MOSES MUTSVANDIYANI
versus
THE STATE

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 20 December 2005

Application for leave to appeal

J. Samkange, for the applicant
R.K. Tokwe, for the respondent

KAMOCHA J: The applicant pleaded guilty to and was found guilty of smuggling 150 boxes of pacific cigarettes from Zimbabwe to South Africa. He was sentenced to undergo 3 years imprisonment of which 12 months imprisonment was suspended for 5 years on the customary conditions of future good behaviour. He was to serve an effective sentence of 2 years imprisonment.

Aggrieved by the trial court's sentence he applied for bail pending appeal as he intended to appeal against the sentence. His application was unsuccessful. He then appealed to this court against the trial court's refusal to grant him bail. This court also dismissed his application on 4 November 2005. He now applies form leave of this court to appeal to the Supreme Court.

The respondent was not opposed to both the appeal against the magistrate's decision to refuse applicant bail pending appeal and this application. I held the view that the concession was not proper and dismissed the application. I indicated that my written reasons would follow later. These are they.

In brief the applicant did the following. He planned the commission of the crime with other persons. He was employed as a driver by a company known as Payloads (Pvt) (Ltd). He told his friends that he was going to be undertaking a trip to South Africa to go and deliver cotton seed.

He and his friends decided to conceal 150 cartons of pacific cigarettes under the load of cotton seed. The applicant first loaded the 24 tonnes of cotton seed from where it was being collected. From there he proceeded to a farm in Ruwa where the 150 cartons of cigarettes were to be collected. Upon arrival the 24

tonnes of cotton seed were offloaded. Thereafter the 150 cartons of cigarettes were loaded underneath and the 24 tonnes were then again loaded on top thereby concealing the cartons of cigarettes.

The applicant's share was going to be an amount of R100 per carton. He was then going to receive a total of R150 000 which translated to $43 500 000.

Arrangements were made for the applicant to meet one Anderson Gwede of Crossborder Freight Services Beitbridge. When applicant was at Beitbridge Anderson supplied him with a vodafone line which he was going to use whilst in South Africa to contact him.

While at the border his vehicle went through a scanning machine which detected the cartons of cigarettes leading to the arrest of the applicant. The cartons contained a total of 75 000 x 20 packets which were valued at $2.2 billion dollars. All this is common cause.

The foregoing reveals that the crime was carefully planned. It also exhibits the applicant's criminal resolve. He went as far as offloading a load of 24 tonnes in order to conceal the cartons of cigarettes.

The crime of smuggling is serious and prevalent. In *casu* the crime was fortuitously discovered but the potential prejudice to the fiscus was enormous.

Although the appellant did not benefit from the crime the trial magistrate still held the view that the crime was still serious. The court observed the then offence was well organised and pre-planned which in the court's view aggravated the offence. The court also observed that the appellant's share was going to be R150 000 which translated $43 500 000 which was a lot of money at that time. It was the court's further observation that the appellant had been employed for 3 years, hence what he did was actuated by greed rather than need.

The learned magistrate was alive to the fact that the act provided for a penalty of both imprisonment for a period not exceeding 7 years and a fine. Further, the learned magistrate was alive to the fact that terms of imprisonment should be reserved for bad cases but arrived at a finding that this case was also a bad one as it involved careful planning by a group of people. The value of the property was also substantial. In the result the court felt that a fine was not an appropriate form of punishment in the circumstances and so was community

service due to the gravity of the offence. The court stated that these other forms of punishment would send a wrong message to members of the public.

The trial magistrate also carefully took into account the plea of guilty. He said due to the gravity of the offence he would start with a sentence of 5 years imprisonment but because the appellant pleaded guilty and cooperated the court then decided to reduce the sentence to 3 years imprisonment with one year's imprisonment being suspended on the customary conditions of future good behaviour.

It seems to me that the learned trial magistrate's approach to sentence is unassailable. In my view he exercised his judicial discretion properly. In fact no misdirection by the trial court was alleged by the appellant. The appeal courts have repeatedly emphasised that unless there is a misdirection by the trial court an appeal court cannot interfere with the discretion of a trial court exercised properly just because it feels it would have imposed a somewhat different sentence if it had been sitting as the trial court.

The trial magistrate imposed a sentence which is within the penalty stipulated in terms of section 206(2)(d) of the Customs and Excise Act [*Chapter 23:02*].

In the light of the foregoing it seems to me that there are no prospects of success on appeal in this matter. I would therefore dismiss the application for leave to appeal.

Byron Venturas & Partners, applicant's legal practitioners.
Attorney-General's Office, respondent's legal practitioners.