GOLDEN SANDI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20 July and 15 September 2021

Application for condonation of late noting of appeal and extension of time to note appeal

K H Kunaka, for the defendant

CHITAPI J: The applicant applies for condonation of late noting of appeal and extension of time to note the appeal if condonation be granted. The background to the application is set out below.

The applicant was charged with the offence of Murder as defined in s 47(1)(a) of the Criminal Law Codification & Reform Act, [*Chapter 9:23*]. He was arraigned for trial before MUSAKWA J (as then he was) sitting with assessors at Mutare on High Court circuit on 19 February 2018. On 23 February 2018, the applicant was convicted of Murder as charged. He was sentenced to 25 years imprisonment.

The brief facts forming the indictment for Murder were that on 14 August 2017 at Nyadombo homestead, Sanyamaropa Village, Chief Saunyama Nyanga, the applicant and an accomplice namely Nicholas Dombo allegedly assaulted the deceased Tendai Nyadombo by slapping him on the face, pushed him to the ground causing the deceased to hit his head against a stone and hit the deceased with a brick on the head. It was further alleged that they used bricks, sticks and a wooden plank to assault the deceased. The deceased suffered injuries from which he died two days after the assault.

The accused pleaded not guilty to the indictment. In his defence outline, he outlined that the deceased and him were brothers. It was accepted by the trial court that the applicant and the deceased were sired by the same father but their mothers were different. The applicant in his defence outline averred that he did not participate in any assault on the deceased and that he passed through the deceased's homestead and found him lying on the

ground injured. He averred that from his observations at the scene he formed the impression that the deceased could have been involved in "a fight of some sort."

The facts of the matter were not seriously challenged by the applicant. Some of the State witness evidence was admitted as set out in the summary of their evidence. The admissions were made in terms of s 314 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. Out of twelve witnesses lined up by the State, the evidence of eight witnesses was admitted. The admitted evidence related to events *ex post facto* the alleged assault on the deceased. The evidence concerned the attendance at the scene by police, indications made by the applicant at the scene, how the deceased was ferried to hospital, his management at the hospital, measuring and weighing of one of the exhibits namely, a plank, the charging of the applicant with Murder and the post examination of the deceased's body and compilation of the post mortem report.

Of the admitted evidence, the post mortem report was key as corroborative of death being due to an assault or application of physical force on the deceased. The post-mortem report which was produced as Exhibit 5 showed that the deceased had a peri-orbital bruise, blood from the nostrils, subconjuctival haemorrhage, laceration of scalp, fractured right sixth rib and grooves and bruises on the back and trunk. The cause of death was recorded as severe head injury.

The applicant's acceptance of the post-mortem report without qualification narrowed the issue to one of identification of the assailant(s) who attacked the deceased and caused the injuries from which the deceased died. Upon identification of the assailant the next issue was to determine whether the identified assailant(s) intended to kill the deceased or foresaw the real risk or possibility that their conduct might result in the deceased's death and nonetheless continued to engage in that conduct despite such realization.

A reading of the record and the judgment shows that there were eye witnesses to the assault perpetrated by the applicant and his accomplice upon the deceased. The trial court in its judgment related to the evidence of state witnesses Lyndon Nakutambiwa an eye witness who had no motive to testify falsely against the applicant. Lyndon gave a detailed account of how the applicant and the deceased first met on the fateful day, the deceased had arrived from South Africa on the previous day. It was according to Lyndon, the applicant who accosted the deceased over a previous dispute. The deceased had suggested that the dispute be discussed in the presence of elders. It was this noble suggestion by the deceased which appeared to have incensed the applicant's accomplice. The accomplice then attacked the deceased who

fled towards the kitchen before the applicant grabbed the deceased by the neck and in the process caused the deceased to fall to the ground. The deceased then hit his head against a stone embedded in the ground.

The trial court also considered the evidence of other eye witnesses, namely, Doreen Nyadombo and Rutendo Samunda. The evidence corroborated that of Lyndon in all material respects. It was the finding of the court that the state evidence was credible and that it was not exaggerated since state witnesses were impartial in their evidence. They even testified that the applicant was not the initial aggressor but only joined in the attack on the deceased later. The trial court's findings of credibility were supportable on a reading of the state witness evidence which flowed well.

The trial court considered the evidence of the applicant and disbelieved it. The applicant's testimony that he acted to restrain the accomplice from assaulting the deceased was found to be inconsistent with his defence outline. The applicant's defence outline had been to the effect that he only arrived at the scene of the assault upon the deceased after the event. The trial court also related to other aspects of the applicant's' evidence in which he departed materially from his defence outline. It is not necessary to individualize the points of departure. The critical observation made and upon which the applicant's defence was rejected was that he created a new defence wherein he confessed his presence at the scene but sought to avoid liability on the basis that he assisted the deceased by restraining the accomplice from attacking the deceased. It was the courts finding that the applicant and his accomplice both attacked the deceased in one way or another in circumstances where they foresaw the real risk or possibility that their conduct could result in death or serious injury to the deceased but persisted in that conduct nonetheless. Both the applicant and his accomplice were found guilty of murder in terms of s 47(1)(b) of the Criminal Law Codification and Reform Act.

The learned judge sentenced the applicant to 25 years imprisonment after finding that the assault on the deceased was reckless and callous. The learned judge was justified to take a serious view of the assault given its nature and the fact that the applicant and his accomplice were determined to assault the deceased and would not be restrained.

The applicant in an application for condonation of late noting of appeal must be guided by the provisions of order 34 rr 262-268. Also relevant to such application are s 41 A(s) and 44 of the High Court Act, [*Chapter 7:06*]. To simplify an understanding of the procedure for appeal by a dissatisfied convict who was convicted and sentenced by the High Court following a criminal trial, it is noted that the convict has a right of appeal against both

conviction and sentence. The right is in some instances unqualified and in other instances qualified. Section 44(2) and (3) of the High Court. The provisions thereof provide as follows:

> "(2) A person convicted on a criminal trial held by the High Court—
> (*a*) may appeal to the Supreme Court against his conviction on any ground of appeal which involves a question of law alone;
> (*b*) may, with the leave of a judge of the High Court or, if a judge of the High Court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact:
> Provided that a person who appeals to the Supreme Court on a ground of appeal which involves a question of law alone may, without applying to a judge of the High Court, be granted leave to appeal by the Supreme Court should it appear to the Supreme Court on the hearing of the appeal that the ground of his appeal involves a question of mixed law and fact;
> (*c*) may, if sentence of death or imprisonment for life has been passed upon him, appeal to the Supreme Court against his conviction or the sentence or both such conviction and sentence;
> [Paragraph as amended by s. 21(1) of Act No. 8 of 1997]
> (*d*) may, where the sentence to which he was liable on conviction was a sentence fixed by any law, appeal to the Supreme Court on the ground that the sentence passed upon him was not a sentence fixed by law in respect of the offence of which he was convicted;
> (*e*) may, where the sentence to which he was liable on conviction was not a sentence fixed by law, and where sentence of death was not passed upon him, with the leave of a judge of the High Court or, if a judge of that court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against his sentence or order of forfeiture or other order following on conviction.
> (3) For the purposes of subsection (2), a ground of appeal that there was no or insufficient evidence to justify a conviction shall be deemed to be a ground of appeal which involves a question of fact alone."

The convict upon an analysis of the above quoted provisions therefore enjoys the right to unqualifiedly appeal to the Supreme Court against his conviction by the High Court on any ground of appeal that involve a question of law only. The convict may also make a direct appeal to the. Supreme Court against both conviction and sentence where the convict has been sentenced to death or to imprisonment for life. Lastly the convict may note a direct appeal to the Supreme Court against sentence on the ground that the High Court sentenced him or her to a sentence which is other than the one provided for by law upon a conviction for the offence on which the convict was convicted.

Other than the above exceptions of the unqualified right of the convict to note an appeal to the Supreme Court as provided, the convict is otherwise required to seek the leave of a judge of the High Court to appeal against the conviction and/or sentence where the ground (s) of appeal involves a question of fact only or a question of mixed law and fact. In this respect, if the convict relies on a ground of appeal that there was insufficient evidence to justify the conviction, it is provided in ss (3) of s 44 that such ground is deemed to be one that involves a question of fact only. Therefore, the leave of the judge is required to be sought

where the convict or would be appellant seeks to argue that his or her conviction be set aside for insufficiency of evidence to justify a conviction. The convict is also required to seek leave to appeal in circumstances where the convict was sentenced to any sentence other than the death sentence and the convict raises the ground of appeal that the sentence imposed was other than that fixed by law in relation to the offence for which the convict was convicted. It is to be noted that in cases where leave to appeal has been sought and refused by the High Court judge, the convict may seek such leave from a judge of the Supreme Court. Having discussed the qualified and unqualified exercise of the convicts right to appeal, this must be read together with s 41 A of the High Court Act. It provides as follows:

> "(1) In any case where a person desires to apply to a judge of the High Court for leave to appeal, such application shall be submitted to the registrar of the High Court within such period and in such manner and form as may be prescribed by rules of court.
> (2) If the applicant is in prison, an application in terms of subsection (1) may, within the time prescribed, be given to the officer in charge of the prison, who shall forward the application to the registrar of the High Court.
> (3) A judge of the High Court may extend the time for giving notice of intention to appeal or of submitting an application for leave to appeal, notwithstanding that the time for giving such notice or submitting such application has already expired."

Significantly, the above provisions provide for time limits within which to apply for leave to appeal. The time limits for applying for leave to appeal are as set out in the rules and so is the manner of applying and the forum to make the application. The rules of court to be followed are the ones set out in order 34 as aforesaid. The rules in question are rules 262-268. It is to be noted however that in terms of ss 3 of s 41A, the judge of the High Court may extend the time for giving notice to appeal or for submitting an application for leave to appeal, beyond the times set out in the rules. In this respect such extension is in the nature of a discretionary indulgence which as with every other judicial indulgence, must be exercised judiciously taking into account the circumstances of each case and of the person seeking the indulgence of extension of time beyond the time limits set out in the Rules. The extension referred to is not a right accorded to the convict. It is a discretionary power given to the judge to exercise in circumstances where an injustice would otherwise result were the application of the rules be cast in stone and the convict shut out of court on account of the expiry of the time limits aforesaid.

That said, the rules aforesaid provide as follows:

> **APPLICATIONS FOR LEAVE TO APPEAL TO THE SUPREME COURT**
> ***"262. Criminal trial: oral application after sentence passed***
> Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed.

The applicant's grounds for the application shall be stated and recorded as part of the record. The judge who pr esided at the trial shall grant or refuse the application as he thinks fit.

263. Criminal trial: application in writing filed with registrar

Where application has not been made in terms of rule 262, an application in writing may in special circumstances be filed with the registrar within twelve days of the date of the sentence. The application shall state the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted.

264. Service of written application on Attorney-General: written submissions by Attorney-General

A copy of the application shall be served on the Attorney-General immediately after the application is filed with the registrar. The Attorney-General may file with the registrar written submissions on the application within two days of the date of service on him.

265. Consideration of application and submissions by presiding judge

Upon receipt of the application and the submissions of the Attorney-General, if any, the registrar shall place the matter before the presiding judge, in chambers, who shall grant or refuse the application as he thinks fit. The presiding judge may in his discretion require oral argument on any particular point or points raised and he may hear any such argument in chambers or in court.

266. Application for condonation of failure to apply timeously

Where an application has not been made within the said period of twelve days, an application for condonation may be filed with the registrar and served forthwith on the Attorney-General, together with an application for leave to appeal. The Attorney-General may, within three days of the date of the said service, file with the registrar submissions on both applications. The provisions of rule 265 shall apply to both such applications and submissions, if any.

267. Limitation of time for application for condonation

No application in terms of rule 266 may be made after the expiry of twenty-four days from the date on which the sentence was passed, unless the judge otherwise orders.

268. Where presiding judge not available to deal with application

If the presiding judge is not available to deal with any application hereinbefore referred to, it may be dealt with by any other judge."

From an analysis of the quoted rules, they are straight forward in their construction or wording. Where the convict intends to appeal to the Supreme Court on any ground(s) in regard to which leave to appeal is necessary to be first applied for and granted before noting the appeal, the default position which should be preferred, everything being equal is to make oral application for leave to appeal immediately after the court has passed sentence and before the court rises. This should not be very difficult to do because the accused is invariably represented by counsel of choice or *pro-deo* counsel. Legal practitioners must be trained to follow the reasons for judgment and sentence as they are delivered and to be able to note points where they consider that the court has erred in fact, in law or both. The making of the application using the default position convenient to the convict, counsel and the court because the judge deals with the points raised in the same sitting of delivering judgment and/or imposing sentence. For counsel and the convict, it is also cost effective as it serves time. Unfortunately it is rare these days to find counsel who utilize the default position yet it should be the procedure of choice. Counsel must not shy away from making the application if

merited, orally as provided for. It is the default position to do so and its obvious advantages present themselves as discussed.

Failing utilization of the default rule 262, the convict can still apply for such leave in writing within twelve (12) days of the date of sentence. The application is subject to the convict establishing special circumstances why the application for leave which should have been made at the hearing upon the passing of sentence should be entertained. The task of the convict as provided for in rule 263 becomes onerous. The convict is required to give an explanation for not making the application orally upon the passing of sentence. The convict will further be required to prepare and present a draft of the grounds of appeal intended to be filed or relied upon. The convict must also set out grounds on which the convict contends that leave be granted. In other words the convict must demonstrate prospects of success on appeal if leave to appeal be granted. The tone of r 263 suggests that the convict is ordinarily required to act in terms of r 262. Where the convict fails to do so other requirements come into play, making the application more involved and onerous. Counsel must therefore be prepared to apply for leave to appeal upon the passing of sentence. Counsel may apply for a sheet adjournment after sentence to put oral argument together. The judge is unlikely to refuse to grant counsel a short adjournment to prepare oral submissions.

Failure to proceed in terms of r 263, the convict who has not made written application within the twelve days given in that rule, is saddled with a further onerous task. The convict is required to apply for condonation through an application for that purpose. The application for condonation must be filed together with the application for leave to appeal. The further requirement for condonation makes the task of applying for leave to appeal tedious but the applicant would only have himself or herself to blame because the rules provide for the making of the oral application immediately after sentence is pronounced. Counsel must be astute in noting judgment and be able to critique the judgment as it is being read and to therefore address the judge on the perceived factual or legal shortcomings or errors and persuade the presiding judge that the perceived errors and shortcomings would if brought on appeal be likely to lead the appeal court to come to a different conclusion.

Rule 267 provides for closure of the window for applying for condonation. A condonation application may not be made after twenty four days reckoned from the date of sentence. Such application may only be made if the judge otherwise orders. Again, the process of applying for leave to appeal becomes even more onerous after the expiry of twenty four days from the date of sentence. There arises a now a further requirement that the judge

has to first grant leave to file the condonation application. It is very easy to again note that the rule maker intended that r 262 be the default position in the making of the application for leave to appeal. Failure to act in terms of r 262, the law giver put reasonable restrictions that require the convict to justify his or failure to utilize the default rule. There is every good reason to place restrictions as aforesaid because the passing of sentence finalizes the trial and the trial court is *functus officio* from thereon. The application for leave to appeal constitutes an exception to the *functus officio* doctrine in that the judge is allowed to review the court judgment to determine whether an intended appeal is not hopeless and would amount to an abuse of the court system. It certainly is undesirable that the convict be allowed free passage when it suits him or her to ask the court to again pull out the record of a finalized matter and determine a plea by the convict for leave to appeal. It is therefore important that would be appellants be guided that there is need to protect finality of litigations and where the convict does not utilize the provisions of r 262, the process to seek leave to appeal otherwise than via r 262 becomes onerous and tedious.

In *casu,* this application was filed on 16 March 2021 following sentence passed on 23 February 2018, a delay of two years. For the application to be considered, the judge must first make an order that the condonation application may be heard. There is no procedure set out in the rules in regard to how an order envisaged in r 267 may be obtained. The rule does not provide that a separate application be made to the judge for an order permitting that an application for condonation may be made after the expiry of 24 days from the date of sentence. The general rule is that a judge may only make an order through a chamber application made to the judge asking for the grant of such then order. It appears to me that in order to avoid a multiplicity of applications, one composite application for condonation as envisaged in r 266 should be filed and must encompass an explanation for the delay beyond twenty four days and for that further delay to be condoned which is the spirit behind r 267. The judge can only be placed in a position to indulge the applicant for apply for condonation after the lapse of twenty four days, upon a consideration of the application for condonation itself. The judge cannot make an order in the air. The powers of the judge given in r 267 derive from s 41A(3) of the High Court Act which permits the judge to grant an extension of time to apply for leave to appeal notwithstanding the lapsing of the given time limits.

In *casu,* the applicant became a self-actor after sentence since his legal practitioner went out of the picture after sentence. It was held in *Venter & Anor* v *State* SC 20/88 that if leave to appeal be granted at the end of trial, it remains the duty of the convict's counsel if he

is appointed *pro-deo* to then draft the proper notice and valid grounds of appeal. It appears to me that it is the duty of *pro-deo* counsel to discuss with the convict immediately after sentence whether he intends to appeal and to give the convict professional advice on this aspect and to then make the application for leave to appeal. It is after all the *pro-deo* counsel who is best suited to apply for leave to appeal by reason of his or her involvement in the whole trial.

The applicant having been abandoned by *pro-deo* counsel, had to act on his own. In his application, he stated that the *pro-deo* counsel "disappeared" after sentence and that the applicant as a lay person did not know that leave to appeal had to be sought upon the passing of sentence. I carefully considered the founding affidavit. There is no doubt that the applicant's level of articulation is low. The sentence construction or grammar is with respect atrocious. There is no sequence or a thought pattern. I must conclude that the applicant is just an unsophisticated rural dweller. It is not surprising that on the evidence found proved by the trial court, it turned out that the applicant nursed a dispute over a piece of land in the village which had been left to the deceased's mother following the death of the ac cussed and deceased's common father. It is my view that in considering the reasons or explanation for the delay, the judge or court should consider the level of sophistication of an applicant as a factor that bears on the reasonableness of an explanation given for delay.

The applicant averred that apart from being abandoned by his *pro-deo* counsel, he did not know about the appeal process and thought that there would be an automatic "review" of the case. He also decried lack of stationery at prison and the difficulties encountered with contacting relatives to arrange stationery for him. He stated that the relatives have not been visiting him and he could not be assisted with accessing and obtaining the record of proceedings. The challenge which the applicant submits as an explanation for the delay are real. The convict is invariably abandoned by *pro-deo* counsel after sentence. It is really a difficult time for the convict to find himself or herself in where the world suddenly collapses on the convict by reason of his freedom having been taken away and being abandoned by the *pro-deo* counsel when such counsel is most needed. The trial records whilst they can be availed require that someone outside prison devote time to follow up on the process and make necessary payments. It is no gainsaying that the judge or court must adopt an understanding attitude towards self-actors so that they do not become victims of injustice arising from their ignorance of procedures for appeals. Therefore whilst there is need to embrace the principle of finality to litigation, this must not be overemphasized at the expense of the interests of

justice as dictated by the circumstances of each case. In terms of s 44 of the Constitution, it is the paramount duty of the courts to promote, protect and uphold human rights (of which the right to appeal is such) and the rule of law. Ultimately, the considerations should be whether or not the decision reached can be said to have served the interests of justice taking into account the rights of the convict to appeal and the need to have litigations finalized and put away for archiving.

The length of and explanation for the delay must be considered cumulatively with the prospects of success on appeal. The greater be the prospects of success on appeal, the more the likehood that the court is persuaded to grant condonation. *In casu*, the applicant does not in my view enjoy any prospects of success in relation to conviction. Such an appeal if filed would be destined to a predictable failure. It would amount to an abuse of the appeal system. I have already outlined that there was overwhelming evidence that the applicant and his accomplice jointly attacked the deceased in one way or another. The deceased suffered injury from the assault and the injuries resulted in the deceased's death. The issue of the degree of involvement of each or other of the assailants does not matter because at law, the action of one accomplice is taken as the act of the other if committed in furtherance of their common design. The trial court determined correctly that the applicant and his accomplice foresaw the real risk or possibility that their unlawful assault may result in serious harm to or death of the deceased but persisted in their unlawful; conduct despite the realization. No other finding could have been justified by the evidence except the one reached by the trial court.

I have considered the proposed grounds of appeal against conviction drafted by the applicant. The grounds are drafted in the form of an argumentative narration and are not clear and concise. I tried to distill them individually and they may be summarized as follows:

(a) Ground 1 – the applicant averred that the trial court was led astray by the State which preferred a charge of murder instead of culpable homicide. There is no merit at all to this ground of appeal since the trial court was at large to retain a verdict of culpable homicide had the evidence proved a case of culpable homicide and not murder. Culpable Homicide is a competent verdict on a charge of murder. I have already observed that the evidence against the applicant was overwhelming.

(b) The second ground of appeal in summary was that the trial court erred in not taking into account that there was a family land dispute between the applicant, the deceased and other family members. The ground of appeal seeks to fault the court for not taking into consideration, the motive behind the murder. There is no merit

in this ground of appeal because the motive was not relevant to conviction. The issue of motive would appropriately be raised in mitigation of sentence.

(c) The third ground of appeal was that the trial court erred in not making a finding that the deceased had provoked the applicant by refusing to point out the applicant's share of their father's estate. In the same ground of appeal the applicant seeks to attack his *pro-deo* counsel for incompetence and the court for being hostile to him by not giving him the opportunity to prepare closing submissions. There is no substance in the ground of appeal. The ground of appeal raises the issue of provocation by the deceased yet the applicant distanced himself from the attack on the deceased. He averred that he arrived at the scene after the event. The attack on the *pro-deo* counsel and the court is not justified. There is nothing on record to indicate incompetence on the presentation of the applicant's case by the *pro-deo* counsel. As regards the court not giving *pro-deo* counsel time to prepare closing submissions, the *pro-deo* counsel was in fact given time to prepare. Counsel as already indicated elsewhere in this judgment was expected to address the court upon the closure of the evidence and defence case and he did so.

(d) The fourth proposed ground of appeal is different to reconstruct. The applicant alleges irregularities committed by the trial court in finding that the applicants' *alibi* was full of irregularities. I have considered the judgment and evidence in depth. There is no irregularity which is noted therefrom. The applicant simply alleged that he was not present when the deceased was attacked. He did not set out where he was nor did he motivate the alibi with any conviction. The *alibi* was in any event not believed because there was overwhelming eye witness evidence that proved that the applicant together with his accomplice attacked the deceased and inflicted injuries which caused the deceased's death. The foundation and facts supporting an *alibi* defence must be set out by the applicant. Only then can the state be required to then disprove the alibi defence beyond reasonable doubt.

In the prayer, the applicant prays that he be acquitted of murder and be convicted instead of culpable homicide. The evidence proved beyond a reasonable that the applicant was guilty of murder with constructive intent. No other verdict could have been reached on the proven evidence. There are no prospects of success against the conviction. Leave to appeal against conviction cannot justifiably be granted.

With regard to sentence, I considered that the applicant has a fighting chance and should be granted leave to appeal against sentence. The upshot of the grounds of appeal against sentence if I may call them such, was that the sentence imposed upon him was too excessive as to induce a sense of shock. The murder was committed in aggravating circumstances because weapons were used and the attack on the deceased was callous. Notwithstanding the finding of the trial court and the fact that it had the discretion to determine what sentence to impose, there is a chance that the sentence may be interfered with taking into account that the murder arose from a family dispute over a field. The motive for the altercation distinguished the case from a murder committed out of an accused's inherent wickedness.

Leave to appeal against sentence is usually granted when considering prospects of success of the sentence being altered because there is a wide scope for differing opinions on what an appropriate sentence would be given the circumstances of every case. See *S* v *Mcgown* 1995 (2) ZLR 81 (S). The sentence of 25 years imprisonment is generally considered as the outer limit of the sentence which may be imposed on a person convicted of murder with constructive intent. I am persuaded that because the circumstances of the murder mirror a family tragedy, the sentence of 25 years may be disturbed on appeal consideraing that it is five years above the minimum sentence of not less 20 years provided for in s 47(4) of the Criminal Law Codification and Reform Act, which must be imposed where a murder is committed in aggravating circumstances and the court does not impose the death penalty. It also appears that the trial court did not make specific findings on the existence or otherwise of aggravating circumstance as listed in s 47(2) and (3) of the same Act. I therefore determine the application as follows:

Disposition

1. The application for condonation of late noting of appeal against conviction is dismissed.
2. As against sentence, the application for condonation of late noting of appeal is granted.
3. The applicant is granted an extension of 10days within which to note his appeal against sentence reckoned from the date that the Registrar shall have served the applicant with this order.
4. The applicant is granted a certificate to prosecute his appeal in person.

National Prosecuting Authority, respondent's legal practitioners