

**PRINCE VHONANI NDOU**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 13 May 2022

**Application for condonation for the late filing of an appeal**

*G. Kachiraire*, for the applicant  
*Ms. N. Ngwenya*, for the respondent

**DUBE-BANDA J:**

[1] This is a chamber application for condonation of the late filing of an appeal against conviction. In terms of r 106(7) of the High Court Rules, 2021 this matter was set down for oral argument and heard on 13 May 2022. After argument by the parties, I gave an *ex-tempore* judgment and dismissed the application. On 17 March 2023 the applicant wrote a letter to the Registrar asking for the reasons for the dismissal of his application. The letter was brought to my attention on the 27 March 2023. In the letter he suggests that I dismissed his appeal against conviction and sentence. I did not. The correct factual position is that I dismissed his application for condonation for the late filing of an appeal. I dismissed the application for the reasons that follow.

[2] The applicant and four accomplices who are not part of this application were charged with three counts, *viz*; contravening s 4(b) of the Firearms Act [Chapter 10:09]; and two counts of robbery as defined in s 126 (1) (a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. In count 3 it was alleged that on 5 September 2021 and at Toporo Village, Chief Sitauze, Beitbridge the applicant and his accomplices, one or more of them used violence against the complainants in order to steal cell phones, an axe and ZAR400 00. After a contested trial he was found not guilty and acquitted in respect of count 1 and 2, and was convicted in respect of count 3 and sentenced to 12 years imprisonment with 2 years suspended on the usual conditions.

[3] The applicant is aggrieved by his conviction and hence this application. In the event that he is successful in this application, the applicant intends to appeal against the decision of the trial court on the following grounds:

- i. The court *a quo* erred in law by convicting appellant on the basis that the State had proved its case beyond a reasonable doubt, when in fact the State case was manifestly weak.
- ii. The court *a quo* erred in law in admitting into evidence the cell phone and axe through the arresting detail instead of the complainants; the court *a quo* erred in convicting appellant on the basis of cell phones and axe, which identity of the property and link thereof to the appellant was not confirmed by the complainants or the arresting detail.
- iii. The court *a quo* erred in law in failing to assist an unrepresented accused person by advising him that he could institute an application in terms of s 198(3) of the Criminal Procedure & Evidence Act, in light of the fact that the State had failed to prove a *prima facie* case.
- iv. The court *a quo* erred in law in finding that there was only one reasonable inference to be drawn from the facts, which inference led to the conviction of the appellant.

[4] In an application for condonation the court has a discretion which it must exercise judiciously. The legal principles a court is to take into account in considering whether or not to exercise its discretion to condone a party's non-compliance with the rules of court are well-established. The first principle is that an application for condonation must be brought as soon as the non-compliance has been detected. See: *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises Pvt. Ltd* 1998 (2) ZLR 249. Second, the factors that have to be considered in such an application are these: the length of the delay, the explanation of the delay, and the applicant's prospects of success in the contemplated appeal. See: *Bennyview Estates (Pvt) Ltd v Zimbabwe Platinum Mines (Pvt) Ltd & Anor* SC 01/05; *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 B-E; *Mhora v Mhora* CCZ 522. There is some interplay between the obligation to provide a reasonable and acceptable explanation for the non-compliance with a rule of court and the reasonable prospects of success on appeal. See: *De Klerk v Penderis and Others* (SA 76 of 2020) [2023] NASC 1 (01 March 2023).

[5] An application for condonation may, however, be refused where an applicant has provided a good and acceptable reason for his or her non-compliance but has failed to satisfy the court that there are reasonable prospects of success on appeal. An application for condonation may

also be refused because the non-compliance with the rules has been glaring, flagrant or inexplicable. In such an instance, the court may decide on the condonation application without having regard to the prospects of success on appeal. See: *De Klerk v Penderis and Others* (SA 76 of 2020) [2023] NASC 1 (01 March 2023); *Kombayi v Berkhout* 1998 (1) ZLR 53 (S).

[6] In *casu* regarding the extent of the delay, the criminal proceedings were terminated on 12 October 2021. In turn this application was filed on 18 February 2022. The applicant was approximately three months out of time. The extent of the delay is inordinate. Regarding the explanation for the delay, the applicant averred that he appeared before the trial court without legal representation, and it took him time to know that he had a right to appeal to a higher court. His relatives were not willing to help him get legal representation, *albeit* because he was convicted of robbing another relative. His legal practitioners are representing him *pro bono*. In the circumstances of this case, the concession by the respondent's counsel that the applicant proffered a reasonable explanation for the delay in filing this application is understandable and was fairly made. I accept that he has proffered an acceptable explanation for the delay in filing this application. However, this finding is not dispositive of this matter.

[7] The inquiry now turns to whether there are prospects of success on appeal against conviction. It is common cause or not seriously disputed that on 5 September 2021 at approximately 21:00 hours there was a robbery at the complainants' homestead. The robbers were using a Toyota Hiace motor vehicle. The robbers had their faces covered in masks. They tied the hands and the legs of the two complainants. They were armed with a knobkerrie and a whip. Although the robbers said they were in possession of a gun the complainants did not see such a gun. They subdued the complainants and stole a Mobicel cell phone IMEI number 358041434272490; one Hisense cell phone IMEI number 861926041518972, an axe and ZAR400 00. After achieving their purpose, they untied the two complainants and drove off in their Toyota Hiace motor vehicle. The complainants did not identify the robbers. The first complainant i.e., the owner of the homestead is applicant's aunt.

[8] The police who were manning a road block at approximately 23:20 hours and acting on the basis of a report, saw a motor vehicle meeting the description of the one allegedly used by the robbers. The police searched the vehicle and recovered a knobkerrie, a knife, a shambok, two cell phones (Mobicel cell phone and Hisense cell phone) which met the description given by the complainants, and an axe with blood stains. In the vehicle there were six male persons, and while the police were conducting a search, two persons bolted from the vehicle, fled and

disappeared into the night. The four who remained in the vehicle were arrested, i.e., the applicant and his other accomplices. The evidence on record shows that at the close of the case for the prosecution, the applicant had a case to answer. The State had established a *prima facie* case against him, calling for an answer.

[9] In his defence case the applicant admitted that he went to the complainants' homestead in the company of his accomplices and the other two persons who fled at the scene of arrest. He said the purpose of going to that homestead was to collect boxes of cigarettes. Therefore, it is common cause that he was at the scene of crime.

[10] It is clear from the evidence that the persons who were at the complainants' homestead on 5 September 2021 at 21:00 hours were robbers. They had nothing to do with cigarettes. The applicant was at the complainants' homestead at the relevant time and in the company of his accomplices. The owner of the homestead is his aunt. He did not announce his presence to his aunt. He did not talk to his aunt. He was content to hide his identity behind a face mask. He was arrested in the vehicle in the company of the other robbers, his accomplices. The stolen cell phones and the axe were recovered in the same vehicle. The applicant made admissible indications at the scene of crime. Even without the evidence of the indications there was just too much evidence against the applicant. The trial court cannot be faulted in finding that he was one of the robbers.

[10] I read the record of proceedings very carefully. In my assessment, it is very unlikely that the appeal court will arrive at a different conclusion other than that of the trial court. There is overwhelming evidence that the applicant was one of the robbers, and he has no prospects of success on appeal against conviction.

[11] Notwithstanding that the applicant has provided a good and acceptable explanation for his non-compliance with the rules of court, however this application must still fail for the reason that he has failed to show that he has prospects of success on appeal. He has no prospects of success on appeal. The proposed grounds of appeal are just a desperate fishing expedition with zero prospects of success. There will be no useful purpose to accede to this application, when the intended appeal itself will suffer a predictable failure. It is for these reasons that I dismissed this application.

*Mutuso, Taruvinga & Mhiribidi*, applicant's legal practitioners  
*National Prosecution Authority*, respondent's legal practitioners