

STEWART DONZA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 4 March & 31 March 2022

### **Application for Condonation**

Applicant in person  
*S Mavunganidze*, for the respondent

MUREMBA J:

1. On 4 March 2022 I heard this application for condonation for late noting of appeal and dismissed it despite the fact that the State was consenting to it. I have been asked for the written reasons and these are they.
2. The accused was charged with and convicted of two counts of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged that he raped his biological daughter who was 14 years then. The accused was convicted and sentenced on 7 June 2017. For both counts he was sentenced to 14 years' imprisonment of which 3 years imprisonment was suspended for 5 years on condition of future good behaviour. He was left with an effective 11 years' imprisonment.
3. Having been convicted after a full trial, the accused intended to appeal against conviction. Although the accused delayed in filing his application for condonation I did not take issue with that as he indicated that he faced some financial challenges to enable him to engage a legal practitioner. The relatives also faced some challenges in obtaining the record of proceedings from the clerk of court where the accused was tried.
4. I dismissed the application on the basis that the accused had no prospects of success on appeal. The State's evidence against the accused is over whelming. The accused and his wife were divorced. The complainant and her 3 brothers aged 17, 10 and 7 years old

remained with the accused at their rural home. The complainant explained that on two occasions in the evening when she had retired to bed in the dining room where she was sleeping alone, the accused entered from the bedroom where he was sleeping with the boys. He raped her and threatened to kill her if she reported the matters to anyone.

5. The complainant said that the accused would hold her mouth so that she would not cry or scream. She was able to identify him because the first time he came in when she in her blankets doing her homework and the light was on. The second time he came when she was in her blankets and the candle was on although she had no homework. Her 17 year old brother was not at home on both occasions which happened two days apart. He had gone to Chitungwiza and had not returned. The accused would come to the dining room when her little brothers had fallen asleep.
6. The complainant only reported the rape to her mother's young sister when she got an opportunity to visit her. The complainant's report was voluntary because she disclosed the rape as soon as she arrived and when the aunt had asked her whether they were staying well at home. The aunt said that the complainant broke down and then told her in the presence of her husband and his sister that the accused had raped her twice. The evidence that the complainant and the aunt as the first recipient of the rape report gave in court was consistent in all material respects.
7. There were only two contradictions. The first one which the State conceded to was that whilst the complainant said her brothers slept in the bedroom with the father, the aunt said that the complainant had told her that she was sleeping with her little brothers in the dining room and that when she was raped they had fallen asleep. I found the concession by the state on this issue to be without merit because the contradiction is immaterial. It simply shows that the aunt did not correctly capture what the complainant told her about the sleeping arrangements. It is normal for witness to make contradictions especially in situations like this where the other witness was not an eye witness to what happened. The aunt's evidence was hearsay and she cannot be expected to give an account of what she was told with angelic precision. What is material is that the two witnesses said that the complainant was raped twice by her father at their home at night. The report to the aunt was voluntary and was made at the earliest opportunity upon

arrival at the aunt's place. This was not a made-up story because there is medical confirmation of sexual abuse. The medical report says that penetration was definite and that the hymen has tears. The complainant did not implicate any other person other than her father. There is nothing that showed that the complainant was falsely implicating him. The accused's defence was that the complainant was lying against him because she was not happy that he had then gone to marry another woman in place of her mother, but there was no substance in this averment. The complainant said that she actually liked her step mother.

8. The other contradiction was that the complainant said that when the accused raped her, her eldest brother had gone to Chitungwiza. The aunt said that the complainant had told her that this brother was sleeping in the bedroom where he used to sleep with the accused. The aunt said that the accused had no relatives in Chitungwiza. Nothing much can be read into this contradiction because the complainant was not asked to explain in detail about her brother's visit to Chitungwiza and the identity of the person the brother had visited. So, the contradiction on this issue does not take the accused's case any further.
9. In his notice of appeal the accused said that his right to legal representation was not explained to him. Whilst, this ought to have been explained to the accused I do not see how this would have changed the accused's case. He failed to file a notice of appeal on time because he failed to raise money for legal representation. It took him more than 4 years until he finally filed the present application for condonation on his own. So, even if he had been informed of his right to legal representation at trial stage he would not have afforded one. However, this is not to say the magistrate was right in not explaining the accused's right to legal representation. I read through the whole record of proceedings and was satisfied that the trial was conducted properly. There was no miscarriage of justice in the way the trial was conducted. The conviction of the accused was proper. Even if the proceedings were to be quashed and a trial *de novo* is ordered, the accused will not be able to engage a legal practitioner. It will be a merry-go-round aimed at achieving nothing.

10. The applicant had no issues with the sentence except that it would naturally fall away in the event of the conviction being overturned or quashed.
  
11. The concession by the State that the accused's right to legal representation entitled the accused to be condoned had no merit on the basis of what I have discussed above. It is in view of the foregoing that I dismissed the application.

*National Prosecuting Authority*, respondent's legal representative.