

TIMOTHY NENZOU
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 15 March 2023

Application for condonation of late noting of appeal

In person, for the applicant
W Badalane, for the respondent

FOROMA J: The applicant was charged with 2 counts of rape in contravention of s 65(1) as read with s 64(3) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The record shows that the complainant was a 16 year old mentally incompetent person who according to law was incapable of giving consent to sexual intercourse. Applicant is alleged to have taken advantage of complainant's mental challenge and had sexual intercourse with her twice.

He was duly convicted of both counts by the regional magistrate at Murewa who sentenced him to 16 years imprisonment 2 of which were suspended for 5 years on condition of good behaviour having treated both counts as one for purpose of sentence. Applicant filed an application for condonation for the late noting of appeal against both conviction and sentence. The State opposed the application on the grounds that the proposed appeal against conviction was not reasonably arguable even though the explanation for the delay in noting an appeal was reasonable.

A perusal of the record of trial reveals that applicant's defence was not a denial of sexual intercourse but that sexual intercourse was by consent.

Applicant actually indicated that he had sexual intercourse with complainant 3 times. Bearing in mind the defence of consent to sexual intercourse by the complainant the issue became only one that is whether complainant could legally and competently consent to sexual intercourse in light of her mental incapacity.

The court *a quo* found that the sexual intercourse was not consensual as complainant was not only mentally challenged but that she did not disclose the abuse because applicant threatened to kill her with a knife if she made noise or disclosed the abuse to anyone.

Applicant's attempt to dispute that complainant was mentally incapacitated was properly dismissed by the court. Applicant admitted in cross-examination that he had known complainant from birth but denied that he knew her to be mentally challenged. Considering that complainant was born mentally retarded applicant as complainant's neighbour ought to have known the child's mental incapacity from birth. In the circumstances applicant's claim that he was ignorant of complainant's mental incapacity could not have been sincere and was properly dismissed by the court *a quo*

Overall I did not find any fault with the court *a quo*'s reasoning in convicting applicant of rape being that applicant had taken advantage of complainant's mental challenges.

The applicant's grounds of appeal do not challenge the court's findings that complainant could not consent to sexual intercourse and that he took advantage her.

The age difference of complainant and applicant clearly shows that as his neighbour complainant grew up under his watch and must have known her mental disability. In these circumstances I did not find that the draft grounds of appeal put forward had anything to do with the defence raised neither would they detain any appeal court in dismissing the appeal.

In the draft grounds of appeal against sentence applicant did not raise any valid grounds of appeal against sentence as in fact he did not allege any misdirection, irregularity or that the sentence imposed was so excessive that it induced a sense of shock.

In the circumstances I did not find the grounds of appeal against both conviction and sentence to be arguable. The court *a quo* treated both counts as one for purpose of sentence and the sentence of 16 years imprisonment is not so excessive as to induce a sense of shock. If anything it is on the lenient side considering the need for the courts to protect a mentally disabled girl child.

For these reasons I dismissed the application for condonation of late noting of an appeal.

In person, applicant
National Prosecuting Authority, respondent's legal practitioners