

ARTWELL KANDIYERO

Versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 15 SEPTEMBER 2021 & 23 SEPTEMBER 2021

**Application for condonation for late filing of notice of appeal and to prosecute the appeal
in person**

Applicant in person
B. Gundane, for the respondent

DUBE-BANDA J: This is an application for condonation for late filing of notice of appeal against both conviction and sentence, and for leave to prosecute the appeal in person. The brief facts are these: the applicant was charged with the crime of kidnapping as defined in section 93(1) (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 25 June 2020, along Cecil Avenue, Selbourne Park, Bulawayo, applicant forced complainant, a twelve year old into his motor vehicle. While inside the vehicle applicant tied complainant's hands together with shoe laces. He drove his vehicle to the gate of complainant's home, there pushed her out of the vehicle and then drove away.

Applicant appeared before the Regional Court sitting at Tredgold, Bulawayo. He had legal representation throughout the trial. He pleaded not guilty. The prosecution adduced evidence from five witnesses. Applicant testified in his defence. He did not call a witness. At the conclusion of the trial he was convicted and sentenced to 24 months imprisonment of which 10 months were suspended for 5 years on condition of good conduct.

In an application for condonation the court has a discretion, which it must exercise judiciously. The factors that the court must consider are well known. The court is enjoined to consider the three factors of the length of the delay, the explanation for the delay and the prospects of success. See: *Mashave & Ors v Zupco & Anor* 2000 (1) ZLR 478 (SC) at 486 C-D.

This application is opposed and the opposition is based on the lack of the prospects of success on the appeal. In other words it is the State's contention that the appeal is devoid of any prospects of success and on that basis it should fail. I now turn to the jurisdictional factors that applicant must meet.

Length of the delay

In terms of the applicable rules ¹ a person convicted by the magistrate's court who intends to appeal to this court in person and who appeals against both conviction and sentence must, within ten days of the passing of sentence, set out clearly and specifically the grounds of appeal and state that he or she intends to prosecute the appeal in person.

Applicant was sentenced on the 9th December 2020. He was obliged to note an appeal within 10 days calculated from the 10th December 2020. On a simple calculation the delay commenced to run from the 24th December 2020. This application was filed on 22nd March 2021. This resulted in a delay approximating three months. In view of the reasons advanced for the delay which I will highlight below, I am of the view that the delay was not inordinate.

The explanation for the delay

The granting of condonation by a court is an indulgence and not a right obtainable on demand. A party seeking condonation must provide an adequate explanation for the delay. The application must provide a full, detailed, accurate and frank explanation for the delay. The explanation must be a reasonable one and must account for every period of inactivity or inaction commencing after the expiry of the period ordained by the legislature. The explanation must also show that the applicant took available steps in an attempt to avoid or curtail the delay. See: *S v Malumo* (CC 32/2001) [2019] NAHCMD 315 (30 August 2019).

Applicant's explanation for the delay in filing his notice of appeal is, firstly, ignorance of the law. Secondly, the Covid-19 Lockdown measures. Applicant contends that he had no legal representation and as a result he did not know about appeal procedures and the timelines

¹ Rule 26 and 27 of the Supreme Court (Magistrates Court) Criminal Appeals Rules, 1979 (SI 504 of 1979) (Rules).

thereof. It appears his legal practitioners abandoned him after conviction and sentence. He avers that he was later advised by prison authorities about the appeal procedures after the time-line within which to note an appeal, when such time line had already lapsed. Again, he contends that the Covid -19 Lockdown measures and the allied restrictions made it impossible for him to file this application immediately upon been advised that he may make such an application. The state does not challenge the explanation for the delay. I take the view that in the circumstances of this case his explanation for the delay is reasonable.

A finding that the delay was not inordinate and that the explanation for it is reasonable is not dispositive of this matter. However where the delay is short and the reason for it is convincing and satisfactory, the prospects of success need not be so great; it may be enough to have an arguable case. See: *Chatira v The State* HB 88/09. I now turn to consider the prospects of success on appeal.

The prospects of success

In considering the prospects of success, the question is not whether the appeal will succeed. The test in this regard is simply whether there is a reasonable prospect of success in the envisaged appeal against conviction and the resultant sentence. The threshold is much lower. See: *Chatira v The State* HB 88/09. I now proceed to consider the prospects of success on appeal.

The evidence shows that it is not in dispute that complainant was kidnapped. There is evidence that when complainant arrived home she was crying, her hands tied together with a string and she was dirty. This corroborates complainant's version that the kidnapper tied her hands together with a string, and at the gate pushed her out of the vehicle and she fell on a dusty ground. The question turns on the identity of the kidnaper.

The real issue is whether or not the complainant's evidence of identification of the applicant as the kidnapper was reliable. See: *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-C; *S v Dhliwayo & Anor* 1985 (2) ZLR 101 (S) at 107A-D); *S v Mutandi* 1996 (1) ZLR 367 (H). Complainant testified that applicant is the kidnapper. It is common cause that complainant and applicant knew each other prior to the commission of this case. They attend the same church.

On the date of the kidnapping the kidnaper was not wearing a face mask, and complainant noticed that it was applicant. Applicant accepts that complainant knows him. According to the complainant the two were together in the car for a distance of approximately 100 metres. The kidnapping occurred during daytime. The two were seated next to each other in the vehicle. Nothing leaves any room for error in this matter. On the evidence it cannot be said that the identification of the applicant is a result of an error. There is overwhelming evidence that points to the reliability of the identification of the applicant as the kidnapper. See: *S v Shandu* 1990 (1) SACR 80 (N).

Applicant's version is that the case against him is fabricated. This version must be tested and juxtaposed with the totality of the evidence on record. His version is that the whole kidnapping case was concocted by the complainant's mother because he caused her arrest. However the evidence is that the kidnapping occurred on the 25 June 2020. On this date complainant's mother was in police custody. She only came to know of the kidnapping and the resultant police report on the evening of the 25th June 2020, after her release from police custody. It is very unlikely, and indeed a remote possibility that she could have strategized while in police custody. In cross examination of the complainant it was suggested to her that the kidnapping was fabricated by her father to avenge for his wife's arrest. On the evidence on record, applicant's version cannot be said to be reasonable possible true.

As regards sentence, the penalty provision for the crime of kidnapping provides for imprisonment for life or any definite period of imprisonment. Applicant was sentenced to a 24 months' imprisonment of which 10 months was suspended for 5 years on the condition of good conduct. Sentence is a matter for the discretion of the court burdened with the task of imposing it. A court of appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or out of proportion to the seriousness of the offence. On the evidence on record, it cannot be said that the sentence is excessive and induces a sense of shock. To ambush a twelve year old child coming from school, force her into a motor vehicle, tie her hands together, drive with her for about 100 meters, and then push her off the vehicle is aggravating. The trial court exercised its sentencing discretion in terms of the law. I take the view that an appeal court may not interfere with this sentence.

In conclusion, the question in this case is whether the applicant has crossed the low threshold of proof that the law casts on an applicant in an application for condonation. A careful reading of the record of proceedings clearly shows that the trial court's findings cannot be faulted. It seems to me that the conviction is unassailable. The evidence is too overwhelming. The applicant's prospects of success against both conviction and sentence, if any at all, are very slim to permit the grating on this application. This application must fail.

Disposition

In the circumstances the applicant has not made out a case for condonation for the late filing of a notice of appeal and this application is accordingly dismissed.

The Prosecutor General's Office, respondent's legal practitioners