

**RICHARD ELTON NYASHA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 6 JULY 2017

**Application for condonation of late noting of appeal**

*A. S. Madzima* for the applicant  
*T. Muduma* for the respondent

**MAKONESE J:** This is an application for condonation for the late noting of an appeal. The application is opposed by the state on the grounds that the appeal carries no prospects of success.

The applicant appeared before a Provincial Magistrate sitting at Gweru on 22 March 2017 facing one count of unlawful entry, one count of theft, one count of robbery and one count of assaulting or resisting a peace officer. The applicant pleaded not guilty in respect of all counts. After a full trial the applicant was convicted and sentenced to 15 years imprisonment of which 3 years were suspended on condition of future good conduct. It is against that conviction and sentence that applicant wishes to note an appeal if this application for condonation is granted.

In his founding affidavit the applicant avers as follows:

“I was convicted of unlawful entry, theft, robbery and resisting arrest and sentenced to 15 years imprisonment of which 3 years were suspended on condition of good behaviour.

Soon after the sentence I had the feeling that the conviction and sentence were not proper as was also the sentence considering the circumstances of the case, but there was nothing I could have done since I was not legally represented, and above all, I was already in prison.

I only engaged my legal practitioners through my relatives on the 13<sup>th</sup> of March 2017. It was only then that I got legal representation regarding this matter.”

The law regarding an application of this nature is now well settled in our jurisdiction. An applicant seeking condonation must satisfy two distinct requirements, firstly they must show that the appeal sought to be noted carried reasonable prospects of success. Secondly, the applicant must establish that the delay was not willful. The applicant must provide a reasonable and acceptable explanation for the delay. In the instant case, the explanation for the delay is that applicant did not have the benefit of legal representation at the trial, implying that he did not know how to appeal. This application does not show willfulness on the part of the applicant. The applicant’s explanation is reasonable. Having said that, however, a perusal of the record reveals that the applicant was properly convicted. The conviction is therefore unassailable. The evidence against the applicant in the court *a quo* was so overwhelming that it would have been a miscarriage of justice and an affront to the criminal justice system had the applicant been acquitted. The applicant carefully planned to execute and conduct his criminal missions and travelled all the way from Kwekwe to Gweru to commit those offences. After having been tracked down by police details from Gweru to Kwekwe, applicant had the audacity to try and evade arrest. Applicant’s conduct reflects an organised criminal mind. One who plans and executes and then plots how to avoid detection and arrest. All the stolen property was recovered from applicant’s house and the defence of an alibi was clearly an after-thought. He had no defence at all. The matter even gets worse for the applicant. Upon his arrest, applicant had the courage and determination to prevent the arrest by fighting the police officer who intended to effect a lawful arrest. Applicant’s attempt to flee is an indication that applicant at all material times sought to prevent his arrest and eventual prosecution. The moral blameworthiness of the applicant in this matter is extremely high. The sentence imposed is however not suited to the offences, to the applicant and interests justice. There is a real likelihood that the sentence may be interfered with by an appeal court.

In the case of *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (SC), the court held that each case must be decided on its own particular facts, regarding the prospects of success. In *Kombayi v Berkhout* 1988 (1) ZLR 53 (SC), the court emphasised that the broad principles the

court will follow in determining whether to condone the late noting of an appeal are, the extent of the delay, the reasonableness of the explanation of the delay; and the prospects of success. If the tardiness of the applicant is extreme, condonation will be granted only on his showing good grounds for the success of his appeal.

It is my view that the sentence is unduly harsh and excessive and induces a sense of shock. I accordingly make the following order:

1. The application for condonation for the noting of an appeal against sentence only be and is hereby granted.
2. The applicant shall file his notice of appeal within 7 days of upliftment of this order.
3. There shall be no order as to costs.

*Mutatu & Partners*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners