

EMMANUEL MUSHATA
and
THE STATE

HIGHCOURT OF ZIMBABWE
CHIKOWERO J
HARARE; 14 & 20 February 2023

Bail Application

C Chingwe, for the applicant
R Chikosha, for the respondent

CHIKOWERO J:

1. This is an application for bail pending appeal against both conviction and sentence.
2. On 29 September 2022 the applicant was convicted on a charge of criminal abuse of duty as a public officer as defined in s 174(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:28*]. He was sentenced to 30 months imprisonment of which 6 months were suspended for 5 years on the usual conditions of good behaviour.
3. The Court found that during the period extending from November 2018 to September 2019 and at Chitungwiza Municipality the appellant, a Works Manager, acted contrary to or inconsistent with his duty by unlawfully approving a site plan in favour of Zengeza West Constituency Development Fund Committee for the construction of a people's market without Council's approval.
4. Right from his defence outline, the applicant missed the gravamen of the charge. It was not that the applicant contravened the law by allocating the land in question to the Committee. Rather the crux of the charge was that he had acted contrary to and inconsistent with his duty as a public officer by signing, and hence approving, the site plan. Whether it was him or somebody else who had contravened the law by unlawfully allocating the land in question to the Committee in the first place was not the issue. The same mistake was repeated at the hearing of this application. Consequently, the second,

fourth, fifth and sixth grounds of appeal are all misplaced. They are divorced from the offence with which the applicant was charged and convicted of.

5. Mr *Chingwe* conceded that the third ground of appeal is incompetent. It criticises the trial court for admitting into evidence a letter which was produced by consent. In any event, that ground, even if it had been competently raised, has nothing to do with the offence in respect of which the applicant stands convicted of.
6. The seventh ground of appeal is an admission that the applicant signed the site plan. What the applicant takes issue with is that his mere signing of that plan did not mean that he did so with a corrupt motive. Motive is irrelevant for determining criminal liability. Assuming that the ground can be stretched to cover the absence of Criminal intent, I agree with Mr *Chikosha* that intention can be inferred from conduct. It was common cause that the land in question was unlawfully allocated. Proper procedures were not followed. The applicant was in the thick of things from beginning to end. He signed a letter notifying Parliament of the allocation of land to the Committee. The letter was not an offer letter. It was not preceded by any lawful process in respect of allocation of the land. Council did not in fact allocate the land in question to the Committee. Yet applicant went further to sign the site plan for land which was not only not lawfully allocated but was not even fully correctly described. The purported diagram of the stand was not even signed by the Surveyor – General.
7. The Committee was a body of persons. Chapter IX of the Criminal Law Code deals with the offences of bribery and corruption. Section 174 falls under this Chapter. The Chapter does not define a person. The learned magistrate resorted to the Interpretation Act [*Chapter 1:01*] for the definition of a person. It matters not, in my view that, the ultimate or direct beneficiary or beneficiaries of the favour may not be the persons who interacted with the applicant. The record reflects that a people's market was under construction on the open space in question when council intervened to stop such activity. It seems to me that the direct beneficiaries were intended to be members of the Zengeza West Constituency. But that cannot mean that members of the committee, who applied for the land, are not persons in the contemplation of s 174 of the Criminal Law Code.

8. In all the circumstances therefore, I am convinced that the appeal against the conviction enjoys no reasonable prospect of success. I have observed too that the applicant did not even tender a defence to the charge itself preferring instead to grapple with a side issue. At the stage of the appeal hearing that Court is likely to proceed on the basis that the applicant did not have a defence to the charge since the record does not reflect any.
9. Sentencing is an exercise of discretion by a trial court. The appellant will complain that the sentence is excessive. An appellate court can only interfere with the exercise of sentencing discretion on the basis that the sentence is manifestly excessive if the sentence is not only severe but is disturbingly inappropriate. See *S v Nhumwa* S 25/93.
10. In my view the trial court balanced the mitigation against the aggravation. The applicant was a forty-four year old first offender with heavy family responsibilities. On the other hand, the court was mindful of the gravity of the offence, its prevalence in our local authorities and that society does not tolerate dishonest officials in public administration. It referred to relevant sentencing principles in cases of corruption wherein the position is that imprisonment is called for unless there are cogent reasons to the contrary. See *S v Chogugudza* 1996(1) ZLR 28(S). Deterrence, both individual and general as well as public indignation predominate over factors personal to the offender.
11. There was no need for the trial court to receive evidence of the nature of the exact benefit that accrued to the applicant from his misdeed. There certainly was something in there for the applicant if one has regard to his heavy involvement in the crime. He could not have been risking his job as well as possible conviction and incarceration for nothing. The court explained that imposition of a sentence of a fine or community service would send the wrong message to the society. It would result in the public losing confidence in the criminal justice system. A non custodial sentence would give the impression that the courts condone corruption. These to me are sound reasons for justifying the passing of the custodial sentence. In any event, the actual sentence imposed appears to be lenient.
12. The appeal against the sentence has no prospect of success.
13. The record of proceedings is ready. The learned magistrate has already commented on the grounds of appeal. Mr *Chingwe* told me that heads of argument will soon be filed on behalf of the applicant. There is no backlog of appeals in the Anti-Corruption Court at

the High Court at Harare. I have taken judicial notice of that fact. Ultimately Mr *Chingwe* conceded, correctly in my view, that there is unlikely to be any delay in the hearing of the appeal. I am satisfied that the applicant will not finish serving before his appeal is heard and disposed of.

14. The conviction means the presumption of innocence has fallen away. The applicant's religious adherence to the conditions of bail pending trial has no bearing on the present application.
15. The entire appeal is in my view doomed to fail. There is a correspondingly heightened inducement on the applicant to abscond. See *R v Williams* 1980 ZLR 466.
16. In the result, the application for bail pending appeal against the conviction and sentence be and is dismissed.

Shava Law Chambers, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners