FIRST GASURA

Versus

THE STATE

IN THE HIGH COURTOF ZIMBABWE
MOYO J
BULAWAYO 4 JULY 2023

Application for Condonation of the late noting of an Appeal against sentence

IN CHAMBERS

MOYO J: This is an application for condonation of the late noting of an appeal against sentence only. I dealt with this matter in chambers and dismissed the application for reasons of lack of prospects of success on appeal.
The applicant has requested for written reasons. Here are they.

The applicant was convicted of 2 counts of rape by the Regional Court, he was sentenced to 17 years imprisonment in respect of each count giving
a total of 34 years imprisonment of which 4 years imprisonment were suspended on the usual conditions, leaving him with 30 years effective.

It is applicant's submission that the sentence is too excessive as he is a first offender, and was the sole bread winner. He prays that the 2 counts be taken as one for sentence. The facts of the matter are that accused sexually abused through rape his own biological daughters, one aged between 8 and 11 years and the other aged between 4 and 7 years. He threatened to chop off their heads and throw them into the toilet if they ever reported the sexual assault. He succeeded in his threats as the 2 complainants never reported the rape until an organization on sexual abuse cases in the communities acted on the abuses resulting in accused's arrest.

In assessing sentence the learned magistrate noted that he is a 1st offender and that he was aged 32 years at the material time. He however, noted that his moral blameworthiness is very high since he was their father. He also noted the prevalence of the offence in Gokwe.

He also noted that rape is a brutal invasion of the victim's privacy and dignity and that it destroys the victims' physical and mental integrity.

The Reason for delay

Applicant avers that he had decided to engage the services of a legal practitioner so as to note an appeal. He avers that his efforts to raise enough money failed hence this application. It is critical to note that applicant was sentenced on 11 February 2016. He filed the application for condonation on 6 August 2018, a period in excess of 2 years. It is unreasonable that, for a period in excess of 2 years he was still making efforts to find a legal practitioner. He does not even make mention of efforts so that this court can assess if indeed they make his explanation for the delay plausible. The applicant just did not treat this matter with the importance it deserved. He sat back and did nothing for a period in excess of 2 years and that is an inordinate delay warranting a plausible foundation for the application for condonation.

Even if this court were to be amenable to accept the explanation for the delay since he is a self-actor, and that he be given the benefit of the doubt on the formulation of a reasonable explanation for his delay, there is no misdirection shown at all on the part of the trial court. The applicant was not convicted of 2 counts of the rape of one victim, but he committed the henious act on 2 counts. To claim that the sentence is excessive and induces a sense of shock is misplaced.

The appellate court will not be quick to interfere with the trial courts' discretion in sentencing an accused unless it is shown that a misdirection exists. No misdirection has been shown from the facts as the learned Magistrate carefully assessed the sentence and found aggravation in applicant's conduct. In the case of *State* vs *Chitima* HH-109-16 the court commenting on sentence in a rape matter stated thus:

> "The legislature has deemed it fit to provide life imprisonment in fitting cases. In the circumstances of this case I am unable to agree that the sentence of 18 years imprisonment induces a sentence of shock on account of severity. In any event, being a school teacher, and the victims' class teacher, the appellant knew very well the risk attendant to his conduct. He shamelessly, committed this crime against a child, society expected him to take care of. He has no one to blame when the courts, in their indignation, impose the sentence he received on this occasion"

In the case of *Chamu* vs S SC-165-94, the court stated thus; "All cases of rape are horrible and sentences for rape have been increasing over the years."

In the case of *Mudyambanje* vs The State, the appellant in that case was convicted of 2 counts of rape (having raped the same victim twice). He was sentenced to 15 years imprisonment on each count giving a total of 30 years imprisonment. Six years were suspended on the usual conditions leaving him with an effective 24 years imprisonment.

The court in that case, affirmed the learned magistrate's observations that:-

> "It should be noted that the offence of rape is a heinous crime which does not only involve the physical abuse of a non-consenting victim, but it brutalizes such victim physically and psychologically. As a stepfather, (accused) had a legal duty to protect the complainant from abusers but unfortunately he turned out to be the rapist himself. He deflowered the complainant thus leading her away from the path of virtue and was putting her at risk of contracting incurable diseases. I wonder what the world is coming to". This child was about 13 years old.

In applicant's case, the 1st complainant was about 8 – 11 years old and the 2nd complainant was about 4 – 7 years old. The applicant committed a cruel violation of little children and yet he is their biological father, the one these little children should look up to for protection. He behaved like a monster in his own household, did not violate only one child but 2 of them, one wonders what has become of humanity where fathers turn monsters and devour their own children of such a tender age.

There is absolutely nothing to interfere with in this case, even a life sentence could have met the justice of the case so applicant must not complain he must be content with the justice

of the sentence as it clearly befits the consequences of his henious act. There is no misdirection at all.

In the South African case of *S* v Pepping 2023 ZAEC MHC 3 where the accused was convicted of raping a 6 year old child the court stated:

> "Rape is a serious offence for reasons that it offends against the victim's rights to personal freedom, dignity, privacy and humanity. It is a disgusting crime as it does not only undermine the person of the victim. The crime of rape is undoubtedly and indubitably serious. In our case law, the act of rape has been described as obnoxious, despicable and disgraceful. There is an abundance of case law condemning this type of offence. The offence becomes more aggravated when it is committed against defenceless and innocent young children and women as is the case here."

In the case of *Director of Public Prosecutions* vs *Thabethe* 2011 ZASCA 186 it was held that;

> "Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and advancement of human right freedoms. It is such a serious crime that it evokes strong feelings of revulsion amongst all right thinking and self-respecting members of our society. Our courts have an obligation to impose sentences for such a crime, (particularly where it involves young, innocent, defenceless and vulnerable girls), of the kind of which reflect the natural outrage and revulsion felt by the law abiding members of society. A failure to do so would regrettably have the effect of eroding public confidence in the criminal justice system."

In *Mudau* v *S* 2013 ZASCA 56 (Supreme Court of Appeal of South Africa) the court described the effect of rape as follows:

> "It is necessary to reiterate a few self-evident realities first, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate private space. The very act itself, even in the absence of any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not be treated in a cruel, inhumane and degrading way"

In the South African case of *Opperman* vs *The State* 2010 (4) ALLSA 267 the court stated thus:

> "The moral reprehensibility of rape and society's abhorrence of this rampant scourge are unquestionable. The most cursory scouting of our law reports bears testimony to the fact that our courts have, rightly so, visited this offence with severe penalty and abhorrence is so much pronounced in the instances of the rape of very young children as is the case here. The court below, correctly took into account the fact that the complainant was an innocent, defenceless and vulnerable victim."

The quotes referred to above show how seriously the courts view the crime of rape against little children, innocent, defenceless and vulnerable members of our society. It follows that when such an abhorrent act is committed by a biological father, the one these vulnerable victims expect protection from, an effective sentence of 30 years imprisonment for molesting 2 innocent, defenceless and vulnerable members of society cannot by any reason be found to be excessive or to induce any sense of shock. It is the appropriate sentence as evidenced by the sentences given in the cases I have referenced to herein.

It is for these reasons that I find that the application for condonation of the late noting of an appeal against sentence is devoid of merit as there is no misdirection at all on the part of the trial court.

The application is accordingly dismissed.