TEST PHIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 8 March 2018

Chamber Application for extension of time to note appeal

Applicant, *in person*
F.I Nyahunzvi, for the respondent

CHITAPI J: The applicant was on 16 March, 2016 convicted on his plea of guilty by the magistrate at Chinhoyi for the offence of stock theft as defined in s 114 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged against him and his accomplice who pleaded not guilty that the two of them being uncle and nephew acted in common purpose in stealing two cows from the complainant's farm in Mhangura. The two cattle were selected from a herd which was grazing in a paddock. After identifying and driving away the two cows, they left them with a third person at another farm with instructions that he should find buyers and sell the cows on their behalf. The third person alerted the police who set up a trap by pausing as prospective buyers. The applicant and his accomplice were arrested in the trap. The two cows both valued at $1 000.00 were recovered.

The applicant as already noted pleaded guilty to the charge. The matter was dealt with in terms of s 271 (2) (b) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. Nothing arises from the conviction. The applicant was sentenced to 16 years imprisonment with 4 years suspended for 5 years on condition that the applicant did not within that period commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine. This left the applicant with an effective imprisonment term of 12 years.

The applicant seeks to be condoned for not timeously noting his appeal against sentence and for extension of time within which to note his appeal in the event that condonation has been granted. The approach of the court in considering such applications was set out by KORSAH JA in *Kombayi* v *Berkout* 1988 (1) ZLR 53 (SC). The court considers the following broad principles in deciding whether or not to grant condonation;

a) The extent of the delay
b) The reasonableness of the explanation for the delay
c) The prospects of success

The learned judge also stated that where the tardiness of the applicant was extreme, the applicant would have to show good grounds for the success of the appeal. The Supreme Court has continued to apply the principles enunciated by KORSAH JA (see *Leornard Dzvairo* v *Kango Products* SC 35/17). It must be noted that the broad considerations aforesaid are the same irrespective of whether the appeal intended to be filed is in consequence of a civil court or criminal court judgment.

The constitution of Zimbabwe (2013) in s 70 (5) provides as follows:

"Any person who has been tried and convicted of an offence has the right subject to reasonable restrictions that may be prescribed by law, to

a) have the case reviewed by a higher court; or
b) appeal to a higher court against the conviction and sentence.

The courts as with every institution and agency of government has a duty as enshrined in s 44 of the constitution to respect, protect, promote and fulfil rights and freedoms enshrined in the declaration of rights. The right enshrined in s 70 (5) of the Constitution as quoted above is one that the court must respect, protect, promote and fulfil subject to reasonable restrictions which the law may impose. The imposition of time limits within which an accused person wishing to appeal against a conviction or sentence is an incidence one such reasonable restriction. The restriction is well founded in the principle that there must be finality to litigation. Even then, the law recognizes that there may be reasonable and substantial grounds or cause for a failure to meet the time limits for appeal. The court does not play slave to its rules but will in a proper and deserving case grant condonation for late noting of appeal and extensions of time within which to appeal. In doing so,

the court plays its constitutional mandate to promote, protect and fulfil the rights of the accused person. The decision which I will reach in this matter is informed by applying the principles I have set out to the facts of this application.

I should at this stage acknowledge that the Prosecutor General's representative has filed a statement comprising two sentences consenting to the application. It reads as follows;

> "Having gone through the applicant's papers, it appears the appeal against sentence is reasonably arguable. The respondent is thus not opposed to the applicant being granted the relief he seeks."

The Prosecutor General's response is not helpful at all and appears to have been perfunctorily prepared. It does not inform the judge or court of the grounds on which the Prosecutor General relies for his submission that the intended appeal against sentence is reasonably arguable. Does the Prosecutor General see a misdirection in the sentence of the trial court? Is the sentence in the view of the Prosecutor General so excessive as to induce a sense of shock? Without extrapolating on the reasons for asserting that the appeal is reasonably arguable, the Prosecutor General has not assisted the court contrary to the court's expectations that the Government Chief Prosecutor uses the expertise in his office to research and make meaningful submissions which help the court in assessing the merits of the application for condonation.

Turning back to application, it has been filed almost 22 months after conviction and sentence. A period of 22 months is *prima facie* inordinate. The applicant attributes the delay to ignorance of the criminal procedure. He states in his application that neither the court nor prison authorities advised him of his rights of appeal. The record of proceedings does not indicate that the applicant being an unrepresented actor was appraised of his rights to appeal nor that the proceedings would be sent on review by a judge of this court and the ramifications of the processes. The trial court does not of course act as a legal representative of an accused person. However as a general practice, courts have always taken it upon themselves to ensure that an unrepresented accused is not unduly prejudiced by a lack of legal representation. Ultimately what a court should strive for, is to ensure a fair trial and to do justice to all persons irrespective of status as enshrined in s 165 (1) (c) of the Constitution. In this regard, section 165 (1) (c) of the Constitution provides that, "the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law." Courts should always be reminded of their role as quoted.

The applicant avers that it was only in the course of serving his sentence that he learnt of his rights to appeal from other inmates. He states that he was also advised that there would be need for him to attach a record of proceedings to his application for condonation of late noting of appeal. Given his state of incarceration, he could not easily make arrangements for preparation of the record. Right or wrong the advise which the applicant was given in prison could be said to be, I am unable to hold that the applicant just sat on his rights. I am equally unable to reject the applicant's assertion that he was ignorant of his rights of appeal. Whilst ignorance of the law is not a defence to a crime, I am unable to hold that where an unrepresented accused has not been advised of his rights of appeal or review after the conclusion of his trial, he should invariably be held to the maxim that his ignorance of further steps to take to challenge the conviction does not avail him as an excuse. The circumstances of each case will inform the decision which a court or judge will arrive at in any given case whether to accept or reject the explanation. *In casu*, the applicant from what I can make from the record was just an unsophisticated farm dweller who depended on piece jobs for his live hood. A reading of his handwritten application shows that it is fraught with spelling and grammatical errors. His handwriting is hardly intelligible and difficult to make out. I believe that I am justified to hold that the applicant is of little education and that whilst he would obviously know right from wrong, to hold against him that his lack of knowledge of procedural law is covered by the *iquorantia juris non excusat* principle would be to adopt an armchair approach and a failure to accept the realities of little or non-existent knowledge by a sizeable number of the populace in Zimbabwe of procedural law. Such approach would be inconsistent with the protection, promotion and fulfilment of human rights and freedoms. I therefore hold that under the circumstances and weighing the applicants' explanation on a balance of probabilities, his explanation for delay is therefore understandable and excusable.

The fact that I have accepted the explanation for the delay by the applicant in noting the appeal and the reasonableness of the explanation is not the end of the matter for him. The applicant still must show on a balance of probabilities that his intended appeal against sentence has prospects of success. In order to properly interrogate the prospects of success, the applicant's grounds of appeal as set out by the applicant with grammar and spelling errors uncorrected must be considered. I reproduce them as follows:-

"Grounds of appeal
AD SENTENCE

1. The court *a quo* erred in failing to consider the defence's evidence and rather opted to rely on the inconsistent evidence by the accused.
2. The court a quo erred in failing to consider that the appellant's was a first offender our court are usually included in treating first offenders with leniency.
3. The court a quo erred in lay by considering the fact that applicant was not married, a youthful and he was not employed. Our law is clear on first time offenders as they should be treated with leniency our court are also highly reluctant to subject first offenders aged (29) to prison terms especially where alternative punishment can be imposed. Prison environment may entirely and hardened and corrupt them into harco criminals.
4. The court a quo erred in law by holdings that there was need for the stiffer penalty to deter would be offenders our law is clear that it is not severity of the punishment that deters but the publicity of such penalty; a now custodial sentence such as community service would in circumstance be highly deterrent as it is performed in full glance of the public.
5. The court *a quo* misdirected itself by failing to considering the reformative and rehabilitative principle of sentencing before deciding on sentencing option the applicant has a life to live after serving the sentence therefore a sentence that reforms and reintegrated him into this society would have nee met and proper.
6. The sentence imposed is so excessive such that the sentence induces a sense to shock taking into account that special circumstances exits.

Wherefore applicant will pray that the lower court sentence be set aside and be substituted with an acquittal and discharged."

It is not proposed to isolate and deal with each of the listed grounds of appeal in turn. Indeed some of the grounds of appeal like the first one do not constitute a valid ground of appeal. A perusal of all the proposed grounds of appeal read holistically reveal that the applicant is aggrieved by having been sentenced to effective imprisonment as opposed to community service or other non-custodial sentence. At best it can be said that the applicant considers the sentence to be shockingly excessive in the circumstances.

In considering the applicant's dissatisfaction with the sentence, two factors should be kept in mind. The first one is that the offence which the applicant was convicted of is a statutory offence of stock theft. The legislation creating the offence provides for a mandatory minimum sentence of 9 years imprisonment to be imposed upon an offender in the event that the offender fails to satisfy the court that there are special circumstances peculiar to the case why the minimum sentence should not be imposed upon him or her. The second one is to recognise that in the law of criminal

procedure, sentencing is a preserve of the trial court whose exercise of sentencing powers will not be interfered with by the appeal court in the absence of a misdirection having been committed by the sentencing court.

In *S* v *Rabie* 1975 (4) SA 855 A at 857 D-F, HOLMES JA stated as follows:

> "1. In every appeal against sentence whether imposed by a magistrate or a Judge, the court hearing the appeal –
>
> (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court;
> and
> (b) should be careful not to erode such discretion hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised.
>
> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

The dicta in the *Rabie* case though a decision of the Supreme Court of South Africa, is reflected in the decisions of our courts and jurisprudence. In *Munyaradzi Hatinahama* v *State* HH 297/16, HUNGWE J with the concurrence of CHIWESHE JP following on the dicta in decisions of the Supreme Court in *S* v *Sidat* 1997 (1) 487 (SC) and *S* v *Gono* 2000 (2) ZLR 63 (SC) followed the same approach as in *Rabie*'s case.

In *S* v *Malgas* 200 (1) SACR 469 (SCA), MARAIS JA whilst agreeing with the dicta in the Rabie case, held further that there will be justification for an appellate court to interfere with the sentence of the trial court where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or disturbingly inappropriate.

My task is to express an opinion on whether taking into account the principles which guide the appellate court with respect to determining appeals against sentence, there is a reasonable chance that the sentence imposed upon the applicant might be interfered with on appeal. I have no hesitation in holding that the applicant cannot escape the imposition of the mandatory minimum sentence of 9 years imprisonment. The applicant did not advance any cognisable special circumstances for committing the offence or surrounding the commission of the offence. After the trial court explained the concept of special circumstances to the applicant, he indicated that he

wanted to fend for his family and thus committed the offence to achieve his goal. This is not a special circumstance.

The trial court however imposed a 16 year sentence which was almost double the mandatory sentence. Granted, the aggravatory circumstances outweighed the mitigatory circumstances in that the offence was deliberately planned and thus pre-meditated. However, there is nothing in the reasons for sentence to justify the imposition of more than the minimum sentence. Despite the suspension of 4 years of the 16 year sentence on conditions of good behaviour, the 12 years effective sentence is nonetheless a lengthy sentence. If one considers that a suspended sentence is in fact an integral part of the global sentence, there is room to argue that the global sentence is so severe as to be shocking and therefore disturbingly inappropriate.

In view of my findings condoning the failure by the applicant to note the appeal out of time and the further finding that the appeal enjoys a reasonable prospect of success, I determine the application in favour of the applicant and the following order shall issue.

(i) The applicant's failure to note his appeal against sentence timeously is hereby condoned.

(ii) The applicant is granted an extension of time within which to note his appeal against sentence.

(iii) The applicant shall note his appeal within 14 days of delivery upon him of this order and proof of service of this order by the Registrar or Prison authorities where the applicant is serving his sentence shall be included as part of the record on appeal.

(iv) The applicant is granted leave to prosecute his appeal in person.

National Prosecuting Authority, respondent's legal practitioners