NOAH NDLOVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 14 September 2023

Application for condonation for late noting of an appeal

Applicant in person

MUTEVEDZI J: In law, looking into the rear view mirror is as critical as looking ahead. The two actions share eerie similarities. The applicant in this case neglected to look ahead. He was convicted on his own plea of guilty to contravening s 60A (3) (a) and (b) of the Electricity Act [*Chapter 13:19*] i.e. Tampers, Cuts, Damages, Destroys or Interferes with any Apparatus for Generating, Transmitting, Distributing or Supplying Electricity. The allegations in count 1 were that on 31 August 2021 he proceeded to a farm called Rathga in the district of Banket where he cut and vandalized copper wires that transmitted electricity. The wires were about 30 metres in length. In count 2 he was alleged to have in a similar manner cut and vandalized copper wires measuring 1300 metres at Hyton farm. He was apprehended whilst he was burning the copper wires to remove the plastic coating. As already said he was convicted on both these charges on his own plea of guilty. During the recording of his plea the trial magistrate explained to the applicant, each of the essential elements of the offences. At one time, in count 1, the magistrate indicated his desire to alter the plea from guilty to not guilty after the applicant had indicated that he had picked the cables in question after he found them already cut. The applicant then protested and turned around to say indeed he had cut them from the pump house. With that the trial court proceeded to record the plea of guilty. There were no such complications in count 2. The section of the statute which the applicant was convicted of carries a minimum mandatory sentence of 10 years imprisonment where a court finds that no special circumstances existed to allow it to depart therefrom. In the instant case, the trial court, after a proper inquiry ruled that special circumstances did not exist in both counts. On 8 September 2021, it then slapped the applicant with 10 years' imprisonment on each count. The

applicant was left to serve an effective 20 years imprisonment. Subsequently the applicant did not appeal against the magistrate's decisions and only sought to do so some seven months later. He was out of time and applied for condonation for late noting of the appeal and extension of time within which to appeal. He intended to appeal against both his conviction and sentence. I heard the application on 15 June 2022. It was essentially not opposed because despite having been served with the application, the state had not bothered to file a response. Nonetheless, I dismissed the application. Consistent with his dilatoriness, it was more than a year later and after he had filed another abortive application for condonation which was dismissed by my brother FOROMA J on the basis that the matter was *res judicata* that the applicant wrote to the registrar of this court requesting my reasons for dismissing the initial application. I deal with those reasons below.

The law on condonation

The law relating to applications for condonation generally and condonation for late filing of appeals appears trite. I can do no better than relate to the findings of MAKONI JA in the case of *Prosecutor General* v *Job Sikhala* SC 116/20. At p 5 of the cyclostyled judgment where she held that:

> "It is settled law that condonation is an indulgence which may be granted at the discretion of the court and is not a right obtainable on demand. See *Friendship v Cargo Carriers Limited &* Anor SC 1/13. In exercising that discretion, the court is enjoined to look at several factors cumulatively. These include the extent of the delay and the reasonableness of the explanation for the delay or non-compliance, the prospects of success on appeal, the possible prejudice to the other party, the need for finality in litigation, the importance of the case and avoidance of unnecessary delays in the administration of justice. (See *Read v Gardiner & Anor* SC 70/19). However, there are several authorities to the effect that condonation may be granted in circumstances where, although the explanation tendered is unsatisfactory, the prospects of success on appeal are good".

I read the above requirements to mean that much as a court must endeavor to consider them collectively, the question whether to condone or not to condone a litigant's infraction is a discretion of the court. That means the court has the freedom to either accept or deny the indulgence sought by the applicant. Obviously whatever decision is taken must be made judiciously. Making a judicious decision simply means that the court must consider the principles of justice, fairness and the requirements which must be established for the grant of condonation. ZIYAMBI JA in *Zimslate Quartzite (Pvt) Ltd & Ors* v *Central African Building Society* SC 34/17 emphasised this point at p 7 in the following manner:

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed."

In *S* v *Tichawangana* HB 126/21 MAKONESE J equally stressed the point that an application for condonation must never be viewed as a formality. He noted with concern an upsurge in frivolous applications for condonation which smacked of an abuse of court process and remarked that only those applications which were deserving would be granted. His Lordship must have been oblivious of an earlier decision of the Supreme Court In *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290 C-D in which it decried the same dubious mushrooming of meritless applications for condonation which the courts had to guard against when it held that:

> "It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute."

The factors which a court must take into account include the length of the period between the time within which the applicant must have acted and the time he/she sought the condonation; the commonsensical of his/her justification of the delay; the prospects of success which the appeal carries among others. The factors which however appear more critical than others are the reasonableness of the explanation for the delay and the applicant's prospects of success in the appeal. The equation is that an applicant may succeed where he advances a less reasonable explanation which is supplemented by high prospects of success at the hearing of the appeal. Conversely a reasonable explanation for the delay may equally compensate for poor prospects of success on appeal. It must undoubtedly follow that an unconvincing explanation for the delay accompanied by poor prospects of success is a disastrous combination for an applicant.

Application of the law to the facts

The delay between the time within which the applicant must have filed his appeal and the time he sought condonation was seven months. His explanation for the delay was that he

was ignorant that he could appeal against the trial court's decision; that he has a rural background and that it took long for him to secure the record of proceedings from the court of origin.

I note here, with concerns similar to those raised by both the Supreme Court in *Ndebele* v *Ncube* (*supra*) and by this court in *S* v *Tichawangana* (*supra*) that the card of being ignorant of the law has lately been waved by many self-representing litigants who seek condonation. Whilst I do not wish to summarily dismiss that allegation in this application what I need to emphasize is that our courts still observe the age old and reverred adage that ignorance of the law is not a defence. If it were, then all unrepresented litigants would be entitled to almost all requests for condonation on that basis. In this application, the situation became worse because the applicant sought to portray himself as a helpless and illiterate individual yet he filed this motion in near perfect English complete with citations of case authorities and references to key sections of the applicable statutes. For instance, he referred this court to the cases of *S* v *Sharika* HB 37/03; *William Ndlovu* v *The State* SC 223/91; *Chaerera* v *The State* 1982 ZLR 226 SC; *S* v *Sakatare* HH 105/13 among many others. He made reference to the Criminal Procedure and Evidence Act and the Criminal Law (Codification and Reform) Act. I am not insinuating that self-representing litigants are not allowed to cite case authorities or to refer to statutes. The point is simply that a litigant who does that cannot turn around and claim to be illiterate and clueless regarding the law. There is no indication in the papers that the applicant got assistance from any quarter. The application is therefore deemed to be from his own industry. Once that conclusion is reached the inescapable result is the holding that the explanation for the delay is a disingenuous attempt to hoodwink the court. There is nothing to support the allegation that the applicant sought and could not obtain the record of proceedings from the court a quo. It was his responsibility to attach correspondences written to the clerk of the court which convicted him requesting the transcription of the record of proceedings. As already said, there is none. I am constrained to find as I hereby do, that the explanation is a concocted story which for strange reasons appears to have been lionized by inmates who have neglected appealing against their convictions and sentences for inordinately long periods. It seems that the applicant in this case had completely lost interest in appealing against his convictions and had resigned to serving the sentences imposed until someone or something pushed him to think about challenging them so belatedly. As a result, I held that the applicant's explanation of the delay was wholly unreasonable and unbelievable.

In relation to the applicant's prospects of success on appeal a number of interesting aspects arose but in the end what was clear was that the appeal was not only not arguable but clearly hopeless. In relation to his conviction, the applicant's grounds of appeal were stated thus:

1. The court *a quo* erred by failing to note that the plea proceedings were not being compliant with s 27 (2) (b) of the Criminal procedure and Evidence Act [*Chapter 9;07*]
2. The court *a quo* erred by failing to consider that the applicant is a first offender it is trite that, as much as possible first offenders should be kept out of prison. See *S* v *Sharika* HB 37/03
3. The court *a quo* on all counts failed to execute a judicial obligation. That is explaining the technical term 'special circumstances' to an unrepresented accused. The law demands the court to give further explanation
4. The court *a quo* erred when it did not consider that the applicant was a lay person and was supposed to be cautioned with the rules of sentence.

Circuitous as the grounds appeared to be, the court's view was that there were only two of them namely:

a. That by failing to explain the charge to him, the court *a quo* did not record the applicant's pleas of guilty in accordance with the requirements of s 27 (2) (b) of the CP & E Act. (I understood s 27 (2) (b) to be a reference to s 271(2) (b) of the same act) and
b. That the court did not explain the concept of special circumstances to the applicant before convicting him

Paraphrased, the essence of s 271 (2) (b) is that the court must explain the charge and its essential elements to the accused. Thereafter, it must inquire from the accused and whether his plea of guilty is an admission of the charge and all its essential elements. I must add that s 271(3) of the same Act requires that:

> "(3) Where a magistrate proceeds in terms of paragraph (*b*) of subsection (2)—
> (a) the explanation of the charge and the essential elements of the offence; and
> (*b*) any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and
> (c) the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and
> (*d*) any statement made to the court by the accused in connection with the offence to which he has pleaded guilty;
> shall be recorded".

In the case of *Febbie Mutokodzi and Others* v *the State* HH 299/21, CHITAPI J elaborately explained the mechanics of the procedure envisaged by ss 271, 272 and 273 of the CP &E Act. He berated magistrates for failing to heed the guidance given by this court in many cases and that such failure constituted a threat to the administration of justice. There is no gainsaying the correctness of the views that his LORDSHIP expressed in that decision. I entirely agree with them. Any failure to observe the stated procedure constitutes a gross

irregularity warranting a vitiation of the proceedings. What I however find disturbing is the attempt by litigants such as the applicant who seek to stretch the decision in *Febbie Mutokodzi* to mean that the magistrate is required to define to the offender the crime with which he/she is charged before the charge is formally read to him/her. The argument, which unfortunately has gained a lot of traction has created two divergent schools of thought. One doctrine advocates for an explanation of the charge to an accused the moment he sets foot in the dock. It is anchored on the contention that an accused must know what charge he is facing before pleading to it. The other school supposes that the explanation of the charge envisaged by s 271(2) (b) is an account intended to ensure that the accused genuinely admits committing the offence and must necessarily flow from his/her plea of guilty. As I will endeavour to illustrate below, my view is that the latter argument is only logical and more convincing.

S 271(2) (b) of the Code was born out of s 255 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 59*]. It was a section *in pari materia* with the current Code. As a result it is safe to categorically state that the procedure of recording a plea of guilty has been the same since pre-independence times. For instance, in *S* v *Collet* (2) 1978 (G.D.) RLR 288 at p. 291 cited with approval by the Supreme Court in *S* v *Tshuma* 1979 RLR 356 the question arose as to whether the magistrate had explained the charge and its essential elements to the accused. The court held that:

> "It was of vital importance in this case to make a finding as to the specific instrument used by the accused, as the nature of the instrument would have a vital bearing on what the intention of the accused was when he inflicted these injuries. It was also essential… for the magistrate to question the accused closely and make certain, he really intended when he delivered the blows, to do grievous bodily harm and not merely to commit a common assault."

In *Ahmed Mahamed Lambat* v *The state* SC 102/83 the issue on appeal was also whether the trial magistrate had failed to meet the requirements prescribed under s 255(2) (b) in that he had inadequately explained to the unrepresented accused the charge and its essential elements. Although the court did not specifically state how the charge must have been explained the appeal succeeded on the ratio that in purporting to explain the essential elements the magistrate had neglected to ascertain from the appellant whether at the time the goods in question came into his possession they had been cleared by the department of customs or accounted for in terms of the law. The only logical inference which flows from that decision is that the Supreme Court conflated the explanation of a charge and the crime's essential elements. Even more critically, in all the above authorities the courts did not hold that it was a requirement for the

magistrate to define the charge as a separate endeavour from explaining the essential elements of the offence. What sticks out is the requirement for the magistrate to thoroughly question the accused in order to ascertain the accused's understanding of the charge and whether his plea of guilty is a genuine admission of the charge and its essential elements. The sentiments expressed in *S* v *Alberto* HH 128/86 also suggest that the central factor remains the trial court's explanation of the crime's essential elements to an accused. An examination of these authorities supports the view that the superior courts have in the past vitiated convictions mainly on the grounds that magistrates had not adequately complied with the requirement to explain the essential elements of the offence to unrepresented accused persons and not a separate explanation of the charge. That in turn resulted in a failure by the judicial officers to satisfy themselves that the self-representing accused would have thoroughly understood the charge and admitted all its essential elements.

If however there was any debate to the interpretation suggested above, a closer reading of s 271(2) (b) itself puts paid to any lingering doubt on what the lawmaker intended to achieve. Subsection (2) of the section states as follows:

> "(2) Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—
> (*a*) the court may, if it is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or of a fine exceeding level three, convict the accused…
> or deal with the accused otherwise in accordance with the law;
> [Paragraph amended by section 8 of Act 8 of 1997.]
> (*b*) the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (*a*) or if requested thereto by the prosecutor—
> (i) *explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based*; "(italics is for emphasis)

My understanding of the provision and the workings of that age-old procedure therefore is that the requirement for the magistrate to explain the charge and its essential elements is triggered AFTER the accused has pleaded guilty to the charge. The statement *"where a person arraigned before a magistrate's court on any charge pleads guilty to the offence"* is not synonymous with *"before a person arraigned before a magistrate's court on any charge pleads guilty to the offence."* A court cannot pretend to invoke the procedure before the accused has pleaded guilty. An explanation of the charge to the accused before he has pleaded cannot therefore be an account made in fulfilment of the requirements of s 271(2) (b). For the avoidance of doubt, it is wrong for a magistrate to purport to explain a charge to which the

accused hasn't yet pleaded guilty unless that explanation is being done for some purpose other than compliance with s 271(2)(b). The procedure in that provision has no use before the accused has pleaded guilty or in instances where an accused tenders a plea other than that of guilty. The explanation referred to in s 271(2) (b) is one that follows after an accused has already pleaded guilty. Once that is settled, the next question is how the explanation must be made. To get to the bottom of that issue the starting point should be what we understand by the word explanation. I understand it to be different from a definition. In the case of *S* v *Yeukai Graham Mutero* HH 173/23 I had occasion to deal with what an explanation is when I remarked that:

> "… The distinction between a definition and an explanation is that a definition is a statement expressing the essential nature of something whereas an explanation is an account intended to make something clearer." (Underlining is mine for emphasis).

With the above in mind, I can neither see nor imagine any other way by which a magistrate can explain the charge if he/she does not resort to the modus of particularising it into its constituent elements and explaining each. As already said I find it not only ridiculous but also inappropriate for a magistrate to get hold of a charge sheet and to parrot the allegations therein in the guise of explaining the charge to the accused. The trend which has developed as evidenced by most records of proceedings submitted for review is that the magistrate adopts the textbook definition of the crime charged and repeats it to the accused before he/she pleads. The magistrate then asks the accused if they have understood the charge. More often than not the accused's answer is in the affirmative. Once that happens he/she is then asked to plead. Such route has resulted in the reinvention of the guilty plea procedure. The requirement for the magistrate to explain the charge to the accused must be approached pragmatically rather than formalistically. The formalistic approach is not only problematic but is the source of the logistical nightmares which magistrates and everyone concerned are grappling with daily. In the end it becomes a savage desecration of the tried and tested method advocated for by the Supreme Court and this court for over decades. An explanation of the essential elements of any crime amounts to an explanation of the charge as envisaged by s 271(2) (b) of the Code. The explanation of the charge is therefore to be found in the` rolled up approach in which each essential element of the charge is explained by asking from the accused questions which directly speak to that element. It certainly does not mean or require the court to define the offence to an accused and thereafter to explain each essential element. If it did it would obviously result in unnecessary and offending repetition of the same issues. Putting questions

to an accused is not the only method of explaining a charge and its essential elements. There could be others but there is little doubt if any that it is effective and greatly assists an unrepresented accused to understand the constituent parts of the charge he/she faces. For instance s 271(4) of the Code is a provision which can be employed to aid in the explanation of a charge yet it so underutilised in our procedure that one will be forgiven to think that it remains undiscovered for many who practise criminal law. It provides that in the midst of recording a guilty plea in terms of s 271:

> "4) The court may—
> (a) call upon the prosecutor to present evidence on any aspect of the charge;

It is therefore permissible for a magistrate to direct a prosecutor to call evidence on a particular aspect of the charge to aid the court in its explanation of the charge. As already said, in this case, the explanation of the essential elements commenced with the magistrate advising the accused that the charge he was facing was that of unlawfully interfering with the supply of electricity by cutting or damaging copper wires which belonged to ZESA. The applicant then indicated that he understood the charge. He was asked to plead to the charge which he did. He pleaded guilty. Thereafter the court inquired from the prosecutor what it is exactly which the state was alleging applicant had done. The court wanted to know whether or not the applicant had just picked a loose copper cable. The prosecutor said it was cut off from a pump house but the accused attempted to say it had already been cut. The magistrate advised the applicant that because of that discord the court was prepared to alter his plea to one of not guilty. The applicant protested against the alteration and said he admitted that he had cut the cable from the pump house. If that argument had persisted it would have been the perfect example of how s 271(4) could be best utilised to explain a charge and its essential elements. The court was at liberty to direct the prosecutor to call evidence in relation to that issue only. Luckily, the impasse did not persist. The applicant was further asked if he accepted that by cutting the cable from the pump house, he was interfering with the smooth transmission of electricity at the farm and the surrounding areas. He once again admitted that and further that he had no lawful excuse for doing so among other admissions. The court proceeded to ask him once more whether his plea of guilty was an unequivocal admission of the charge, the facts which grounded that charge and its essential elements. The applicant confirmed that it was. Principally similar exchanges were undertaken in count two. Given that, I find it preposterous and distasteful that the applicant expected the magistrate to do anything more. His expectations were impractical and amount to clutching at straws. If such were to be condoned, they could only bring a stench so

ruinous that it could easily nauseate the entire criminal justice system. An accused who unequivocally pleads guilty to his wrong doing like the applicant did cannot be allowed, in his futile endeavour to overturn an unassailable conviction, to lean on a technical requirement which is clearly not available to him.

It was against the above background that I had no apprehension to find that the applicant's major ground of appeal against his conviction was doomed to fail. His second ground, that the court did not explain special circumstances to him was equally hopeless. Whilst this court has said it is ideal when dealing with crimes punishable by minimum mandatory sentences to explain to an accused right at the onset of the trial, that the offence with which he/she is charged carries a minimum mandatory sentence unless he/she is able to prove that there are special circumstances warranting the court to depart from it, the fact remains that it is not a legal requirement to do so. In fact in the case of *S* v *PM (A juvenile)* HMT 6/23 MUNGWARI J remarked that the practice of explaining special circumstances at the beginning of a trial is especially helpful in fully contested trials. There is not much assistance that an accused can derive from it in the truncated procedure provided under s 271(2) (b) of the Code. The peremptory obligation to explain special circumstances only arises after conviction and before sentence. To make matters worse for the applicant, the magistrate in this case warned him of that aspect before recording the plea of guilty. The rest of the applicant's protestations such as that the court did not consider that he was a first offender and a lay person who must be kept out of prison have nothing to do with his conviction and are clearly ill-informed.

Appeal against sentence

The applicant's grounds of appeal against sentence were lengthy. The majority of them are completely misplaced and ill-advised. Those which appear to matter are stated in the following manner:

a. "The sentences imposed were totally abnormally according to the age of the applicant they did not give an applicant chance to reflect and learn from his mistakes. (sic)
b. The court *a quo* was supposed to treat all two counts as one since there were no touchable evidence produced by the applicant only that the crime he committed was already gazetted its term and the hands of the court were tied to flex the sentence as it mentioned. (sic)
c. The court *a quo* erred to make a finding that no special circumstances were there yet no inquest was done to rule out special circumstances as expected at law
d. The court *a quo* erred when it rejected the special circumstances of applicant as being a breadwinner to a poor family and also considering the age of the applicant he is still a young man who deserved to be warned, he has a small child who still needs more care from both

> parents. Applicant also mentioned that he is a breadwinner to an old granny but the court a quo unfortunately did not consider all the strong facts and acquitted the applicant". (sic)

Clearly, what comes out of the above labyrinth are the allegations that the trial court erred by holding that the applicant's explanation did not amount to special circumstances and that it should have treated both counts as one for sentence. Tellingly, the applicant does not allege that the court did not explain special circumstances to him. He could not possibly make that allegation because the record of proceedings shows that the court did. That he went to town about it vindicates my acceptance that he understood the court's explanation in that regard. His only contention is that what he submitted to the court that he is the breadwinner of a very young and poor family; that he is a young offender who looks after his grandmother and that the court must have looked more at rehabilitating him than simply punishing him indeed amounted to special circumstances. Unfortunately he was mistaken.

The assessment of whether or not special circumstances exist in a particular case is a function which is left to the opinion of the trial court. As long as there is no misdirection a challenge that another court may have seen issues differently is insufficient. This was put beyond doubt in the case of *S* v *Stouyannides* 1984(1) ZLR 144 at 152 C-D, where GUBBAY JA, (as he then was) held that:

> "Where a finding on whether special reasons exist or not is left by the lawmaker to the opinion of the trial court, in the absence of a misdirection on the facts upon which that opinion is based, the power of an appeal court to overrule it is curtailed. It will only interfere with the opinion of the trial court if satisfied that the facts do not reasonably justify it. It will not interfere merely because it might have formed a different opinion on the facts."

Put differently, in the appeal, the applicant will be required to show that the facts which he stated as described earlier reasonably justified a finding of the presence of special circumstances by the trial court. The term special circumstances is one that has drawn a huge amount of debate in this jurisdiction. Resultantly, the courts have interpreted it in several authorities. What is made clear by those authorities is that ordinary mitigation does not amount to special circumstances and that a trial court is at liberty to take together a number of factors which could cumulatively amount to special circumstances. An inquiry of special circumstances necessarily entails an examination to see if the facts of the case show that the accused's moral blameworthiness is lessened by reasons which are exceptional in both their sum and substance and in their gradation so as to justify a departure from the prescribed minimum mandatory penalty. Perhaps KUDYA J (Now JA)'s dictum in the case of *S* v *Telecel*

Zimbabwe (Pvt) (Ltd) 2006(1) ZLR 467 at p 474 H - 475 A-B explained the concept in the most comprehensible terms. He graphically put it in the following manner:

> "It is apparent from decided cases therefore that the question of special reasons is dependent on the particular facts of the matter before the court. These factors must be abnormal, unusual; extraordinary in the sense approximating to a choice between life and death, that is, that the accused person is left with no choice but to break the law in order to save his or her life or the life of some other person."

As earlier stated and as typified by the authorities cited ordinary and mundane mitigating factors such as being the breadwinner of a very young and poor family or being a young offender who looks after his grandmother only serve to assuage the severity of a penalty in ordinary situations where the court retains its unbridled discretion in the imposition of a penalty. They do not get anywhere near special circumstances. For completeness, it must be stated that the applicant's submissions which he wishes to bank on during the hearing of his mooted appeal remain uninteresting. Even when put together they cannot amount to special circumstances. As a result, the applicant's prospects of success on appeal against the sentence approximate nothing.

The applicant's second draft ground of appeal challenges the trial magistrate's failure to combine the two counts he was convicted of as one for purposes of sentence. Once more what he advocates for is impermissible. In the case of *S* v *Huni and Others* 2009 (2) ZLR 432 this court held that in cases where an accused is convicted of more than one count of an offence which carries a minimum mandatory sentence he/she must be sentenced to the minimum mandatory sentence on each count. Combining the counts as one for purposes of sentence is illegal. It would only serve to defeat the clear intention of parliament that the minimum mandatory sentence ought to apply to each count.

Disposition

From the above synopsis, the applicant fell far short of satisfying the requirements for the grant of condonation. His explanation for the inordinate failure to comply with the prescribed timelines within which to note an appeal against conviction and sentence is unworthy of belief. It is unreasonable. His prospects of success on appeal are hopeless at best and non-existent at worst. Given that toxic combination, I had no choice but to order as I did that the application be dismissed.