the trial.”

The Supreme Court also quoted the case of *Howard v State* HH 39/05 to the effect that the accused is entitled to know the outcome of his trial and findings of credibility. The accused must be advised on why the defence raised was rejected as well as that the accused is entitles to an analysis of the evidence led against from and that led on his behalf. This process was not apparent in either the trial or appeal court’s judgment.

In the premises I hold that the applicant has made out a case for the grant of condonation to apply for leave to appeal out of time. The applicant concomitantly must be granted leave to appeal against conviction.

In relation to sentence, sentencing is always a difficult area for the court wherein because the process is a discretion of the court, there is scope for a difference of opinions. The justice of the case will not be compromised with the grant of leave against sentence.

The following order is my determination in the application.

IT IS ORDERED THAT:

1. The application case No CON 197/21 for condonation to file an application for leave to appeal out of time is granted.
2. In relation to Case No Con 198/21, the applicant is granted leave to appeal to the Supreme Court against the whole judgment of the High Court judgment dated 21 June, 2021 dismissing her appeal in Case No CA 316/12.
3. The applicant shall file her appeal with 10 days of the date of this order.

Antonio Dzyvetero, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners