

MWANZA v THE PEOPLE (1967) ZR 138 (HC)

HIGH COURT

PICKETT J

29th SEPTEMBER 1967

Flynote and Headnote

[1] Criminal procedure - Appeal out of time, application for - Conditions for granting.

An application for an extension of time within which to appeal under section 295 of the Criminal Procedure Code will only be granted, where the delay is considerable, if the applicant can advance reasons "sufficient in themselves" for the delay or if there are such merits in the appeal that it is likely to succeed.

Cases cited:

- (1) *Cullum v R* (1942) 28 Cr. App. R 150.
- (2) *Rigby v R* (1923) 17 Cr. App. R 111.
- (3) *Lesser v R* (1939) 27 Cr. App. R 69.
- (4) *March v R* (1935) 25 Cr. App. R 49.

Statutes construed:

- (1) *Criminal Procedure Code* (1965, Cap. 7), s. 295.
- (2) *Criminal Appeal Act*, 1907 (England, 7 Edw. 7, C. 23), S. 7 (1).

Shamwana, for the appellant

Shoniwa, State Advocate, for the respondent.

Judgment

Pickett J: This applicant was convicted by the resident magistrate, Lusaka, on the 11th April, 1967, upon his own fully unequivocal plea of guilty, upon a charge of rape contrary to section 113 of the Penal Code, and he was committed by the magistrate to the High Court for sentence where, on the 23rd June, 1967, he was sentenced by me to six years i.h.l. He now applies for an extension of time within which to appeal against conviction, and Mr Shamwana has appeared and argued the matter on his behalf.

The application for an extension of time within which to appeal is dated 27th July, 1967 that is to say, ninety - three days out of time. When he appeared before me on the 23rd June, 1967, for sentence, the applicant made no mention of the fact that he desired to appeal against conviction and of course this was probably due to the fact that he desired to hear what the sentence was before he thought of appealing.

[1] Applications for leave to appeal out of time involve consideration of section 295 of the Criminal Procedure Code, which provides that every appeal shall be entered within fourteen days of the order or sentence appealed against, unless the appellate court shall see fit to extend the time. These provisions must be regarded as of considerable importance because if they were not, they would not have been enacted as they are. They can only be relaxed for most substantial reasons.

It has already been accepted by this court that in matters such as this, although the wording of section 295 is not the same as that of section 7 (1) of the Criminal Appeal Act, 1907, of England, the High Court of Zambia will exercise its discretion on the same principles as are followed by the courts in England. These principles are well established. Examples of them may be seen in the cases of *Cullum v R* [1] and *Rigby v R* [2].

Although there may be a relaxing of these standards when the delay is a minor one, they must be strictly adhered to in the case of a substantial delay, of the order, for example, of a month or so. Basically, a convicted person who has failed to appeal within the time stipulated under section 295 should be recorded as having lost his right to appeal (see the appeal of *Lesser v R* [3] per Humphrey, J, at page 7). In the appeal of *March and Others v R* [4], at pages 52 and 53, Avory, J, giving a judgment of the court in an application to it for an extension of time in which to appeal referred to it being the rule and practice in

the Court of Criminal Appeal in England "not to grant any considerable extensions of time unless we are satisfied upon the application that there are such merits that the appeal would probably succeed".

In this country, we look first to the reasons adduced by the applicant for failing to appeal within the proper time. If they are sufficient in themselves to justify the grant of the application, then of course it will be granted without further ado. The courts in Zambia have not been slow to help an applicant when the delay has been no fault of his, as for example, when the prisoners have been moved about from one prison to another and the papers concerned lost or mislaid through no fault of the prisoners, but if the grounds adduced are not sufficient in themselves, the court will then look at the trial record and the grounds of appeal in the notice of appeal, which the applicant proposes to put forward, to see whether by themselves they would justify the grant of the application on the basis of the principles before described.

In this present case, the reasons for the delay are stated:

"As I had no legal advisor at the time of the proceedings in this prosecution and as I am now in the Central Prison, Lusaka, it was not easy for me to arrange with solicitors to help me in the conduct of the appeal."

I am fully satisfied that these are no reasons at all for granting the extension of time asked for. Moreover, I have considered the record of the trial, together with the grounds of appeal which the appellant would have set out on an appeal if he had been allowed to do so. I shall merely observe that at his trial before the learned magistrate, the appellant fully and completely unequivocally pleaded guilty to the charge and, in my opinion, such an appeal as he has proposed would not have had the remotest chance of succeeding. Accordingly, this application is hereby dismissed.

Application dismissed.