

TAKUDZWA KASWAYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 9 August 2019

Application for condonation of late noting of appeal – (In chambers)

KWENDA J: The applicant was convicted by the Regional Court sitting in Murehwa on a charge of rape as defined in s 65 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]. He was sentenced on 23 April 2019 to 18 years imprisonment of which 2 years were suspended on the usual conditions of good behaviour.

The facts leading to the conviction are that the applicant who is 26 years had sexual intercourse with the female juvenile aged 12 years without her consent. The trial court found that the state proved that the applicant who was herding cattle, spotted the juvenile who was walking along a path leading to a family garden. He called her to come to where he was. When she refused, he chased after her, caught her and carried her into a bush where he raped her once. The victim reported the incident to her mother on the same day. She preserved the evidence of her torn pant which was produced at the trial together with a medical affidavit confirming penetration.

At the trial the applicant stated that although he had met the victim on her way to the garden while he was herding cattle, he had not raped her.

I have scrutinized the judgment by the court *a quo* and find no misdirection. The evidence was overwhelming. The applicant was unable to pose any meaningful challenge to the victim's evidence during cross examination.

Section 48 (2) (a) of the now repealed Supreme Court (Magistrate Court) Criminal Appeals Rules 1979 require an applicant to submit a draft Notice of Appeal. The reason for that requirement is obvious. A notice appeal directs the Court of appeal to the errors allegedly committed by the trial court. When this court grants leave to appeal out of time, it is necessarily approving of the grounds of appeal as valid. It therefore follows that when grounds of appeal

do not meet the standard set one in s 22 (1) of the rules, the application for extension of time within which to appeal cannot succeed.

The draft notice of appeal has only one ground of appeal against conviction which is that the trial court erred in finding that the appellant incriminated himself in cross examining the complainant. The single ground would not sustain an acquittal. Even if the trial court erred in concluding that a question put by the appellant in cross examination was self-incriminatory, that misdirection alone would not affect the correctness of the conviction.

The appeal does not deal with the self- evident overwhelming evidence. There was irrefutable evidence proving that the juvenile was indeed raped. The only issue to be determined by the trial court was the identity of the assailant. The victim and the applicant were known to each other prior to the rape. They lived in the same village. The applicant conceded that he met the girl on the day in question at the place mentioned by her. The court *a quo* believed the complainant. The notice of appeal does not challenge the court's finding on the credibility of the victim. The intended appeal against conviction, therefore, lacks merit.

The grounds of appeal against sentence are not valid. It is inadequate to attack a sentence on the grounds that the sentence is "disharmonious with modern trends of sentencing" Such a ground raises questions instead of directing the court to the error alleged. The ground does not inform this court, on the trends of sentencing contemplated. Could it be community service? Could it be a fine or other non-custodial options? The ground therefore lacks specificity and clarity.

The other ground is that the sentence is devoid of mercy. A ground of appeal must attack the reasoning of the trial court. The court took into account that the applicant is a first offender, married and the solo breadwinner in the family. Those are merciful considerations. The ground does not inform the court of what the trial court failed to consider in sentencing the applicant.

In an application of this nature the court considers the cogence of the reason(s) given for failing to comply with the rules and the prospects of success on appeal.

The test is that the applicant should satisfy the court that there is sufficient cause for excusing him from non-compliance. In considering where the applicant has satisfied that requirement this court must have regard to the draft grounds of appeal. See *S v McNally* 1986 (2) ZLR 280 (SC)

The applicant has not succeeded in that regard.

Accordingly, the application is dismissed.

Chigoro Law Chambers Applicant's legal practitioners
The Prosecutor General Respondent's legal practitioners