

COSMAS MACHINGAUTA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 22 February 2016 & 1 June 2016

### **Criminal Trial**

MATANDA-MOYO J (IN CHAMBERS): This is an application for condonation for late noting of appeal. The brief facts are that the applicant was arraigned before the magistrates court facing six separate charges of theft of car parts as defined in s 33 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9 : 23*]. He pleaded guilty to all six charges and was sentenced to 48 months of which 6 months was suspended on condition that accused did not within the next 5 years commit a similar offence. 13 months were suspended on condition of restitution. It is against the above conviction and sentence that the accused intends appealing against.

Although the covering application indicates the applicant intends appealing against both conviction and sentence, a reading of the body of the application indicates, applicant intends appealing against sentence only. I shall therefore deal with condonation for late noting of sentence only.

The applicant submitted that the delay in noting an appeal was caused by:

- 1) his ignorance of appeal procedures as the trial court had neglected to inform him of his appeal rights in terms of the law.
- 2) late access to the record of proceedings considering the distance between the applicant's confinement prison and the court *a quo*.

He also submitted that his prospects of success on appeal are good. He submitted that he court *a quo*'s sentence is likely to be altered by the appeal court as it failed to consider that he

was a first offender. The applicant also pleaded guilty to the offence. The sentence imposed, the applicant argued, is not commensurate with modern day punishing trends. The applicant argued that the sentence is harsh and shocking in the circumstances.

In considering an application for condonation, the court will look at the following factors;

- (1) the degree of non-compliance
- (2) the explanation for it
- (3) the importance of the case
- (4) the prospects of success and others see *NSSA v Denford Chipunza* SC 116-04, *Bishi v Secretary for Education* 1989 (2) ZLR 242.

The applicant herein was sentenced on 2 November 2015. On 11 January 2016 he filed this application. The applicant was then out of time by just over 30 days. The explanation given for the delay in the absence of evidence to the contrary is reasonable.

Let me deal with the issue of the applicant's prospects of success on appeal. The trial magistrate sentenced the applicant to 48 months for the six counts of theft he was facing. The trial magistrate considered that the applicant was, a family man and breadwinner. He was self-employed and that some of the property was recovered. He pleaded guilty to the offences. On aggravation the trial magistrate found that the thefts were premeditated. The applicant stole wheel nuts and wheel covers from motorists. The removal of wheel nuts from those vehicles posed a danger to the users of such cars as wheels would be loosely secured. That increased the moral blameworthiness of the accused. Theft from motor vehicle is a serious offence. The applicant was in the business of selling those stolen items.

Sentences falls under the purview of "discretion". It is trite that, an appeal court would not lightly interfere with the discretion of the trial court unless the sentence is initiated by irregularities or misdirection's so severe that no reasonable court, addressing its mind to the circumstances of the court would impose such a sentence. The sentence must induce a sense of shock. In *S v de Jager & Anor* 1965 (2) S.A 616 at 628 – 9 Holmes JA said:

"It would not appear to be sufficiently realised that a court of appeal does not have a general discretion to a meliorate the sentences of the trial courts. The matter is governed by principle. It is the trial court, which had the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say, unless the sentence is initiated by irregularly or misdirection or is so severe that no reasonable court could have imposed it in this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say, it there is a sticking disparity between the sentence passed and that which the court of appeal would

have imposed. It should therefore be recognized that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.”

The appeal court is not vested with powers to simply substitute. Its own penalty. The mere fact that an appeal court would have given a different penalty is not in itself a justification for interfering with the discretion of the sentencing court. As long as the penalty of the sentencing court complies with the guiding sentencing principles, even if it is severe than the one that the appeal court could have given, cannot be interfered with. A sentence can only be interfered with if it is disturbingly excessive.

In *S v Masvosva* HB 83/90 the court agreed that generally first offender should be kept out of prison where there is a single count and where only one crime is committed. The type or gravity of the offence is also a consideration to be considered. If a first offender commits a serious offence, he cannot expect to be treated leniently on the basis that he is a first offender.

In the matter *in casu* the applicant was convicted of six counts of theft. The thefts were planned. The applicant opened a business to sell these stolen items. The trial magistrate also considered that by tempering with the securing of motorists’ wheels the accused posed a danger to society. I do not see any appeal court interfering with the sentence imposed.

I am of the view that the applicant’s prospects of success are not good. Even though the sentence may be on the harsh side, it is highly unlikely the appeal court would find it as inducing a sense of shock to warrant interference.

Accordingly I am unable to grant the application for condonation. I do not intend to deal with leave to prosecute in person after dismissing condonation. In the result the application for condonation is hereby dismissed.