NOBERT MADZIMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 18 July & 22 November 2022

Application for Condonation of the late noting of an Appeal and Application for leave to Prosecute the Appeal in Person

Applicant in person
C Muchemwa, for the respondent

WAMAMBO J: The applicant filed a chamber application for condonation of the late noting of an appeal and leave to prosecute an appeal in person. I dismissed the application and rendered an *ex tempore* ruling. Applicant has requested for the reasons. These are they.

Applicant appeared before the Regional Court sitting at Rotten Row Magistrates Court facing two counts of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Applicant appeared together with three other co-accused persons. Applicant is reflected on the charge sheet as accused one.

A trial ensued and the Regional Magistrate found applicant and second accused guilty and his two other co-accused not guilty of both counts. The sentence imposed is 12 years imprisonment for both counts.

The applicant raised four grounds of appeal against conviction and one ground against sentence. Summarily the grounds raised against conviction are that the court *a quo* did not inform the applicant of his rights to legal representation and right to remain silent.

- Did not carry out an inspection *in loco* to verify the possibility of the two counts being carried out at the same time.
- Failed to carry out an identification parade.
- There was doubt on the recovery of the high way code.

Notably the last ground of appeal is rather vague. It refers to "countersigning the recovery of the Highway Code." The sole ground against sentence is that the sentence was harsh considering that the applicant never committed the offence.

The applicant in his application points out that the sentence was passed on 16 October 2012. This application reflects that it was filed in 2021. The applicant's founding affidavit bears the Chikurubi Maximum Security Prison's date stamp of 20 October 2021.

The reasons applicant gives for the late noting of his appeal are as follows:

- He is a self-actor who is not versed with the legal procedures. It took long for him to obtain a copy of the record of proceedings and stationery.
- Under prospects of success on appeal and conviction applicant basically broadens his grounds of appeal and basically attacks the findings by the court *a quo*.
- On sentence applicant avers that the trial court relied on "fanciful possibility to convict" (sic) him.

I should note that the state was not opposed to the application. They base their concession on the lack of an identification parade and the fact that applicant challenges the recovery of the high way code. I was not satisfied with the said concession as will become clear in the course of the judgment.

The factors to be considered in an application such as the instant are the length of the delay, the reasonableness of the explanation and the prospects of success on appeal. See *Kombayi* v *Berkhaut* 1988 (1*)* ZLR 53 (S) *and Fuyana* v *Moyo* SC 54/06.

I will proceed to deal with the application with the above factors in mind.

The explanation for the delay in noting of the appeal is clearly unsatisfactory. That it would take applicant seven years to know that he had a right of appeal and to obtain a record of proceedings and stationery is rather far-fetched. If one has regard to the grounds of appeal there is nothing to indicate that applicant had regard to the record of proceedings. The grounds proffered are rather generalised and do not particularly call out for a record of proceedings. The visits by his relatives do not seem to have been properly explained to show the relevance of the delay. Access to stationery was apparently denied to applicant for seven years. The Prison Services provides and processes applications such as the instant one and refer same to the relevant court. That it would take seven years for Prison authorities to provide applicant with stationery is clearly not truthful.

I find in the circumstances that the explanation for the delay is unsatisfactory.

The period of delay is a whole seven years and it is an unduly long period. The length of the delay appears to indicate that applicant decided to launch an appeal at a very late stage after the sentence. The length of delay is unduly lengthy and there is nothing averred by applicant justifying such a lengthy delay.

Applicant attacks procedural aspects of the trial in the main. He complains that his rights were not properly explained to him. He also complains that the court should have carried out an inspection *in loco* and that the State should have carried out an identification parade. The issue of the high way code will be dealt with in the course of the judgment.

The record of proceedings at p 3 reflects that the provisions of ss 188 and 189 of the Criminal Procedure and Evidence Act were explained to the accused persons and understood. I have no reason to doubt that this was indeed done. Applicant simply raises this point as a red herring. The fact that applicant gave a detailed defence outline is an indication that he was being responsive to an explanation by the court.

The issue of the inspection *in loco* raised by applicant is colourless. He gives out that if it were carried out it would verify the possibility of the two counts being carried out at the same time. Applicant does not explain or lay a basis on how the inspection *in loco* would assist his case. In any case there is no basis laid to suggest in any way that the Magistrate misdirected himself or herself.

The applicant in his defence outline raises an alibi claiming that he was never in Macheke and was not familiar with the area. It appears from the record of proceedings that no identification parade was carried out. While an identification parade is a useful tool in investigations it does not follow that where it is not carried out it should always be to an accused's advantage. In its absence the available evidence still has to be considered in its entirety.

Militating against the applicant was the following evidence:-

- Out of the four accused Agnes Chimberu (the complainant in the first count) quickly made a dock identification of applicant and the second accused. The incident took place at a spot where there was lighting emanating from the nearby service station. The incident lasted for a while and gave Chimberu an opportunity to observe her assailants. Notably Chimberu is a member of the police who was on night duty. By the nature of her work and her specific duties on the night in question one would expect the police officer to possess better than average observation prowess.

It is no coincidence that the Highway Code robbed from Farai Mashamba (the complainant in the second count) was recovered from applicant's rural home. The Highway Code bore the complainant, Mashamba's name. I note that the two counts are interconnected in time and space. The record reflects that the robbers committed the robberies at the same

time and the scenes of crime are close to each other. The evidence reflects that the complainant in the second count was attracted by screams of help from the first complainant. Further that the gun robbed of the first complainant was used to break the second complainant's window by the same assailants.

It is noteworthy that the record reflects that it was applicant who led to the arrest of his co-accused including accused two whom the court also found guilty at the end of the trial. It is no coincidence that accused two was identified by Charles Mashamba as one of the assailants. Charles Mashamba's testimony was analysed closely by the court *a quo* and the court found that the identification was satisfactory. It is the same accused two who was implicated to the police by applicant.

The witnesses gave the police a prior description of applicant which matched his facial and other physical features. See p 35 where applicant was described as an elderly dark and bearded person who is hugely built. Notably among the accused person's ages as they appear on the charge sheet applicant is the oldest at 57 years whilst the other three are aged 32, 28 and 29 years old respectively.

In the circumstances l find that there are no prospects of success on appeal against conviction. As for sentence, the ground of appeal as couched is based on the conviction as it were. The argument being that applicant should not have been sentenced as he did not commit the offence in the first place. Clearly it is not a tenable ground.

A sentence of 12 years imprisonment is not harsh in the circumstances obtaining in this case which are:-

- The first count was committed against a police officer carrying out State duties at a police station. The officer was disposed of a firearm a state asset clearly dangerous in the hands of the wrong person as will be shown by its use in committing another offence in the second count. This was at a nearby service station against a complainant also carrying out guard duties.
- The offences were carried out in the dead of night or early hours of the morning.
- There was a sustained assault particularly on the first complainant.
- Goods of value and practical use were stolen from second complainant.

The sentence passed is in line with the range of sentences passed in similar matters. In find that the learned Trial Magistrate carefully balanced the circumstances of the crime, the applicant's circumstances and the interests of society in passing sentence.

I find that there are no prospects of success on appeal against the sentence.

Flowing therefrom l also find that the application for leave to prosecute the appeal in person is also unmeritorious and is dismissed.

The application is dismissed.

National Prosecuting Authority, respondent's legal practitioners