GODFREY DZVAIRO
and
TENDAI MATAMBANADZO
and
ITAI MACH
versus
THE STATE

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 28 October, 11 November and 13 December 2005
12 January 2006

Bail Application

Mr *Hwacha*, for the applicant
Mr *Nemadire*, for the respondent

PATEL J: The three applicants in this matter are not directly connected to one another. The 1st applicant is aged 47 and employed by the Ministry of Foreign Affairs as Consul-General and was the Zimbabwean Ambassador designate to the Republic of Mozambique at the time of his arrest. The 2nd applicant is aged 42 and was employed by the Metropolitan Bank of Zimbabwe Limited as Company Secretary until his retrenchment in December 2004. The 3rd applicant is employed by ZANU-PF as a Deputy Director for External Relations.

All three applicants were convicted on 24 December 2004 on their pleas of guilty to several charges of contravening section 4 of the Official Secrets Act [*Chapter 11:09*]. Thereafter, on 29 December 2004, they applied to alter their pleas of guilty to pleas of not guilty. Their application was dismissed and they were sentenced on 8 February 2005. The 1st applicant was sentenced to a term of six years imprisonment, while the 2nd and 3rd applicants were each sentenced to five years imprisonment.

The applicants have appealed against their conviction and the sentences imposed upon them. Their appeal is pending and should be heard early next year. The necessary transcripts and ancillary paperwork have already been processed, with substantial effort and resources contributed by the applicants' legal practitioners. As indicated in a recent minute from the

Criminal Registrar, the appeal could be heard in the last week of January 2006 if the matter is handled expeditiously.

All three applicants have been in custody since their arrest in December 2004. They now seek bail pending appeal.

Grounds for Bail

Mr *Hwacha*, for the applicants, argued very persuasively that their prospects of success on appeal were good. In particular, he submits that the proceedings before the Regional Magistrate in December 2004 were fraught with irregularities – as regards his acceptance of the applicants' pleas of guilty as well as his refusal to allow the alteration of their pleas. Counsel further contends that the sentences imposed upon the applicants were not only arbitrary but also patently excessive. Given their prospects on appeal, it is argued that the applicants are not likely to abscond if granted bail, especially in view of their stable family and economic circumstances.

Mr *Nemadire*, for the State, submits that there was nothing significantly irregular about the proceedings in the court below to warrant their being set aside. He further contends that the sentences imposed by that court were not excessive having regard to the moral culpability of the applicants and the maximum penalty of 20 years prescribed in respect of the offences that they were convicted of. He accordingly submits that the applicants have no prospects of success on appeal and are therefore very likely to abscond if granted bail.

Application *In Limine*

At the inception of this matter, the State applied for the application to be heard *in camera*, in terms of section 3(1)(a) of the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*], on the ground that the issues to be canvassed *in casu* touched upon State security and public order. It was conceded, however, that the issues before the Court essentially pertained to the proceedings before the court below and the applicants' suitability for bail.

The Court therefore took the view that these issues did not warrant the exclusion of the public from the entirety of the proceedings. The Court

accordingly ruled that it would exercise its discretion, in terms of section 3(1)(a) or section 3(1)(d) of [*Chapter 7:04*], either to exclude the public from or to order the non-publication of any part of the proceedings should they delve into any issues covered by those provisions. In the event, the need to exercise that discretion did not arise.

Other Cases

As an additional point, it was argued by Mr *Hwacha* that in the case of two other accused persons who were charged in similar circumstances, namely, Messrs. Chiyangwa and Karidza, the former was released from remand while the latter was granted bail pending appeal. However, as was pointed out by Mr *Nemadire*, these cases were treated differently because their circumstances were very different from those pertaining to the applicants. In Chiyangwa's case, the precise nature of the information allegedly passed on to foreign agents could not be produced in court. More significantly, both Chiyangwa and Karidza had pleaded not guilty to the charges preferred against them. Accordingly, I do not think that their cases are of any persuasive relevance to the determination of the applications *in casu*.

Pleas of Guilty

The essence of the applicants' argument, as I understand it, is as follows:

(i) The facts set out in the charges and statements of agreed facts do not disclose that the applicants communicated information of a military or security nature such as to constitute an offence under section 4 of the Official Secrets Act. In particular, the agreed statements encompass issues of a general nature and do not specifically elaborate any matters impinging upon national security.

(ii) The matters allegedly communicated by the applicants as per the charges are substantially different from those communicated according to the agreed statements, and the charges were not altered to reconcile those differences.

(iii) At the trial stage, the magistrate did not adequately canvass the essential elements of the offences charged and, in particular, he did not specifically address issues of a military or security nature necessary to establish the commission of those offences.

(iv) In the case of the 1st applicant, the court accepted his plea of guilty even though it was hesitant and conditional.

1st Applicant

The 1st applicant was charged with contravening section 4(1)(d)(i) of the Act in that from 1994 to 2004 he unlawfully communicated information obtained through his position as a State official to unauthorised persons. The information allegedly divulged pertains to matters of a political and economic nature in the context of Zimbabwe's foreign relations.

The statement of agreed facts indicates that the 1st applicant supplied information of a political and economic nature to various named foreigners from 1994 onwards till he was arrested at the end of 2004. In return for the information that he supplied he was to be paid US$2000 per month and did in fact receive a total of *circa* US$240,000 over the 10 year period. The statement sets out a detailed list of the information supplied by the 1st applicant as well as the years in which and the places where such information was supplied. The information listed relates to a wide range of matters covering Zimbabwe's internal affairs and external relations over the years in question.

Following his plea of guilty, the 1st applicant stated that he had understood and agreed with the statement of agreed facts. He further stated that the facts outlined were drawn from the affidavits he himself had made and that none of them had been altered. The trial magistrate then canvassed the essential elements of the offence charged and the 1st applicant agreed to them without demurrer. He then stated that he could not defend his offence and that he fell into a trap and did not intend to prejudice his country. He went on to declare that he had committed the offence and did not in any way detract from his plea of guilty. Ultimately, he acceded to a full admission of the facts and essential elements as explained to him.

The offence with which the 1st applicant was charged entails simply that he divulged to unauthorised persons information obtained by him as a State servant. The offence does not require that the information so communicated should be of a military or security nature. Nor does it require that such communication should involve any prejudice to Zimbabwe. The essence of the offence under section 4(1)(d)(i) of the Act, which is in the nature of an absolute offence, is the unauthorised disclosure of official information. The motive for the disclosure in question is irrelevant as is the question of prejudice to the State consequent upon such disclosure. See *S v Savory* 1973 (2) RLR 51 (RAD), per MACDONALD JP, at 59-61.

As regards the recital of the information concerned as it appears in the charge and in the statement of agreed facts, the details set out in the latter are an elaboration of what is contained in the former. I am unable to discern any material difference in the two documents and regard them as being generally *ad idem*.

With respect to the essential elements of the offence charged, the 1st applicant clearly admitted to having supplied unauthorised persons with information obtained by him in his official capacity. I take the view that the requisite elements of the offence were adequately canvassed by the trial magistrate and that there was no irregularity in this respect.

As for the contention that the 1st applicant's plea of guilty was hesitant and conditional, I simply cannot agree with that argument. His statements *in fine* are tantamount a to a full and clear admission of guilt. His explanation that he had been trapped and did not intend to prejudice his country is of possibly mitigatory relevance only and does not in any way detract from his admission of guilt. I am therefore satisfied that his plea of guilty was correctly and properly accepted by the trial magistrate.

2nd and 3rd Applicants

The 2nd and 3rd applicants were charged with contravening section 4(2) of the Act in that they unlawfully communicated to other persons information in their possession, relating to military matters or the preservation of the security of Zimbabwe or the maintenance of law and order, in a manner or for a purpose prejudicial to the safety or interests of Zimbabwe. In the case of

the 2nd applicant, the information allegedly communicated pertains to Zimbabwe's political and economic relations vis-à-vis countries within the region and specific western countries. As regards the 3rd applicant, the information allegedly divulged centres primarily on Zimbabwe's internal political and electoral affairs and the land issue.

The statement of agreed facts for the 2nd applicant indicates that he operated in collusion with the 1st applicant and other State officials to supply regular reports to various foreign agents located in Malawi and South Africa from 1994 to 2004. In return for his services he was paid a total sum of US$82,700 over the 10 year period in question. The information supplied by the 2nd applicant encompassed matters relating to Zimbabwe's economic and monetary affairs, bilateral relations with neighbouring states, and reports from Zimbabwe's foreign missions located in specified African cities.

The statement of agreed facts for the 3rd applicant indicates that he supplied political and economic information pertaining to Zimbabwe to specific South African agents from 2001 until his arrest at the end of 2004. In return for this information he received various payments totalling US$16,200, R7,000 and Z$400,000. The information supplied by the 3rd applicant covered matters relating to the internal politics and divisions within the ruling ZANU-PF party, the conduct of domestic elections, as well as the land issue.

After pleading guilty, the 2nd applicant agreed with the statement of agreed facts and the essential elements constituting the charge as read to him. The trial magistrate then canvassed the essential elements of the offence charged. The 2nd applicant agreed that he had come into possession or control of information relating to the security or safety or interests of Zimbabwe and that he had unlawfully communicated such information to certain persons to the prejudice of the country. He further agreed that he had no right to do so and that he had no defence to offer.

Similarly, after pleading guilty, the 2nd applicant agreed with the statement of agreed facts as read to him and stated that he had understood the charge against him. The trial magistrate went on to canvass the essential elements of the offence charged. The 2nd applicant agreed that at the relevant time he was in possession of information or documents of a security nature or of particular interest to Zimbabwe and that he had unlawfully

passed on such information to certain persons to the prejudice of Zimbabwe. He further agreed that he had no right to do so and that he had no real defence to offer. He then admitted that he had committed the offence and made a mistake which he regretted and wished to reverse.

A contravention of section 4(2) of the Act requires that the document or information communicated by the accused should relate to a military matter or the preservation of the security of Zimbabwe or the maintenance of law and order. It further requires that the accused should publish or communicate such document or information to another person in a manner or for a purpose prejudicial to the safety or interests of Zimbabwe. Except in a case where the act averred in itself evinces prejudice to the safety or interests of the State, it is essential to establish that the manner in which or the purpose for which the accused communicated the information was prejudicial to Zimbabwe. Where information communicated is already well known, its disclosure cannot normally operate to the prejudice of the safety or interests of the State. See *S v Niesewand (3)* 1971 (1) RLR 216 (RAD), per BEADLE CJ, at 222-223, citing *S v Marais* 1971 (1) SA 844 (AD).

In the context of section 4(2) of the Act, the interests of the State denote the interests of the State according to the policies laid down for it by its recognised organs of government and authority. Anything which prejudices those policies is "prejudicial to the interests or safety of Zimbabwe" within the meaning of the Act. See *Chandler v Director of Public Prosecutions* [1964] AC 763, cited by DUMBUTSHENA CJ in *S v Harington* 1988 (2) ZLR 344 (SC) at 358.

As regards the content of the charge and the statement of agreed facts that pertain to the 3rd applicant, I can see no material difference whatsoever in the information identified as having been communicated by him to other persons. However, with respect to the 2nd applicant, the description of the information divulged is certainly not identical. There is some overlap insofar as concerns Zimbabwe's relations with neighbouring SADC countries. The remaining matters mentioned in the charge are not specifically mentioned in the statement of agreed facts. Nevertheless, the matters so omitted are almost identical to those that were communicated by the 1st applicant. According to the 3rd applicant's statement of agreed facts, a major part of his

given assignments was to transmit the 1st applicant's reports to the foreign agents concerned. In the event, I do not consider the apparent divergence between the charge and the agreed statement to be of any critical consequence. This is particularly so because what was read out to and canvassed with the 3rd applicant at the plea stage was not the original charge but his statement of agreed facts. In my view, the apparent discrepancy between the charge and the agreed statement is one that falls within the ambit of sections 202(3) and 203 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The combined effect of these provisions is that a defective charge may be cured by relevant probative evidence adduced at the trial and the failure to amend the charge before judgement does not affect the validity of the proceedings thereunder.

Turning to the essential elements of the offence charged, "the security of Zimbabwe" is a concept of exceedingly wide connotation. Without attempting any detailed or exhaustive definition of the term, I conceive it to include a broad range of matters embracing not only physical security but also the political, economic and financial well-being of the country.

In the present case, the information and matters communicated by the 2nd and 3rd applicants related to, *inter alia*, Zimbabwe's economic and monetary affairs, bilateral relations with neighbouring states, reports from Zimbabwe's foreign missions, the internal politics and divisions within the ruling ZANU-PF party, the conduct of domestic elections, and the much-debated land issue. Ostensibly, these are matters which do not invariably and necessarily relate to State security under normal circumstances. However, the Court cannot but take judicial notice of the unquestionably abnormal political and economic circumstances that presently apply to Zimbabwe, both domestically and internationally. Given this context, and without succumbing to the excesses of political paranoia, it is not inconceivable that the information and reports transmitted by the applicants did relate to the preservation of State security and that their covert disclosure to the foreign agents concerned was effected in a manner prejudicial to the safety or interests of Zimbabwe.

In canvassing the essential elements of the offence charged, the trial magistrate did not delve into any great detail as to the security-related

nature of the information disclosed or the precise manner in which its disclosure was prejudicial to the safety or interests of the country. Ordinarily, these aspects should have been properly canvassed and the magistrate's failure to do so constituted an obvious misdirection. The critical question, however, is whether or not this misdirection was such as to invalidate the entire trial proceedings. I am inclined to think not. The magistrate's omissions in this regard, though not entirely excusable, are nevertheless quite understandable in light of the very detailed and elaborate admissions contained in the statements of agreed facts. These statements were acknowledged and endorsed by the applicants without any objection. As I read them, the facts set out in the statements clearly evince the disclosure of information pertaining to State security as well as the manner in which such disclosure was prejudicial to the interests of Zimbabwe. Taking all the relevant circumstances into account, it cannot be said that the magistrate's misdirection operated to vitiate the propriety of the trial proceedings *in casu*.

Authority to Prosecute

In terms of section 11 of the Official Secrets Act, no criminal proceedings may be instituted under the Act against any person unless the Attorney-General has authorised the prosecution of that person. *In casu* the prosecution of all three applicants was authorised on charges of contravening section 4(2)(b) of the Act.

I note in passing that paragraph (b) of section 4(2) does not *per se* create a complete offence without reference to paragraph (a). The offence properly chargeable under subsection (2) of section 4 is constituted by paragraphs (a) and (b) as read and taken together. This anomaly, although not fatal, was not rectified at any stage of the proceedings under review.

The more serious anomaly arises from the fact that the 1st applicant was not charged under section 4(2), as originally authorised, but under section 4(1)(d)(i) of the Act. The Attorney-General did not at any time amend his authorisation accordingly or issue a fresh authority to prosecute the 1st applicant for contravening section 4(1)(d)(i). In this respect, it is submitted by *Mr. Hwacha* that the criminal proceedings against the 1st applicant were

flawed *ab initio* and that his consequent prosecution and conviction are incompetent and must be set aside.

There can be little doubt that the requirements of section 11 of the Act are couched in peremptory language and that compliance with that provision is mandatory. It is equally incontestable that the Attorney-General failed to strictly comply with those requirements in respect of the 1st applicant. That being so, the question that must be answered is whether or not such non-compliance operates to nullify his subsequent prosecution and conviction under section 4(1)(d)(i).

In order to answer this question it is necessary to examine the purpose underlying the statutory requirement under consideration. It is a requirement that fully accords with the independence and autonomy conferred upon the Attorney-General by section 76 of the Constitution insofar as concerns the institution and discontinuance of criminal proceedings. As I understand it, the purpose of section 11 of the Act is to require the Attorney-General to personally consider each case on its merits and to determine whether or not the matter should in fact be prosecuted. This is so because of the very broad and wide-ranging nature of the offences created under the Act. The object of Parliament in enjoining the Attorney-General's personal attention to each case is to obviate the possibility of unnecessary or vexatious prosecutions at the instance of over-zealous police officers or public prosecutors.

If my assessment of the purpose behind section 11 is correct, it cannot be said that the failure to fulfil its requirements is fatal in each instance where there has been non-compliance. In my view, the Legislature could not have intended that every conviction under the Act, which is otherwise competent and proper, should be visited with the sanction of nullity for failure to comply with the provisions of section 11.

In the present matter, it must be assumed on the basis of his certificate that the Attorney-General did in fact consider the specific allegations against the 1st applicant. He then proceeded to authorise the latter's prosecution on those allegations, albeit erroneously under a different provision of the Act. Therefore, it cannot be said that he did not apply his mind to the case against the 1st applicant. Nor can it be said that the intention of Parliament was wholly frustrated in that regard.

In any event, the actual charge against the 1st applicant was properly framed in terms of section 4(1)(d)(i) of the Act. The charge that was subsequently put to him at his trial and to which he pleaded guilty was that of having contravened section 4(1)(d)(i). Equally importantly, his statement of agreed facts as accepted and endorsed by him related to an offence under section 4(1)(d)(i).

In the above circumstances, I cannot see that non-compliance with section 11 of the Act would have occasioned any material prejudice to the 1st applicant or entailed any miscarriage of justice in his eventual conviction and sentence. I accordingly take the view that the 1st applicant's conviction under section 4(1)(d)(i) was competent and valid notwithstanding the failure to authorise his prosecution under that specific provision in strict compliance with section 11 of the Act.

Alteration of Pleas

Where an accused person seeks to alter his plea of guilty to that of not guilty, he must simply offer a reasonable explanation as to why he pleaded guilty in the first instance. If his explanation holds a reasonable possibility of truth, viz. unless the court is convinced beyond reasonable doubt that his explanation is positively false, he should be allowed to alter his plea. See *S v Matare* 1993 (2) ZLR 88 (S), per GUBBAY CJ, at 97C and 100B.

In casu it is submitted on behalf of the applicants that after having been illegally detained they were subjected to various forms of coercion and were brought into court after hours. These factors coupled with the fact that they were not legally represented at that time induced their statements of agreed facts and their pleas of guilty at the trial. It is further submitted that at the change of plea stage the magistrate applied the wrong test in that he kept probing as to the guilt of the applicants as opposed to evaluating the reasonableness of the explanations proffered by them.

The evidence given by the State witnesses at the change of plea proceedings indicates that the applicants were initially unlawfully detained in insalubrious conditions with inadequate toilet and ablution facilities. It was also conceded that the 1st applicant was denied cigarettes in order to break

him down psychologically. However, it was denied or certainly not admitted that the applicants had been hooded and kept in solitary confinement.

In his ruling, the magistrate declared that what he had to determine was whether there was a reasonable possibility that the applicants were innocent and whether their application for change of plea was *bona fide*. The issue, as he saw it, was whether the plea in each case was "voluntary and understandingly and correctly made".

The magistrate then proceeded to note the applicants' academic qualifications and professional backgrounds on the basis of which he was unable to accept that they did not understand the effect of their admissions in criminal proceedings. He also noted that the applicants had not been denied legal representation at the initial hearing as alleged. Finally, he took into account the evidence and explanations given by the State witnesses as to the conduct of their investigations and the preparation of the applicants' statements.

After analysing all the evidence, the magistrate found that "there was nothing to show that the accused were unduly influenced to plead as they did". Moreover, he was satisfied that "the plea of guilty by each accused was not brought about by fear, fraud, coercion, mistake or any other form of undue influence". He concluded that "the application does not only lack *bona fides* but is also unreasonable" and accordingly dismissed the application.

Having regard to the proceedings as a whole, I am not at all convinced that the magistrate focused on irrelevant considerations and accordingly applied the wrong test in making his ruling. Whilst he might have take into account the applicants' guilt or innocence as an incidental factor, his principal concern appears to have been the genuineness of the applicants' original pleas and the reasonableness of their applications for change of plea. On the basis of the evidence presented to him, he obviously rejected as being false their explanations of having been coerced or unduly influenced into pleading guilty. I am accordingly satisfied that he did not misdirect himself in this regard and that there is no justification for reversing his ruling on the matter.

Propriety of Sentences

As stated at the outset, the 1st applicant was sentenced to a term of six years imprisonment, while the 2nd and 3rd applicants were each sentenced to five years imprisonment.

In sentencing the 1st applicant, the trial magistrate accepted that there was some doubt as to "the level of information" that he had divulged. He therefore found that "most probably minimal harm befell or minimal prejudice befell the country". Nevertheless, he assessed the 1st applicant's moral blame-worthiness as being "considerably high" in light of the long period of ten years over which he had abused his official position in return for "substantial remuneration" and the fact that he had recruited others to convey information on his behalf.

As regards the 2nd applicant, the magistrate was again constrained to accept that "the amount of damage or prejudice to Zimbabwe [was] very minimal". However, he noted that the 2nd applicant had committed his "morally reprehensible" crime knowingly and willingly over a long period of time and for considerable monetary reward.

As for the 3rd applicant, the magistrate observed that he "may not have seen or felt the harm he was causing or had caused". However, the magistrate declined to impose a fine by dint of the fact that the 3rd applicant had also received payment for his wrongdoing. In his view, a mere fine "would be like encouraging others in a similar situation [who] may believe they could get away by paying from the very proceeds of the offence".

Taking all of the above considerations into account, the magistrate decided that a deterrent custodial sentence was warranted in the case of each applicant.

I fully concur with the learned magistrate insofar as concerns the moral culpability of all three applicants. Their conduct over the years in question was unquestionably reprehensible. Moreover, their offences were significantly exacerbated by their acceptance of large sums of money in return for their nefarious activities. I also agree that the imposition of monetary fines for the offences committed would have been patently inappropriate and would have clearly trivialised those offences. Having regard to the personal circumstances of the applicants on the one hand and the seriousness of their

offences and the interests of society on the other, I have no doubt that a custodial sentence is the only form of punishment that befits the offenders and their crimes *in casu*.

Notwithstanding the position that I have taken, the difficulty that remains arises from the magistrate's avowed failure to adequately address the extent of the prejudice occasioned by the applicants' conduct. In the case of the 1st applicant, the question of prejudice is immaterial as it is not a relevant component of the offence with which he was charged and eventually convicted. However, as regards the 2nd and 3rd applicants, the extent to which their conduct was prejudicial to the interests of Zimbabwe is an essential feature that must be reckoned with in assessing the sentences to be imposed upon them. The clumsy attempt to circumvent this aspect at the sentencing stage constitutes a clear misdirection which renders questionable the respective periods of imprisonment arbitrarily fixed by the magistrate. This arbitrariness is further compounded by the fact that the same sentence was imposed upon the 2nd and 3rd applicants despite the obvious differences in the gravity of their offences. As appears from their statements of agreed facts, the 2nd applicant purveyed the reports and information concerned over a considerably longer period of time and for greater reward than did the 3rd applicant.

Given this misdirection, I am of the view that the sentences imposed upon the 2nd and 3rd applicants are likely to be set aside on appeal. The matter should either be remitted to the magistrate's court for a proper evaluation of the extent of prejudice occasioned or be revisited in that respect by the appellate court itself.

Bail Pending Appeal

The principles governing bail pending appeal were very lucidly articulated in *S v Williams* 1980 ZLR 466 (AD) at 468E-H, per FIELDSEND CJ, and in *S v Tengende & Ors* 1981 ZLR 445 (SC) at 448A-E and 449F-H, per BARON JA. I paraphrase the principles enunciated in these cases as follows.

Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds

for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases – notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice, and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospect of success on appeal is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail.

Conclusion

As regards the 1st applicant, I am satisfied that he has no reasonable prospect of success on appeal, either against his conviction or in respect of the sentence imposed upon him. His conviction was proper notwithstanding the initial blunder occasioned by the failure to authorise his prosecution for contravening the specific statutory provision that he was actually charged under. Moreover, in light of the nature and circumstances of his offence, the sentence of six years imprisonment imposed upon him does not induce a sense of shock and cannot be said to be excessive.

Whatever his prospect of success on appeal, the likelihood that the 1st applicant will abscond if granted bail is quite considerable. He obviously has well-established contacts with the foreign agents that he dealt with over the past decade. He also retains access to the huge amount of convertible currency that he illegally amassed during that period. (Presumably, these moneys have not as yet been confiscated or otherwise dealt with as proceeds of crime). These factors, coupled with the long term of imprisonment that he still has to serve, render the 1st applicant an extremely unsuitable candidate for bail.

As for the 2nd and 3rd applicants, I do not think that they have any reasonable prospects of success against their conviction. However, the sentences imposed upon them are likely to be set aside for the reasons that I have detailed above. Nevertheless, I remain convinced that custodial sentences, of such duration as is deemed commensurate after due inquiry, are appropriate and unavoidable in the case of both applicants. It is therefore highly probable that they will continue to be incarcerated, even if their original sentences were to be set aside on appeal and properly substituted thereafter.

Apart from the fact that the 2nd and 3rd applicants face the prospect of continued detention in custody, there are other pointers towards the possibility of their abscondment whilst on bail. As already observed vis-à-vis the 1st applicant, the 2nd and 3rd applicants have ready access to foreign agents and convertible currency, the combination of which greatly enhances the opportunity as well as the incentive for them to flee this jurisdiction. Moreover, I cannot ignore the fact that their appeal is likely to be heard in the very near future. In my view, all of these factors taken together militate against the granting of bail to the 2nd and 3rd applicants.

In the result, the application of all three applicants for bail pending appeal is dismissed.

Dube, Manikai & Hwacha, the applicant's legal practitioners
Attorney-General's Office, the respondent's legal practitioners