

LUCKY MHUNGU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 17 February 2023

Condonation of late noting of appeal

Applicant in person
F Kachidza for the respondent

CHITAPI J: The applicant represented by Messrs Tendai Biti Law, legal practitioners filed on 17 June 2020, an application for condonation of late noting of appeal. The applicant intends to appeal against the judgment of the Regional Magistrate per Kumbawa Esq delivered on February 2010 at Harare. The applicant attached the copy of the judgment aforesaid as an annexure to the application. He also attached a copy of the transcript of the record of proceedings in case No CRB 734-6/09. I must note that it was through my directive given on 24 August 2022 to the Registrar to intervene in having the transcript prepared because there had been an mordinate delay in its preparation since 2020.

The approach of the court in determining whether or not it is in the interest of justice to grant condonation was set out in the case *Terera v Lack* and 3 Ors Sc 93/2021 per CHITAKUNYEA JA (as then he was upon referring to the cases of *Kodzwa v Secretary for Heath* 1999 (1) ZLR 313 and *Bessie Maheya v Independent Africa Church* SC58/07. The learned judge restated the factors which the court considers and/ I summarize them thus;

- (a) The court has a discretion which it excuses judicially which in essence means that the court must consider all pertinent facts and apply established principles
- (b) Length of delay and explanation preferred
- (c) Prospects of success
- (d) Importance of case

The listed factors must be considered cumulatively and are not exhaustive. The discretion should not be exercised upon a closed list of factors as stated, albeit the listed ones ought to be considered as a trite rule

The record of proceedings in R 734-36 shows that the applicant and two accomplices Clarence Mware and Llyd Clorence Venge appeared before the Regional Magistrate Mr Kumbawa Esquire on a charge of robbery as defined in section 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The details of the charge were that on 11th June 2009 at Queendale Spar Harare, the applicant and his accomplices whilst armed with a Naringo type pistol robbed the supermarket of USD \$ 9125.000 which was in the custody of the supermarket employees thereat. The transcribed record contains under the, same CRB R 7334-6/09 a charge sheet that is endorsed with the name of the same Regional Magistrate, Kumbawa Esq.

In the second charge sheet the accused stood charged with the offence of contravening section 4 (1) as read with section 4(2) of the Fire-arm Act [*Chapter 10 .09*] which creates the offence of possession of a fire- arm without a valid fire- arms certificate. The details of the charge were that on 19 October 2019 at house 2342 Kuwadzana 4 Harare the applicant was found in possession of Noringo pistol serial number 701194 without being a holder of a valid fire arms certificate. A reading of the evidence in the robbery charge shows that the fire- arm recovered on 19 October , 2019 was said to be the same fire arm used in the robbery committed at Spar Supermarket on 11 June 2019

The record does not show any recording that the charge of contravening the Fire-Arm Act was put to the applicant. There is no endorsement of the plea which the applicant gave upon the charge being put to him had this happened. However the judgment starts as follows from the perusal of record

“The 3 accused pleaded not guilty to a charge of armed robbery. Accused also pleaded not guilty to another charge of contravening section 4(1) as read with section 4 (2) (b) of the fire-arm Act [*Chapter 10:09*] (unlawful possession of a fire arm without a valid fire arms certificate)....”

The Regional Magistrate in the judgement noted in the defence outline that the applicant had denied being found in possession of the fire-arm and had averred that the pistol was brought by the police who simply fostered it on the applicant. The Regional Magistrate in his judgement found the applicant guilty of possession of a fire – arm without a licence in

addition to finding him guilty together with his two accomplices on the charge of robbery. The applicant addressed the court after the pronouncement of verdict on both charges.

In this application the applicant seeks condonation of late noting of appeal against conviction only in relation to both the robbery and unlawful possession of a fire-arm charges. The applicant's proposed grounds of appeal are listed in the draft notice of appeal. They are as follows:

“Grounds of Appeal

1. The trial court erred in convicting the appellant when there were no facts linking the appellant to the offence.
2. The trial court erred in convicting the appellant solely on the basis that he had been identified in a parade where there was no shred of evidence *aliunde* linking the appellant with the offence or justifying his placement on the identification parade. The appellant and co accused were shown to witnesses before the parade and this was not disputed during trial.
3. The trial court erred in failing to realize that the evidence arising from an identification parade can only be used as confirmation of independent evidence linking a suspect with a crime.
4. The trial court erroneously imposed on the appellant the duty to prove his innocence.
5. All in all the trial court erred in concluding that the State had proved beyond reasonable doubt that the appellant had committed the robbery as alleged.
6. The court *a quo* grossly erred and misdirected itself in convicting the appellant of an offence of possession of a firearm without a valid sentence as the charge was never put to the appellant during trial.
7. The court grossly erred in failing to perform its obligation to,
 - (v) Advising the appellant his constitutional rights in particular his Miranda rights including in particular the right to silence.
 - (vi) There was an obligation on the part of the court to ensure that the applicant was legally represented. Proceeding under the circumstances without legal representation, breached the applicant's right to a fair trial as codified under Section 69 of the Constitution of Zimbabwe.
 - (vii) The applicant should also have been advised of the fact that he had a right to appeal to this honourable court.
 - (viii) Moreover and in any event there was a failure to comply with the requirements of the Criminal Procedure and Evidence Act in particular Section 271 (2) (b) and 29,30,31WHEREFORE, the appellant prays that his conviction be quashed.”

It is not my intention to deal with the prospects of success of each proposed ground of appeal in turn. It is my view that in an application for condonation as *in casu*, whilst the applicant must demonstrate good prospects of success, see *Kombayi v Berkhout* 1988 (1) ZLR 53 (sc) the court in considering proposed grounds of appeal for purposes of an application for condonation of late noting of appeal does not necessarily have to interrogate each and every ground of appeal exhaustively where one or more grounds have high prospects of success. It is I think proper to grant condonation in such circumstances.

Where a few and not all of the grounds interrogated have prospects of success. *In casu* the state conceded that the record did not show that the charge of possession of a fire – arm without a certificate was put to the accused. To the extent that there is no recording of the charge being put to the accused the procedural fairness of the trial becomes arguable and if the applicant succeeds on this ground the conviction would likely have to be set aside on appeal. This ground alone persuades me to grant condonation.

On behalf of the respondent, Ms Kachidza filed a response on 17 January 2023 in which she fairly conceded that the applicant’s explanation for the delay was reasonable because the record of proceedings was missing. As I have already indicated, the court had to intervene to have the record of proceedings prepared. It was not denied that the applicant was being moved from Khami to Chikurubi Prisons and vice versa and could not effectively follow up on the record.

On prospects of success Ms Kachidza submitted that because the applicant’s co-accused in the trial had noted their appeal reference CA 894/10 and been granted bail pending appeal, it followed that the applicant appeal enjoyed prospects of success. It does not however necessarily follow that because a court has found that a co – accused’s application has prospects of success every co – accused similarly enjoys the same prospects. The evidence against each such accused is considered because the accomplice must be shown to have performed an *actus reus* in a manner recognized by the law with the requisite *mens rea*.

In casu however I am further persuaded to grant the indulgence of condonation by another consideration. The Regional Magistrate Judgment does not deal with the credibility of the witnesses or their evidence in any detail. The judgment is at best a summary of the evidence led with little or no analysis. In the case of *Chikukwa v State SC 75/20* which was an appeal against a High court decision in which I presided, the Supreme court quoting various judgments emphasized the need for a trial court to give an appraisal of the credibility of each witness who has given evidence. The High court judgment was set aside for failure by the court to do likewise. The Supreme court referred to the cases *Hwande v State HH154/16*, *Charangwa v State HH 664/15* and *S v Ncube HB 61/03* and *Clever Howard v S HH 39/05*. The cases all emphasize the need to assess witness credibility. The Supreme court in the *Chikukwa* Case then stated as follows on page 7 quoting from the *Clever Howard* case-

“An offender who goes through a trial is entitled to know the outcome of his trial and the court’s findings on his credibility. Each witness evidence is required to be weighed and reasons given why the evidence has been accepted or rejected. Such an offender is also just entitled to the outcome of the trial but to be furnished with reasons why the defences he raised were rejected. A judgment should be well balanced and is required to include reasons showing that both the offender and the complainants versions have been considered. It must be shown that all the facts and issues raised have been considered and weighed
.....Failure to do so renders the judgement passed “bad” so to say as highlighted on the *Charangwa* case(Supra)”.

The judgement in this case does not appear to have dealt with credibility issues and on that score there is a reasonable prospect that if this point is argued, the Supreme court may be persuaded to rule in the applicant’s favour. Therefore the states’ concession that condonation may be granted is well taken. The applicants proposed grounds of appeal 1-5 which can be rolled into one ground basically attacks the sufficiency and reliability of the state evidence hence putting its credibility into question.

The applicant when given the opportunity to address the court submitted that he was in double jeopardy of serving the sentence of possessing a fire arm without a licence twice because although records CRB 734/10 and CRB 744/10 were consolidated for trial two separate but similar sentences were noted on each record, the conviction and sentence was one. The applicant essentially moved for a correction of the court record and prison warrants to be altered to reflect only one sentence and have the duplicated sentence cancelled. CRB 734/10 and 744/10 were consolidated for trial but similar sentences were imposed on each record, yet it was the same offence on both records. Having carefully considered the matter of duplication raised, I have come to the conclusion that the applicant if advised may consider filing an application for correction of the duplication. The issue falls out of the purview of this condonation application.

The following relief is granted by consent the respondent being in agreement.

- (i) The applicant is granted condonation of late noting of appeal in case No CRB R 734-36/09 and the applicant is further granted an extension of time to note appeal.
- (ii) The applicant is granted leave to prosecute appeal in person.

- (iii) The applicant shall file his proposed notice and grounds of appeal within 10 days of the date that this order is served upon the applicant personally by the Registrar.

Tendai Biti Law applicant's legal practitioners
National Authority respondent's legal practitioners