WILFRED MAPFUMO TAKAONA
and
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 14 January 2022

In Chambers

CHIKOWERO J: These are reasons for dismissing this 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.

The applicant was convicted of two counts of robbery of motor vehicles as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as read with s 2 of the Road Traffic Act [*Chapter 13:11*].

The judgment was delivered on 17 September 2019. Munyaradzi Chirimuuta, who was the second accused person at the trial, was similarly convicted. A warrant of arrest was issued against Tinashe Mupezeni, the first accused person, since he defaulted court on the judgment day.

The applicant and Chirimuuta were each sentenced to 7 years imprisonment on each count. Of the total 14 years imprisonment 4 years imprisonment was suspended for 5 years on condition each accused person does not within that period commit an offence involving violence and/or dishonesty for which upon conviction each would be sentenced to a term of imprisonment without the option of a fine.

The application which is the subject of this judgment was filed on 19 January 2020. The degree of non-compliance with the rules stipulating the time frame within which to note an appeal is on the low side. It is in the applicant's favour.

I also give him the benefit of the doubt in respect of his explanation for that delay. He relies on a combination of factors. These are they. He says that he was not aware that the rules allowed him to appeal against both conviction and sentence, subject to obtaining leave to prosecute the appeal in person on application to a judge of this court. The record reflects that the trial court did not advise him of this right after sentencing him. He says he only obtained this knowledge from fellow inmates when he was already serving. I have no reason to disbelieve this. Logistical challenges wrought by the Covid-19 pandemic meant that it took some time before his relatives could visit him, pay for and avail a transcript of the record of proceedings to enable him to file the application. I take judicial notice of the effect of the various practice directions issued pursuant to the national lockdowns on the operations of the courts. I am keenly aware that prison visits were also suspended during part of the period covered by the national lockdowns. Therefore, the reasons tendered for the delay in filing the application are acceptable.

However, the intended appeal against both the conviction and sentence has no prospect of success at all.

The intended grounds of appeal against the conviction read as follows:

> "1. The court *a quo* erred by failing to uphold and apply basic principles of the criminal law that the state must prove its case beyond any reasonable doubt.
>
> 2. The trial court erred by capitalising on the weakness of the unrepresented accused person, and seriousness of the offence, hence seriousness of the offence is not evidence."

The intended ground of appeal against sentence is couched in these terms:

> "1. The sentences imposed on the appellant is too harsh/severe to the extent it induces a general sense of shock, the appellant was a first offender on lifely treatment on 5 chronic diseases, which he buys all the required medication."

I decided to overlook the absence of any prayer in the draft notice of appeal attached to the application. Had I struck the application off the roll of chamber applications, chances were that the highlighted defect would have been attended to and another judge of this court would have been required to plough through the voluminous record of proceedings again to estimate the prospect of success of the appeal. Hence my preference for the robust approach to effectively dispose of the application.

The first ground of appeal against the conviction is invalid. It amounts to saying that the trial court misdirected itself in finding that the respondent had proved its case beyond reasonable doubt[1]. That cannot be a ground of appeal because that is always the standard in every criminal trial. I entertained no doubt that, if I overlooked the glaring invalidity of the first ground of appeal and acceded to the application, the appellate court would still strike out that ground as invalid.

[1] *Kunonga* v *The Church of the Province of Central African* 2017(1) ZLR 181(S)

In any event, there was overwhelming evidence against the applicant. It is true that both complainants, although robbed of their motor vehicles in broad daylight, conceded that they did not identify the applicant. There was nothing peculiar about his person that could have aided his identification as one of the three robbers. Indeed, in respect of the first count, the applicant and the second accused person wore hats which covered their faces. It is true also that the first complainant's motor vehicle was not recovered from the applicant. Instead, the same was found having been abandoned. However, Rapozo, the fourth witness called by the respondent at the trial testified that the applicant and the second accused person removed three new tyres from the stolen vehicle and sold these to the witness. The witness shot a photograph of the vehicle and recited the registration number of the stolen vehicle. The three tyres were recovered by the police and were handed back to the complainant. A record was produced reflecting how the police had handled not only the tyres but other exhibits in respect of count two. There are no proposed grounds of appeal seeking to impugn the trial court's acceptance of the evidence of Rapozo, the complainants and the rest of the state witnesses. My view is that there is no prospect of successfully persuading an appellate court to overturn the trial court's findings that the applicant, acting in common purpose with the second accused, committed the two robberies.

The second count was committed around 11.00am. The vehicle in question had a tracking device. By midday on the same day the police details had recovered the vehicle. The applicant was observed by the police as he sat in the stolen vehicle. He got out. He ignored police orders to stop. He ignored a warning shot. He was shot and injured as he attempted to run away to evade arrest. He implicated his co-accused. He led the police into the supermarket where the latter were arrested. The court relied on the doctrine of recent possession of stolen property to convict him of count two. Some of the milk stolen from the second complainant was still in the vehicle. The applicant and his accomplices had sold some of the milk. The accomplices led the police to those buyers. This led to the recovery of the milk which had been sold. The arresting details, the buyers and the investigating officer all testified. The court ejected the applicant's defence that he was merely hired to drive the first accused around. After all, the applicant was found in possession of the second complainant's recently stolen motor vehicle which still contained some of the milk which the latter had been selling when the offence was committed. The applicant had no reason to go to the extent of leaving the police details with no option but to shoot him in order to arrest him if he was in innocent possession of the second complainant's motor vehicle.

The intended second ground of appeal is misplaced. It does not seek to impugn the correctness of the conviction on both counts. It is liable to being struck out. Even if this were not to happen, the record of proceedings clearly reflects that the applicant and his accomplices' fair trial rights were explained, understood and exercised by all three. Among other things, the purpose of a defence outline, cross-examination and of the defence case were explained and understood not only by the applicant but by those not before me. The applicant carried out a meaningful though sometimes misdirected cross-examination of the State witnesses. He is not a legal practitioner. I am of the view that even inexperienced legal practitioners sometimes conduct cross-examination in the manner that the applicant did.

I see no prospect of the appellate court being shocked by the sentence imposed. It is within the range of sentences meted out for similar matters. My view is that an appellate court will find that the learned magistrate carefully balanced the mitigatory and aggravatory factors before settling for what he considered to be an appropriate sentence. The sentencing discretion reposed in that court. The record also reflects that the mitigation tendered by the applicant did not speak to his health condition at all. The trial court could not have considered a factor not placed before it. These were carefully premeditated and well executed robberies. The manner of their execution, in broad daylight, deeply traumatised the complainants. The one complainant was stabbed with a knife, the other had a sharp object placed on his throat. These are robberies committed in aggravating circumstances.

Although I have found in favour of the applicant on two of the factors usually considered in an application of this nature the absence of prospect of success of the intended appeal means the application must fail. It is not in the interests of the administration of justice to clog the appeals court roll by including a matter whose prospect of success is non-existent.

These, then, are the reasons why, on 14 January 2022, I granted the order that:

"1. The application for condonation for late noting of appeal and extension of time within which to appeal against conviction and sentence be and is dismissed.

2. The application for leave to prosecute the appeal in person be and is dismissed."

The National Prosecuting Authority, respondent's legal practitioners