

JOHN MUVIRIMI
versus
THE STATE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 15 March 2022 and 23 February 2023

Application for Condonation of Late Noting of an Appeal

Applicant in person
T Mapfuwa, for the respondent

WAMAMBO J: The applicant sought an order for condonation of late noting of an appeal and leave to appeal in person. I heard the application and dismissed it. Applicant now seeks reasons for the dismissal. The reasons are as follows:

The charge applicant faced before the Regional Magistrate sitting at Karoi is that of contravening of s 65 of the Criminal Law and Codification and Reform Act [*Chapter 9:23*] (Rape).

The applicant is alleged to have raped the complainant on 20 February 2019. The complainant's evidence can be summarized as follows:

She is a sex worker who only came to know the applicant on the date the offence was committed. On the night in question at around 23:00 hours she proceeded to Ring Night Club. She observed applicant and her friend Tariro engaged in a shouting match. Applicant addressed complainant and said she was one of them. She proceeded to a spot where a lorry was parked. The applicant assaulted her and it was only at the intervention of persons in the nearby lorry that he desisted and fled. When the lorry left applicant returned armed himself with various weapons including a stone and a rope intent on assaulting complainant.

The events culminated in applicant producing a knife and dragging complainant to a secluded place. Whilst there he tore her blouse, skin tight and panty and ordered her to bend and proceeded to rape her. She was under fear of injury. In the skirmish she got scratched on her hand. Applicant fled after the rape while she proceeded to her lodgings and made a report to the police the next day as she was not conversant with the location of the police station.

There was an exchange of phone numbers between complainant and the police. This exchange soon produced results for when she saw the applicant, she contacted the police who proceeded to arrest him. Complainant's pant, blouse and "skin tight" were produced as exhibits 2, 3 and 4.

The applicant gave a long defence outline. The long and short of it is that he acknowledged that he met complainant on 15 February 2019 and on the fateful night his version is that complainant insulted him on the first occasion. On the fateful night when he tried to find out why she insulted him earlier she insulted him again retorting that he was used to having free sexual intercourse. He testified that the complainant left and stood near the lorries where he followed her and the occupants of the lorry intervened and assaulted him resulting in him fleeing. He summoned his friends leading to an altercation between on one side his friends and on the other side the occupants of the lorry. When the lorry left complainant slapped him and in response he held her by the sleeve of her blouse. A crowd gathered and an altercation ensued. He testified that he was falsely implicated. Applicant called one Eunah Mangwende as a defence witness. She was not very helpful to applicant's case. The witness, however, divulged that she reprimanded applicant and told him what he was doing was wrong.

In a reasoned judgment spanning a whole eighteen (18) pages the Trial Court summarized and analysed the witness's testimonies.

The trial court made adverse findings about applicant's behaviour on the fateful night. The court found that the applicant was on a violent streak that night. The trial court found that a bulky man saved complainant from applicant's further assault and only left after assuming the situation was calm.

A long analysis was made of the evidence wherein the trial court found as follows:

Complainant was a single State witness. The version by complainant was more believable than that of applicant. The complainant testified about suffering injuries to her hand which injuries are reflected on the medical report. There was no issue of mistaken identity in the totality of the circumstances wherein applicant indeed puts himself at the scene for a considerable amount of time.

The trial court disbelieved applicant's version in the circumstances. The defence witness was also not believed as she had sat in the gallery and was partial to applicant.

In the circumstances as fully encapsulated in the judgment I have no qualms in finding that the Trial Court properly convicted the applicant.

Applicant in his application

In an application such as this one a number of factors are considered namely degree of non-compliance with the Rules, reasonable explanation for the failure to file a notice of appeal in time and prospects of success on appeal.

The record reveals that applicant was sentenced on 22 February 2019 and his application was only filed on 10 September 2021. I note, however, that applicant's founding affidavit was commissioned on 13 August 2021. Applicant gives basically three reasons for the delay. He avers that it took time for his relatives to pay for the recording. The period of delay is in excess of the 24 months as averred by applicant. Why would it take more than 2 years to access a record. I find this explanation unreasonable.

The other explanation proffered is that there was the unavailability of a transcribed record. That is not borne by the record as this implies applicant's delay was partly caused by the unavailability of the transcribed record. The record in the instant case is actually not transcribed. It is a handwritten copy. I find equally that the explanation hereunder is not reasonable.

The period from 22 February 2019 to 10 September 2022 is a period of 31 months, a considerable period indeed. I am satisfied that the degree of delay is too long. For the reasons as given above I also find that the explanation is not reasonable in the circumstances.

The applicant raised a number of issues under the banner "prospects of success". I find none of the issues raised supported by the record. A lot of dust is raised on not getting a fair trial which have no basis nor proof. Suffice it to say the issues raised can be answered as follows:

The defence witness was not believed for the reason that she remained in the gallery in the course of the trial. In any case she never testified to the effect that no rape took place. Some if not most points raised on prospects of success are speculative. Without resort to appropriate and relevant legislation, the applicant attacks the medical report produced in court. I find nothing irregular about the medical report with regard to the qualifications of the author nor the contents. The medical report was compiled pursuant to s 278(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

One needs go no further than refer to s 278(3a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which reads as follows:

“(3a) For the avoidance of doubt and without derogating from subs. (3) it is declared that in any criminal proceedings for the prosecution of a sexual offence, an affidavit relating to the examination or treatment of the alleged victim of the offence made by a suitably qualified nurse who in that affidavit states that he or she is a suitably qualified nurse and in the performance of his or her duties in that capacity ascertained any fact by treating or examining the alleged victim and arrived at any opinion relating to that fact, shall on its mere production in those proceedings by any person but subject to subs(s) (11) and (12) be prima facie proof of the facts and of any opinion as stated.”

In the instant case the medical report was compiled by a registered general nurse and conforms with the provisions as aforementioned. The findings of credibility, the violent path walked by the applicant that fateful night and the medical report were properly canvassed by the trial court. I am in agreement with such findings and find that in the circumstances the prospects of success are dim on conviction.

The applicant was sentenced to 13 years imprisonment of which 2 years were suspended on conditions of good behaviour.

The applicant attacks the sentence as well. He avers that he was a youthful first offender. The charge sheet, indeed, reflects the applicant as being 22 years old. The trial court was mindful that the applicant was youthful and as youths would be, they are sometimes given to thoughtlessness and lack of life experience. The trial court also found that the fact that applicant is a first offender worked in his favour. The applicant avers that he is faced with financial constraints and failed to “hire” a legal practitioner. I am clear that the sentence passed is in line with other similar cases in our jurisdiction. The Criminal Law (Codification and Reform Act) [Chapter 9:23] in s 65(1) provides for a possible “imprisonment for life or any definite period of imprisonment”.

In *George Naphazi v The State* HB 246/21 MAKONESE J at p 4 said:

“The evidence against the applicants was clear and credible. The applicant’s version of events was rejected by the trial magistrate. The court as an appeal court may not re-assess the evidence led in the court *a quo*.”

In *S v Mutasa* 1988(2) ZLR 4(SC) the court held that:

“.....the correct approach to adopt when considering an application for leave to appeal should not be based on whether an appeal is arguable or not but on its prospects of success.”

I have already found that the Magistrate was correct in the assessment of the evidence and that prospects of success on conviction are dim.

With regards to sentence I find in the circumstances that the prospects of success on appeal are also dim as the sentence passed is in line with similar decided case.

For starters I am cognisant that rape is a vile and violent offence that infracts on human dignity and privacy. In this case applicant was a constant aggressor against the complainant who for some reason he had negatively focused on. Whatever the vocation of the complainant she did not deserve to be sexually abused. She is equally protected as a human being under the laws of the land.

Some cases wherein sentences within the vicinity of the sentence meted out on applicant are the following: *Simbarashe Mutsindiri v The State* HH 512/21. *Merryward Marara v The State* HB 96/21.

In the circumstances of the matter, I found the application unmeritorious and ordered as follows:

The application is dismissed.

Applicant in person
National Prosecuting Authority, respondent's legal practitioners