

DAVID MWANJEYA  
versus  
STATE

HIGH COURT OF ZIMBABWE  
CHATUKUTA, J  
HARARE, 23 October 2017

**Chamber application for condonation for filing of application for leave to appeal**

CHATUKUTA J: On 6 May 2011, the applicant and a co-accused, Simbi, were convicted by the Magistrates Court, Harare, of eight counts of contravening s 137 (1) (a) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Both were sentenced to a total of 24 years imprisonment of which eight years were suspended on condition of future good behavior. The applicant appealed against both conviction and sentence. We dismissed the appeal on 18 November 2015. The applicant has now filed a two in one application firstly seeking condonation for late filing of application for leave to appeal against our decision and secondly, seeking leave to appeal to the Supreme Court.

The full facts giving rise to the conviction by the magistrates court are set out in our judgment in case number HH 903/15. In summary, the facts are that the appellant and Simbi had been incarcerated on remand on allegations of armed robbery. Upon their release, they forged High Court bail orders and unlawfully facilitated the release of eight prisoners who were on remand. They gave the orders to the prisoners' relatives who in turn paid bail at the magistrates' court. The court *a quo* found that there was evidence which proved that the appellant directly participated in the release of two remand prisoners in counts four and five. The court made a finding that although there was no direct evidence implicating the appellant in the other six counts, the forged bail orders in those counts bore a striking resemblance to the ones that were directly attributed to him in counts four and five. The resemblance permitted no other evidence other than that the appellant had participated in the forgery of the orders and ultimately in the unlawful release of the six prisoners. The court therefore applied the similar fact evidence rule. The court found that the applicant's co-accused to have directly facilitated the release of all eight prisoners using the same *modus operandi*. The court also applied the common purpose doctrine in finding the applicant guilty of the six counts.

During the hearing of the appeal before us, the appellant abandoned his appeal against conviction in respect of counts 4 and 5. It remained for us to determine his appeal against six counts. We found the trial magistrate not to have misdirected himself in convicting the applicant and upheld the conviction and sentence.

The factors to be considered in an application for condonation for filing an application out of time are aptly captured in “*Criminal Procedure in Zimbabwe*” by JR Rowland. At 27-19 (b) the author stated:

“The first is the length of the delay. The second is the reason advanced for the delay. The third is the chance of the appeal succeeding. The greater the length of delay and the less satisfactory the reason for the delay, the greater must be the chance of success. Where the delay is short and the reason for it is convincing and satisfactory, the chance of success need not be so great; it may be enough to have an arguable case.”

The applicant has explained that he was not able to file his appeal against our decision because he did not have the resources to engage the services of a legal practitioner. The explanation, as rightly conceded by the State, is reasonable as the applicant has been in prison since his conviction on 6 May 2011, if not earlier. The delay of two years cannot therefore be said to be inordinate under the circumstances. The applicant initially sought leave to appeal. I denied him the leave as the application had been filed out of time and without leave, causing a further delay in filing the present application. He subsequently filed the present application.

The determination of the application for condonation, in my view, rests on the question whether or not the applicant has prospects of success on appeal. The applicant contends that he has prospects of success. The respondent submitted two sets of responses to the application, one dated 29 May 2017 in which opposed the present application and another dated 18 September 2017 in which it conceded to the application. The responses were prepared by different counsels and are clearly contradictory. However, in both responses the State submitted that the applicant does not have prospects of success on appeal. The only basis for the concession in the response of 18 September 2017 is that the applicant should be given an opportunity to argue his case in a higher court.

Firstly, the draft grounds of appeal are worded as if the appeal is against the decision of the trial magistrate and not that of the High Court. Consequently, the issues raised therein are similar to those raised in his heads of argument before us which issue were, in my view, adequately addressed in our judgment under case number HH 903/15.

Secondly, the reason that an applicant should be allowed recourse to a higher court is not adequate justification for allowing condonation. I am of the view that there is a limit to which an applicant should be allowed recourse from one court to the other. Where a matter is hopeless, it would amount to an abuse of the next court to grant condonation solely to allow an applicant access to the higher court. The case must be at least arguable even if the prospects may be slim. But, there should be a glimpse of success on appeal.

It is my view that the applicant does not have any prospects of success on appeal for the same reasons set out in case number HH 903/15. By abandoning his appeal against counts 4 and 5, the applicant admitted being guilty of those counts. He in essence admitted using the two fake court orders resulting in the release of persons who were on remand and not entitled to be released. The two fake orders were similar to the fake orders in the remaining six counts. Simbi was convicted for the same six counts. The applicant's association with Simbi in the release of prisoners under those counts was sufficient to bring him within the ambit of the common purpose rule and to have fraudulently release prisoners from remand prison using fake court orders similar to those he admitted to have used in counts 4 and 5. Our finding that the court a quo did not err in placing reliance on the common purpose doctrine and the similar evidence rule cannot therefore, in my view, be faulted.

The applicant also seeks to appeal against sentence. The applicant did not address the court on sentence. He had engaged counsel when he was midstream addressing us on conviction. He therefore was represented when it came to addressing us on sentence. We concluded in our judgment that he had abandoned his appeal against sentence. It is not clear what his appeal is against our decision. His draft grounds of appeal against sentence are, as in the case of the draft grounds against conviction are worded as if he is appealing against the decision of the trial magistrate and not our decision. It is therefore my view that the applicant does not have prospects of success on appeal.

Having concluded that the applicant does not have prospects of success on appeal against both conviction and sentence, the application for leave to appeal to the Supreme Court is of no consequence.

It is accordingly ordered that the application for condonation for late filing of application for leave to appeal is accordingly dismissed.