ELLIAH GOTAMI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 18 March 2022 & 8 July 2022

Condonation

L Chitanda, for the respondent
Applicant, in person

MAXWELL J: On 18 March 2022, I dismissed Applicant's application for condonation of late noting of appeal. On 21 March 2022 Applicant made a written request for a judgement in the matter. On 16 May 2022 Applicant wrote a follow-up letter on his request. The record of proceedings was only brought before me with the request on 17 June 2022. It is not clear why it took so long for Applicant's request to be placed before me.

The reasons for the dismissal of the application are as follows:
Applicant was charged with four counts of rape. The complainants are Applicant's biological children. The first complainant who was 20 years old at the time of the trial indicated that the abuse started when she was in grade 6 when she was 12 or 13 years. The second complainant was 17 years old at the time of the trial. She testified that the abuse started in December 2010 until 28 July 2017. At the end of the trial Applicant was convicted of all four counts. He was sentenced to 18 years imprisonment in count 1, 10 years imprisonment in count 2, 5 years imprisonment in count 3 and 18 years imprisonment in count 4. 3 years was suspended for 5 years on condition he does not commit an offence involving assault of a sexual nature upon another for which upon conviction he is sentenced to a term of imprisonment without the option of a fine. The sentences in counts 2 and 3 were ordered to run concurrently with the sentence in count number 1. The sentence is stamped 13 May 2018.

On 3 July 2020 Applicant filed the application for condonation of late noting of appeal. In the founding affidavit, he states that his relatives had promised to engage a legal practitioner for him. He alleged that financial deficit caused the delay. He stated that his relief came when on 12 March 2020 Hon Justice Chitapi, who was part of the delegation visiting Chikurubi Maximum Prison indicated that inmates can prepare their applications with the court records. Applicant intends to appeal against both conviction and sentence.

In oral submissions he complained that he was not given ample time to express himself in the court *a quo*. He indicated that he had a hearing problem from 2006 to 2018 when he was convicted. He further complained that he was not advised of the right to have legal representation, the right to remain silent and that he did not have a fair trial. According to him the report by the two complainants did not satisfy legal requirements. He however, did not state which requirements were not satisfied.

The application was opposed on the grounds that Applicant had not given cogent reasons for the delay. It was also submitted for the Respondent that Applicant had not pointed out any misdirection by the court *a quo* and therefore there are no prospects of success on appeal.

In para 34 of his founding affidavit, Applicant demonstrates that he is aware of the considerations and issues taken into account when an application of this nature is assessed. He stated

> "The requirements at law for this application to succeed are as follows:
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> (i) For how long the delay has been
> (ii) How reasonable is the explanation for the said delay; and
> (iii) Whether there is a reasonable argument in favour of the grounds of appeal and the prospects of success
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> See the case of Marufu 1971 (10) RLR 166(7)"

That Applicant might have faced financial constrains may be probable. However, the delay has been inordinate. I am not convinced that there are prospects of success on appeal. Firstly, in his oral submissions, Applicant raised procedural issues. It is trite that where a litigant's grievance is against the method of trial, it is proper to bring the case on review. See Herbstein and Van Winsen. *The Civil Practice of the Superior Courts in South Africa*, second ed. There are no prospects of succeeding where procedural issues are raised on appeal.

Secondly, the Applicant's intended grounds of appeal against conviction are challenging factual findings of the court *a quo.* It is trite that an appeal court will not interfere with the exercise of discretion unless such exercise has been afflicted by a serious misdirection. The appeal court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at such a decision. See *Hama* v *NRZ* 1996(1) ZLR 664. A reading of the record of proceedings shows that the court *a quo* properly analyzed the evidence before it. The trial court's findings

are well reasoned and cannot be faulted. The court a quo found the complainants credible and confident and that their evidence was pregnant with details of the alleged rape. On the other hand, the Applicant was found to be an unreliable witness. The court *a quo* observed that Applicant would not answer questions but exhibited violent tendencies which the court *a quo* concluded weakened his evidence. The court *a quo* concluded that Applicant did not have a defence to the charges against him. No basis has been laid to impugn the court *a quo*'s findings therefore there are no reasonable prospects of success on appeal against conviction.

Thirdly, I was not persuaded that there was merit in the appeal against the sentence. Applicant did not address this issue in his oral submissions. However, in his application he states that the sentence is harsh and shocking. He submitted that the court *a quo* ought to have treated all the counts as one for sentence. The court *a quo* stated the reasons for the sentences in very clear language. It considered that applicant is the biological father who would be expected to protect the complainants especially considering that their mother was dead. It also considered the threats made to the complainants and the negative effect the abuse had on the complainants. The court a quo relied on a report from a social worker who indicated that the second complainant's behaviour was a direct result of the abuse she had suffered from a tender age of 10. It also considered the repetitive nature of the abuse and concluded that Applicant is a danger not only to the society but to his children.

I was of the view that the court *a quo* exercised its discretion judiciously. It is trite that where the discretion has been exercised on judicial grounds and for sound reason, that is, without caprice or bias or the application of wrong principles, an appeal court will not interfere.

For the above reasons I dismissed the Applicant's application for condonation of late noting of appeal.

National Prosecuting Authority, for the respondent