BISCEND ZHUWAO
and
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 15 November, 2021

Chamber Application

Applicant in person
K Kangai, for the respondent

CHIKOWERO J: This is an application for condonation for late noting of an appeal against conviction and sentence, extension of time to note the appeal and for leave to prosecute the appeal in person.

The applicant and his then co-accused were, on 3 October 2017, convicted of 3 counts of robbery as defined in s 126(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The magistrates court sitting at Bindura treated both counts as one for the purpose of sentence. The applicant and the co-accused were each sentenced to 10 years imprisonment of which 2 years imprisonment were suspended for 5 years on the usual condition of good behaviour.

The respondent had preferred 5 counts of robbery against the two. However, it withdrew counts 3 and 4 at the close of the State case for want of evidence. With that, the applicant and his co-accused were acquitted of the robbery charges in respect of counts 3 and 4.

It is only the applicant who is before me.

This application was filed on 18 June 2021, which is about four years from the date that the applicant was convicted and sentenced.

The applicant himself concedes that the delay is inordinate.

He defended himself at the trial. He attributes the late filing of this application on a number of factors. Although he was dissatisfied with the conviction and sentence from the word go, he was unaware that he could apply for leave to prosecute the appeal in person. He

acquired this knowledge from other inmates at prison on a date not disclosed in the application. But this was well after the time within which to appeal had lapsed.

Much later, he was also advised by a person or persons not identified in the application that he could seek condonation for late noting of the appeal against both conviction and sentence and extension of time within which to note the appeal. The date on which he received this advice is not disclosed.

His relatives managed to obtain a transcript of the record of proceedings on 10 February 2020. But this was later than the applicant expected.

However, due to Covid-19 restrictive measures his relatives could not bring the record to the applicant. Prison visits were banned. It was only recently, on relaxation of such restrictions, that the relatives were able to bring the record to him. The date when the record was availed to him is again not disclosed.

I agree with Mr *Kangai* that the applicant's explanation for not noting the appeal within the time frame provided by the rules is unacceptable. Everyone is presumed to know the law. This court will not accept ignorance of the law as an excuse for the non-timeous action.

Further, the applicant well knowing that he is seeking an indulgence, has deliberately decided not to take the court into his confidence. He has chosen to withhold the date when he became aware that he could appeal as a self-actor subject to him obtaining leave to prosecute the appeal in person. He has seen it convenient not to disclose the date when he was appraised of his right to seek condonation for late noting of the appeal against both conviction and sentence and extension of time to appeal.

In my view, these omissions are deliberate. The applicant is on a fishing expedition. He is simply trying his luck. When a would-be appellant is out of time in seeking leave to prosecute an appeal in person he or she is expected, all the same, to bring an application such as the present without undue delay. Where that has not been done, a reasonable explanation must be tendered. In other words, there is an additional requirement to explain why the application for condonation for late noting of appeal and extension of time to appeal has been filed late.

Dates are paramount in an application of this nature. It is only by relating to dates furnished in the application itself that the court can assess whether the explanation for the late filing of the application is reasonable.

As it is, the only date mentioned in the application is 10 February 2020. Indeed, the transcript of the record of proceedings bears the date-stamp 10 February 2020. That is the Clerk of Court, Bindura Magistrates Court date-stamp. However, even by that date, when he record was presumably availed to the applicant's relatives, a lot of time had passed since 3 October 2017, the date that the applicant had been convicted and sentenced.

The court takes judicial notice of the fact that documents received at prison, including Chikurubi Maximum Prison, are checked by the prison authorities. Thereafter the prison authorities affix their date-stamp indicating that the document has been security-checked. The transcript of the record of proceedings, copy of which is attached to the application, does not bear such a stamp. The result is that the applicant has not proved the date when he received the record. The inference that he received the record soon after 10 February 2020 has not been excluded. The assertion that the applicant "recently" received the record is not only vague but has not been substantiated.

There are no prospects of success in an appeal against the convictions. The complainants in counts 1 and 2 knew the applicant and the co-accused before the date of the commission of the offence. In a thorough judgment the court below found that the two complainants were credible. The witnesses gave detailed testimony of their prior dealings with the applicant and the co-accused as well as the events of 11 August 2016 when the robbery occurred.

The two witnesses were gold-buying agents. For the preceding three months the applicant and his co-accused were appearing at the witnesses' workplace at least twice per week to purify and sell gold. The applicant and his co-accused, residents of Shamva, were known to the witnesses as Nyanden and Soda respectively. Those were pseudo names. On the date of the robbery, the applicant and four others, including the one with whom he was jointly charged, appeared at the complainants' workplace on the pretext that they intended to purify and sell gold. It was around 6pm. They were in the company of the witnesses for about an hour. One of the robbers produced a black pistol and ordered everybody to lie down and be quiet. The applicant demanded that the complainant in count 1 discloses where the money was kept. On receiving the response, the applicant emptied the drawers of the money and emptied the complainant's pockets of more money. The complainants corroborated each other on how the robbery was committed including the roles played by each member of the gang.

The second complainant's cellphone was stolen during the commission of the offence.

There was no need to hold an identification parade. The applicant was not a stranger to the two complainants.

The applicant's defence of an alibi was disproved by the cogent evidence of the two complainants.

Similarly, the complainant in count 5 had seen the applicant and his co-accused about four days before they robbed him at Mazowe river.

In my view, there is no reasonable prospect of success in the intended appeal against the sentence.

It is so late in the day for the court to exercise its gate-keeping function in favour of allowing the applicant to test, on appeal, the correctness of his argument that there was an improper splitting of charges. He proposes to argue that the fact that the court below found that the two complainants were robbed during the same incident does not competently constitute two counts of robbery, but one. He is referring to counts 1 and 2. What the applicant is overlooking is that robbery is an offence committed in relation to a person. See s 126(1)(a) and (b) of the Criminal Law Code.

There also is no prospect of success in the intended appeal against the sentence. In my estimation, the court below properly exercised its sentencing discretion. It balanced the mitigating and aggravating factors. The applicant was a first offender. His personal circumstances were taken into account. What aggravated the offence were these factors. Robbery is a serious offence. A pistol, okapi knives and a machete were used in respect of counts 1 and 2. As for count 5, the applicant and his accomplice impersonated police officers and handcuffed the complainant on the pretext that he was illegally dealing in gold before stealing cash amounting to US$1 600.00, 5 grams of gold, a cellphone and motor-cycle keys. Thereafter they fled, leaving the complainant in handcuffs.

The complainants were traumatised.

The first complainant was seriously injured during the robbery. One of the robbers stabbed this complainant thrice with a knife. The result was that the complainant sustained serious injuries on the stomach, back and cheek.

The applicant (and the other co-perpetrators) benefitted from the commission of the offences. Nothing was recovered.

In respect of counts 1 and 2, the complainants, between them, lost US$15 035.00, four cellphones and 10 grams of smelted gold. The total value of the stolen property was US$15560.00.

As for count 5, the following property was stolen: 5 grams of gold, gold weighing scale, a Nokia 1208 cellphone, motor cycle keys and US$1 600.00. The total value of the property stolen was US$1 800.00.

The court also considered that the applicant had been convicted not of one count of robbery, but of three counts. Counts 1 and 2 were committed on 11 August 2016 in Shamva while the applicant and his accomplice had committed the 5th count of robbery on 5 October 2016 at Mazowe River, Bindura.

Since the three offences were similar and were closely related in time, the Magistrates court treated the same as one for the purposes of sentence.

There can be no doubt that a lot of planning was involved before the offences were committed. Undoubtedly, the sentencing court was justified in proceeding on the basis that the moral blameworthiness of the applicant was high.

In respect of counts 1 and 2, the applicant breached his duty of trust to the two complainants. Throughout their evidence, the first and second complainants told a harrowing tale of how their trusted customers had turned villains.

Aggravating also is the fact that this was gang robbery.

The court's main purpose in sentencing the applicant was to achieve individual and general deterrence. This approach resonates well with the sentiments of this court in *S* v *Madondo* 1989(1) ZLR 300(H) where it was stated:

> "Robbery is an inherently serious offence. It usually involves premeditation, criminal resolve and purpose, brazen execution, an attack on a human victim with an attendant disregard of that person's right to personal security and forceful dispossession of whatever property the victim has. It is also a terrifying and degrading experience. The victim is injured in his person and his property. The robber acts with contempt and callousness. It is therefore proper to regard robbery as a particularly reprehensible form of criminal behaviour. That attitude should be reflected in the sentence."

The mitigating factors, particularly that the applicant was a first offender, is reflected in the quantum of the sentence that was imposed and the portion suspended on the customary condition of future good behaviour.

Far from being manifestly harsh and excessive as to induce a sense of shock, the sentence that was imposed was, in my view, very lenient. Resultantly, there is no prospect of success in the intended appeal against sentence.

I would still have dismissed this application without even considering whether there is a prospect of success on appeal, on account of the inordinate delay and the unreasonable explanation for that delay. Indeed, what was placed before me as an explanation for this late launching of the application is no explanation at all. It is an excuse. As already found, the applicant is simply trying his luck. He had accepted both the conviction and the sentence. In his own words, as the prison authorities have remitted a third of the effective sentence, what he remains to serve is just over a year of the sentence.

There is need for finality to litigation. This litigation is stale. It is not the function of this court to embark on an academic exercise. To grant the applicant the relief that he seeks will open the door for such an exercise.

On an assessment of all the relevant principles, this application cannot succeed.

In the result, the following order shall issue:

1. The application for condonation for late noting of an appeal against both conviction and sentence, extension of time within which to appeal and leave to prosecute the appeal in person be and is dismissed.

Applicant c/o Chikurubi, Maximum Prison
The National Prosecuting Authority, respondent's legal practitioners