PRICILLAR VENGESAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 17 & 31 May 2023

Criminal Appeal

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

CHIKOWERO J:

INTRODUCTION

1. This is an appeal against the sentence imposed on the appellant by the Magistrates Court sitting at Harare following a full trial on a charge of bribery as defined in s 170 (1) (a) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]
2. The trial court passed a sentence of 2 years imprisonment of which 9 months were suspended for 5 years on the usual condition of good behaviour. The effective custodial sentence was 15 months imprisonment

THE FACTUAL BACKGROUND

3. The appellant, a legal practitioner, was the Chamber Secretary for Chitungwiza Municipality at the material time. She approached a Judge of the High Court in Chambers, at Harare, to whom she offered a bribe. The bribe consisted of an undisclosed amount of United States dollars contained in an envelope. The appellant told the Judge that she had been sent to deliver the sum of money as a token of appreciation by a client pleased that the Supreme Court had dismissed an appeal which had been noted against the decision of the High Court Judge, sitting as the High Court of Zimbabwe.
4. The Judge turned down the bribe, told the appellant that she strongly disapproved of the latter's conduct and caused the appellant's arrest.

Issues Arising On Appeal

5. In seeking to impugn the sentence, the appellant raised six grounds of appeal. However, only two issues arise. They go to the legal principles involved in determining an appeal against sentence.
6. The first is whether the trial court committed an error in the sense of passing a sentence which was manifestly harsh and excessive as to induce a sense of shock.
7. The second is whether the Court misdirected itself in exercising its sentencing discretion. In particular, the appellant contended that the court disregarded the mitigating factors and exaggerated the seriousness of the offence in assessing an appropriate sentence.

THE LAW IN AN APPEAL AGAINST SENTENCE IN SO FAR AS IT RELATES TO THIS MATTER

8. Sentencing is pre- eminently a matter for the discretion of the trial Court. An appellate court should be careful not to erode such discretion. Where a sentence is attacked on the general ground that it is excessive, it should be altered only if the appellate court is satisfied that it is disturbingly inappropriate. See *S* v *Ramushu and ors S* 25/93; *S* v *Nhumwa* S 40/88 and *S* v *de Jager* 1965(2) SA 616 (A) at 628-9.
9. The other scenario relevant to this case is whether the sentence imposed is marred by a misdirection in the sense of the court having disregarded relevant factors in the form of the mitigation presented by the appellant and exaggerating the seriousness of the offence. This is so because the appellate Court's function in an appeal against sentence is not the general one of ameliorating the sentences of trial Courts. See *S* v *Mundowa* 1998(2) ZLR 392(H).

DETERMINATION OF THE APPEAL

10. It is true that the appellant was a female first offender, and that the lawmaker has provided the option of a fine for the offence of bribery. Mr Masango submitted that insufficient regard was had to the appellant's status as a female first offender and that the Court disregarded the legislated option of a fine. He argued also that the Court exaggerated the seriousness of the offence and hence placed undue emphasis on the need for deterrence.

11. In arguing that the offence was not so serious in the circumstances Counsel relied on the fact that the bribe, which was rejected, was offered at a time when the Judge had already rendered judgement and hence did not influence the making of that judicial decision.
12. Ms Kunaka referred us to *S* v *Mudawari* HH 270/90 where the point was made that bribery and corruption are viewed with thorough disapproval. The reasons for this are that they undermine the fabric and orderly function of the country's institutions. Consequently, the proper punishment in bribery and corruption cases should be imprisonment unless there are circumstances which indicate that this would be inappropriate.
13. We think that the learned Magistrate applied the correct principles in sentencing the appellant. He took into account the appellant's status as a female first offender and gave sound reasons why a fine was inappropriate in the circumstances. He noted that the crime of bribery was prevalent. He considered too that the appellant's moral blameworthiness was elevated by the fact that the appellant was a legal practitioner who had exhibited unparalleled courage by approaching a whole Judge of the High Court in Chambers to offer a bribe.
14. Members of the judiciary are required to be persons of unquestionable integrity. S 165 (2) and (3) of the Constitution demands of them to strive to enhance their independence in order to maintain public confidence in the judicial system and that in making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence.
15. By acting as she did the appellant was undermining public confidence in the judicial system. The message that she was sending out to members of the public was that it was possible to interfere with the judicial function by bribing judges. Members of the judiciary hold the judicial office as a public trust. It is an honour to hold judicial office. The powers exercised by holders of the office belong to the public. Viewed in this light the public are important stakeholders in the proper functioning of the judicial system. It is thus easy to understand why the Supreme Court in *S* v *Ngara* 1987 (1) ZLR 91(S) laid down the correct sentencing approach in bribery and corruption cases, at 101 C, as follows:

> " 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".

See also *S* v *Lawrence and Anor* 1989)(1) 29 (SC)

16. By incarcerating the appellant the learned magistrate was giving expression to the need to ensure that deterrence and public indignation predominated over all other factors in determining an appropriate sentence.
17. Judges sit in the higher courts of the land. The magistrates' court, correctly in our view, realised the need for the courts themselves, in sentencing offenders for bribing members of the judiciary, to sent out a clear message that society, through the courts, did not condone this offence. The learned magistrate said in this regard:

> "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 ……."

18. That the bribe was offered not as an inducement to decide the court case in a certain way but as a reward for having decided the matter as the Judge did is to us a distinction without a difference. Even for purposes of founding criminal liability the lawgiver defined both scenarios as the offence of bribery. What remains paramount is that the appellant's conduct undermined public confidence in the integrity of the judicial system.
19. In the circumstances the first, third and sixth grounds of appeal are without merit. The sentence imposed does not induce a sense of shock. Sufficient weight was accorded to the appellant's status as a female first offender, a fine was properly discounted, due regard was had to the need for individual as well as general deterrence and the seriousness of the offence was not exaggerated at all.
20. *State* v *Adolfo* 1991(2) ZLR 325(H), cited in the appellant's heads of argument, does not assist her at all. It underscores the point that sentences for bribery depend on the circumstances of each matter.
21. The second ground of appeal is not properly taken. This is so because the appellant attacks the severity of the sentence on the basis that all she did was to attempt to bribe the Judge. The appellant was convicted on a charge of bribery. There is no appeal against the conviction. In these circumstances, the second ground of appeal merits no further consideration.

22. The court did not ignore the submission made by the Prosecutor- General's representative, which grounded the concession that a fine may have been a suitable sentence. Indeed, the State was careful to place a rider on its concession by pointing out that the sentencer still retained the discretion to pass an appropriate penalty. We agree with Ms Kunaka that the trial court was not bound by the concession. That court considered the concession and the basis thereof and concluded that it was not sound. Accordingly, the fourth ground of appeal, that the sentencer ignored the concession and the basis thereof, is founded on an incorrect reading of the record. The misdirection sought to be relied upon is non-existent.
23. Finally, we do not share the appellant's view that the court disregarded the mitigating factors placed before it by the appellant. If anything, the reasons for sentence are thorough. There was a careful identification of both mitigating and aggravating factors. This was followed by a balancing exercise of those factors the result of which was a finding that the aggravation outweighed the mitigation so as to justify the imposition of a custodial sentence. Even then, the court was minded to exercise lenience on account of the mitigating factors chief of which included the fact that the appellant would lose her job as a lecturer at the Great Zimbabwe University as a direct consequence of the conviction (which loss was a punishment on its own), her status as a female first offender and single parent with young children to look after. We agree with Ms Kunaka that the court did not misdirect itself. It did not irregularly approach the issue of sentence by ignoring the mitigation.
24. At the end of the day, the appellant must consider herself fortunate that she received a lenient sentence.
25. The sentence is neither excessive nor is it vitiated by any misdirection. The appeal against the sentence cannot succeed.
26. In the result, the appeal be and is dismissed.

CHIKOWERO J:……

KWENDA J:……..

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