PRICILLAR VENGESAI
and
THE STATE

HIGHCOURT OF ZIMBABWE
CHIKOWERO J
HARARE; 7 & 13 February 2023

Bail Application

A Masango, for the applicant
K H Kunaka, for the respondent

CHIKOWERO J:

1. This is an application for bail pending appeal against sentence only.
2. The Magistrates Court sitting at Harare, following a protracted trial, convicted the applicant on a charge of bribery as defined in s 170(1)(a)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
3. The judgment was delivered on 18 November 2022. Sentence was passed on the same date. The sentence imposed was 2 years imprisonment of which 9 months were suspended for 5 years on the usual conditions of good behaviour. The total effective sentence was 15 months imprisonment.
4. The principles applicable in an application for bail pending appeal are:
    - the right of the individual to liberty.
    - the likely delay before the appeal is heard.
    - the prospects of success on appeal.
    - the likelihood of the applicant absconding before the appeal is heard.

    See *S* v *Dzawo* 1998(2) ZLR 536; *S* v *Chikwizu* HH 396/17.
5. Since the applicant has been tried and sentenced it is for her to prove that there are positive grounds for granting bail. She must tip the balance in her favour. See *S* v *Dzvairo* 2006(1) ZLR 45(H).

6. The applicant no longer has the right to personal liberty for the duration of the sentence. The conviction and the custodial sentence imposed on her has deprived her of that fundamental right set out in s 49 of the Constitution of Zimbabwe Amendment (NO. 20) Act, 2013.
7. There is no likelihood of a lengthy delay before the appeal is heard, unless the applicant herself endeavours to occasion such a state of affairs. There is no backlog of criminal appeal cases in the Anti- Corruption Division of the High Court at Harare. The record of the proceedings held before the trial court has been transcribed. It is an annexure to the present application, filed on 24 January 2023. All that the applicant needs to do is to file and serve heads of argument whereupon the Registrar will set down the appeal for hearing. She does not need to take a back seat and wait for the Registrar to serve her legal practitioners with a notice to file heads of argument. I have taken judicial notice of the fact that the Senior Regional Magistrate who presided over the trial retired from the bench in December 2022. There will thus be no need for the record to be placed before him to elicit his comments to the grounds of appeal. The need to obtain such comments has fallen away. No delay will arise on this score. If the applicant had filed heads of argument in respect of the appeal at the same time that she filed the present application the appeal would by now have been set down for hearing. All the same, I agree with Ms Kunaka that the applicant holds the key to the early hearing of the appeal. All she needs to do is to file heads of argument. If she does so this month the likelihood is that the appeal will be set down and determined this term. Accordingly, the second factor in an application such as this, just like the one preceding it, works against the applicant.
8. As for the prospect of success of the appeal, the applicant relies on six grounds of appeal. First, she will argue that the sentence of 2 years imprisonment of which 9 months was suspended on the usual conditions of good behaviour is manifestly harsh and excessive as to induce a sense of shock. Second, she will contend that a custodial sentence was too harsh if regard is had to the fact that she only attempted to bribe the Judge of the High Court. Third, the point will be taken that the court misdirected itself by paying undue regard to the need to pass a deterrent sentence without balancing that against the need to keep the applicant, a female first offender, out of prison. Fourth, the applicant is aggrieved

that the court disregarded the concession by the trial prosecutor that a fine met the justice of the case. Fifth, the applicant will contend that the court disregarded her mitigation which was that she was a female first offender, a single mother and had two children to take care of. Finally, the applicant will argue that the Court unduly elevated the seriousness of the offence because the offer of a bribe did not influence the Judge since, sitting as the High Court of Zimbabwe, that judicial officer had long since rendered judgment by the time that the bribe was offered.

9. There is no substance in all the grounds of appeal. The appeal is hopeless.
10. Thirty-three years ago, this Court in *S* v *Mudawari* HH 270/90 per GIBSON J said:

> " bribery and corruption are regarded with thorough disapproval since they undermine the fabric and orderly function of the country's institutions. In such cases the proper punishment should be imprisonment unless there are circumstances which indicate that this would be inappropriate."

See also *S* v *Mukwezva* 1992(2) ZLR 283(S).

11. The Supreme Court in *S* v *Ngara* 1987(1) ZLR 91(S) reiterated that the above is the correct approach to sentencing in bribery and corruption cases. There, the Court said at 101C:

> " If unchecked or inadequately punished, it will disadvantage society by depriving it of a good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the penalty."

12. Mr Masango did not refer me to any cases indicating that the sentencing approach in bribery and corruption cases has since changed.
13. The applicant, then the Chamber Secretary for Chitungwiza Municipality, and hence a legal practitioner, approached a High Court Judge in Chambers whereupon she offered a bribe coated as "a token of appreciation from a client pleased that the Supreme Court had upheld the High Court decision rendered by the Judge." The bribe was therefore offered as a reward. The Judge turned down the offer, sternly censured the applicant and proceeded to file a police report.
14. I am aware that I am not determining the appeal itself. All the same, I am not persuaded that there is any prospect of the appellate court discerning any error or misdirection in the justification for a custodial sentence. In this regard, the trial court said:

> "This crime is prevalent, and you showed criminal daring by approaching a Judge of the High Court in her Chambers in order to give her the token of appreciation. Courts must make a stand against such abuse of courts themselves and it is true that the Legislature

> allows the option of a fine in this case but there are certain offences which by their nature, never mind what the Legislature has provided for, call for custodial penalties. I am mindful of the fact that our jails are full to the brim. Facilities are poor. There are communicable diseases that are being witnessed but it would be wrong I think of me to keep you out of prison. I must pass a deterrent sentence. But in order to show some measure of lenience, I am going to suspend a big portion or at least a sizeable portion of the jail term in order to deter both you and such like-minded offenders."

15. There appears to me to be no scope for arguing that the sentence is so harsh and excessive as to induce a sense of shock. Rather, the applicant seems to have been fortunate to escape with a somewhat lenient sentence.
16. The second ground of appeal is misplaced. It actually questions the correctness of the conviction whereas applicant has not appealed the conviction. The offence of bribery is complete once the offender offers a bribe. That the offer is turned down is not a defence.
17. I do not agree that there is any prospect of successfully arguing that undue emphasis was had to deterrence at the expense of the appellant's status as a female first offender and single mother with two children under her care. The court paid regard to the correct approach in sentencing in bribery cases. It follows that the contentions to be taken in the third and fifth grounds of appeal are flimsy.
18. As for the fourth ground of appeal, I underline that a concession by the Prosecutor – General's representative is not binding on a sentencing court. In discussing and finding that a sentence of a fine would not meet the justice of the case the court was effectively considering the concession by the respondent. For all intents and purposes, it found that the concession was not well taken. Had it found otherwise, a sentence requiring the applicant to pay a fine would have been imposed. In the premises, the fourth ground of appeal misses the point. The court did not disregard the concession.
19. The sixth ground of appeal is in substance no different from the first. What I have said in respect of the latter applies to the former with equal force. I underscore the point, considered by the trial court, that the offer of a bribe to the Judge was an attack on the integrity of not only the individual Judge but the Judiciary as a whole. The sentence reflected that courts needed to take a stand by excluding non-custodial sentences in circumstances where a legal practitioner offers a bribe to a Judge.

20. Although Mr Masango presented argument designed to persuade me to find that there is a reasonable prospect of the appellate court sentencing the applicant to perform community service in view of the fact that the effective custodial sentence imposed did not exceed 24 months, those submissions were also misplaced. There is no ground of appeal raising such as issue. Further, the applicant's prayer as set out in the notice of appeal is that the sentence passed by the trial court be set aside and a sentence of a level 14 fine be substituted therefor. There is no prayer for community service in the notice of appeal. In any event, even if such a ground of appeal had been raised and the allied relief prayed for, the sentencing principles in bribery cases, as applied to the circumstances of this matter, are a clear indicator that it would be fanciful for the applicant to suppose that the appellate court would fault the Magistrates Court for not having imposed a community service sentence.
21. Ultimately, I agree with Ms Kunaka that sentencing is an exercise of discretion by the trial court. I agree with her that, going through the reasons for sentence, the appeal is an exercise in futility.
22. The need to determine whether the applicant will abscond falls away. Everything else is against her. It is in the interests of the administration of justice that the applicant continues to serve the sentence while prosecuting the appeal. Even if I had been persuaded that she will not abscond it would still not be in the interests of the administration of justice to release her on bail pending appeal only to send her back to prison on determination of the appeal itself.
23. In the result, the application for bail pending appeal against the sentence be and is dismissed.

Malinga Masango Legal Practice, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners