

NOREST CHIKOWORE
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 13 September 2016

Chamber Application: Condonation of Late Noting of Appeal

TSANGA J: The 22 year old accused was convicted in the magistrates' court, of rape of a 15 year old school girl who was his girlfriend. He was sentenced to 14 years imprisonment, of which four years was suspended for five years on the usual conditions. Taking into account all applicable factors, on 24 June 2016, I dismissed the application for condonation of late noting of appeal on the basis of there being no prospects of success of the appeal.

In applications of this nature it is the party seeking condonation who has the onus of satisfying the court that there exists sufficient cause to justify the granting of the application. Condonation is not simply there for the asking. There must, in general, be an acceptable explanation for the delay or non-compliance with the rules. Furthermore, condonation must also be sought without delay since the degree of delay is a factor to be considered. The application for condonation must also demonstrate good prospects of success on merits. See *Kombayi v Berkhout*.¹ If there are no prospects of success, there is not much point granting the condonation. for the factors that are taken into account However, this last factor does not stand alone and is not conclusive as it is the cumulative effect of all factors including the explanation given for non-compliance with the rules is considered.

The facts against which the application was dismissed were these. It was common cause that the accused and the complainant were boyfriend and girlfriend. He was staying in Harare whilst she was residing in Chiweshe where she attended school. On 16 January 2016,

¹ *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) at 57 G-H

he had gone to visit her. His evidence was that when they were alone he had accosted her about her many boyfriends and had slapped her because he was angry. He denied having intercourse with her on that occasion but stated that the two had been intimate sometime in November 2015. Complainant denied this and said that on that occasion he had tried to have intercourse with her but she had struggled with him and he had merely gotten away with her skin tight pants.

Her narrative of this particular day with regard to the rape was that after accompanying a friend to where she was going, she had remained in the accused's company on the way back. This was around 18:00 hours. They had been discussing the picture of a girl which he had on his phone. He had offered her the phone to delete the picture but she had refused. He had then proceeded to remove his belt and had felled her to the ground. He had then forcefully had intercourse with her. She had yelled at a passer-by but the accused had said he would kill them both. She had not actually seen the passer-by as her view was obstructed by trees. She had bitten the accused on his shoulder and had fled the scene but had hit a stone and had fallen. He had caught up with her and assaulted her. She had asked him to accompany her home to explain what he had done to her but she did not see how he had disappeared. Upon arriving home, she had reported the sexual assault to her grandmother who had in turn reported to the police. She said she had reported because she felt he had destroyed her life. They had gone to make a report to the police on the same day but had been advised to return the following day as there were no police officers.

A medical examination had been done two days later. It confirmed that the complainant had been penetrated and that the complainant also had a sexually transmitted disease. On hearing and analysing the evidence, the magistrate had convicted him on 9 February 2016. The accused filed his application for condonation in June 2016.

The four months delay in applying for condonation is not inordinate. The accused's explanation for the delay is that because of the incarceration, he had not been in a position to seek proper legal advice as to where and how to lodge his appeal. He also had financial challenges. The delay and the explanation are not an issue in my view, since the explanation is reasonable and the delay, as I have said, is not inordinate. However, on the prospects of success he relies on the fact that the magistrate did not properly assess the complainant's testimony, in particular, the fact that the relationship had gone sour. He also relies on the fact that it is highly improbable that someone else witnessed the rape and merely walked by. It is

also alleged that the magistrate made his finding without assessing the scene of the rape. It is also said that the magistrate wrongly concluded that the blood on the complainant was from the alleged rape. Whilst acknowledging that the delay was not inordinate, counsel for the State expressed the view in response to the application, that there are little prospects of success on appeal against both conviction and sentence, albeit rightly leaving the final decision in the hands of the court.

Having carefully examined the backdrop evidence against which the application was made, I too came to the conclusion that there were little prospects of success. The judgment shows that the magistrate ably examined and analysed the evidence linking the accused to the commission of the rape. He paid special attention to the medical report and the evidence therein that there were fresh wounds to the vagina confirming that sexual intercourse had indeed taken place. He also analysed the credibility of the complainant's evidence and found that it was convincing especially as regards the fact that no intercourse had taken place prior to that date. He also found her version of what occurred on the day of the rape to be the more credible. He found the grandmother's evidence equally credible.

In dismissing the application on the basis of lack of prospects of success, I also examined the facts against the back drop of what is known about incidences of the reality of rape in a date context. In *Musumhiri v The State*,² the significance of examining such applications from the optics of both the accused and the victim, within a cultural milieu was emphasised. The record reveals that she expressed the view she felt her life had been destroyed. It also reveals that after the sexual assault he had asked her to be his wife. Such utterances appear to fit in with a cultural context where deflowering a girl outside marriage brings with it expectations of marriage. However, making a marriage offer equally has to be understood as a "silencing" act to prevent a woman from reporting particularly here where his own evidence was that the relationship had turned sour.

Indeed another indicator from the record that sexual intercourse took place is to be gleaned from the complainant's own reference to her life having been destroyed. It is not just the risk of pregnancy and all its attendant consequences that may have fuelled this perception but in a society where "lobola" is paid, she may have formed the impression that her marriageability potential had been ruined by no longer being a virgin.

² *Musumhiri v The State* ZLR 2014(2) 223

What is relevant is her lack of consent and the evidence in this case does not point to any. There is no evidence that the magistrate erred. The fact that the alleged passer by failed to intervene is not the complainant's fault. The fact that the rape occurred between a boyfriend and girlfriend does not mean that the magistrate should have treated it with scepticism. Most rapes, in any event, occur between people who know each other. A man's desire for sex should not take precedence over a woman's wishes not to have sex.

It is difficult to see how the appeal holds prospects of success in the face of the evidence upon which accused was convicted. The sentence imposed also shows that the court did take into consideration his age. It suspended a reasonable portion of the sentence on good behaviour. It was therefore hard to see any prospects of success on appeal against both conviction and sentence.

Accordingly, for the above reasons, I dismissed the application for condonation.

GS Kashangura Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners