

DOMINIC TICHAONA TICHAWANGANA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 1 JULY 2021

Application for condonation for late noting of an appeal

Applicant in person
B Maphosa, for the state

MAKONESE J: This is an application for the late noting of an appeal. The application is opposed by the state on the grounds that there are no reasonable prospects of success. Further and in any event, there are no recognizable grounds of appeal in the application and no reasonable explanation has been advanced for the failure to note the appeal timeously.

It is a well established principle of our law that in an application for condonation for the late noting of an appeal, the application must show *ex facie*, the grounds of appeal and the explanation for the delay. Condonation is not a formality and the courts will not indulge an applicant who does not make full disclosure of the basis of the application. In recent times, there has been an upsurge in applications of this nature. While every litigant enjoys the right to seek condonation, the courts should not be flooded with countless applications for condonation with no merit. This is an abuse of court process and the court must emphasise that only deserving cases for condonation for non-compliance with the rules of court will be entertained.

FACTUAL BACKGROUND

The applicant appeared before a Regional Magistrate at Tredgold, Bulawayo on 15th November 2017 facing three counts of armed robbery and one count of escaping from lawful custody. Applicant denied the allegations. After a lengthy trial he was convicted on all the charges and sentenced to 22 years imprisonment. 8 years were suspended for 5 years on the

usual conditions of future good conduct. On the first count, the complainant Sylvester Chitandawata testified that on the 29th July 2017 he was lured by three men from Pelandaba Township to the City Centre in Bulawayo. Complainant was employed as a taxi driver at Mini Taxis. Whilst in the taxi applicant sat directly behind the driver's seat. Before arriving at their destination the applicant and his associates stripped complainant of his clothes, strangled him, took cash and a mobile phone from him. Complainant was dumped on the road side. Applicant and his associates drove away in complainant's Toyota Raum motor vehicle. Complainant was left stark naked. The applicant was positively identified by the complainant who knew him as a tenant at a property he was residing at in Makokoba, Bulawayo. The evidence of the complainant was credible and reliable in material respects. He was not mistaken about the applicant's identity and the conviction on this count is unassailable.

In the second count the complainant Ndumiso Ndlovu narrated how he picked three men who hired his white Honda Fit motor vehicle to take them from Cowdray Park to Entumbane. Whilst in Nketa suburb the complainant was man handled. He was robbed of cash, and a mobile phone. He was moved from the driver's seat to the rear seat. A knife was produced by the one sitting in front. Complainant was advised that the assailants had a firearm. Ndumiso was later dumped, tied up using seat belts. He later untied himself and made a report at the Police station. During cross examination Ndumiso was positive that the applicant was involved in the robbery. He had spoken to applicant. The headlights were functioning and the complainant had a good look at the applicant at the time of the robbery. His evidence was not seriously challenged. Once again the conviction on the second count was proper.

On the third count the complainant Robert Chinemurumbi was employed as Manager at Moriah Guest Lodge along George Silundika street in Bulawayo. On 2nd August 2017 around 1900 hours the complainant was at work manning the reception area. The applicant in the company of his co-accused arrived at his workplace. They knocked at the gate. Complainant attended to them briefly and they left. Applicant and his colleagues went to sit at a street corner next to complainant's workplace. They had pretended that they wanted to secure a booking for the night. At around 2200 hours the applicant and his colleagues returned to the lodge. One remained in the motor vehicle. Because of the lighting in the

lodge complainant managed to identify the applicant. Whilst in the lodge applicant's accomplice produced a firearm, silver in colour. Complainant was ordered to lie down. They demanded cash. His mobile phone was taken away. He was locked up in a toilet. The mobile phone was later recovered and led to the arrest of the applicant and his co-accused. Complainant was robbed of US \$50. The trial magistrate was satisfied with the evidence led and there is no reason to interfere with his findings on factual matters.

On the fourth count the applicant and his accomplice Farai Nhiwatiwa had gone for indications in Harare and Marondera. On 28th August 2017 and at Ntabazinduna Plaza tollgate, along the Bulawayo-Harare highway, the applicant and his associates escaped from lawful custody after successfully removing the leg irons and handcuffs. Applicant conceded that he had escaped from lawful custody but indicated that the incident was engineered by the police. Applicant contended that the Police had been given a motor vehicle by Farai to act as an inducement for the Police details to facilitate his escape. There was incontrovertible evidence that applicant had committed the offence of unlawful escape from custody. The essential elements of the offence were met. It is no defence to the charge of unlawful escape from custody to assert that the escape itself was orchestrated by some other third party.

As regards sentence the trial court properly exercised its sentencing discretion. There is no misdirection.

The applicable law

The factors that have to be considered in an application for condonation for the late noting of an appeal were clearly laid down in the case of *Kombayi v Berkhout* 1998 (1) ZLR 53 (S) as the length of the delay, the explanation for the delay and the applicant's prospects of success in the contemplated appeal. This matter was concluded on the 17th of November 2017. The application is dated 13th November 2019. There has been a considerable delay of nearly two years. No reasonable explanation for such delay has been advanced. The convictions on all counts are safe. The evidence placed before the court *a quo* was credible and reliable. The applicant has not met the requirements for the granting of the application.

In the result, I conclude that the application for condonation for the late noting of an appeal is an abuse of court process. The application has no merit.

Accordingly, the application is hereby dismissed.

National Prosecuting Authority, respondent's legal practitioners