JACOB NGARIVHUME
and
THE STATE

HIGHCOURT OF ZIMBABWE
CHIKOWERO J
HARARE; 9 & 14 June 2023

Bail Application

L Madhuku with M Nkomo, for the applicant
F I Nyahunzvi, for the respondent

CHIKOWERO J:

[1] This is an application for bail pending appeal against both conviction and sentence.

[2] The applicant was convicted on a charge of incitement to commit public violence as defined in s 187(1)(b) as read with s 36(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

[3] He was sentenced to 48 months imprisonment of which 12 months were suspended on the condition of good behaviour.

[4] The Court found that he, realising that there was a real risk or possibility that members of the public may be persuaded or induced by his message to commit the offence of public violence, had posted a message on his twitter account inciting them to engage in public violence.

[5] The applicant bears the onus of establishing that there is a reasonable prospect of his appeal succeeding and that there are positive grounds for granting him bail pending the determination of the appeal. See *State* v *Labuschagne* 2003(1) ZLR 644(S); *State* v *Manyange* 2003(1) ZLR 21(H); *State* v *Chikumba* 2015(2) ZLR 382(H).

[6] I take the view that there is no reasonable prospect of success in the appeal against the conviction. It is true that the prosecution did not adduce expert evidence to prove that the

applicant owned the twitter account on which the message in question was posted. It is true also that the prosecution did not place before the trial court expert evidence to prove that it was the applicant who had posted the message on that twitter account.

[7] However, I think the appellate court is likely to agree with the trial court' finding that such expert evidence was not necessary in the circumstances of this matter. To begin with, the applicant, in excepting to the charge, effectively admitted that the twitter account belonged to him and that he posted the message on that account. The exception was placed before him, for comment, under cross-examination. He was asked to read the relevant paragraphs of that document into the record. That he did. He was asked to explain the meaning of those paragraphs. The record discloses that although he endeavoured to evade the questions put to him by the cross-examiner he ultimately conceded that, in the exception, he made the point that in the tweet he was exercising his freedom of expression among other constitutional and political rights. He complained of selective prosecution on the basis that others were not on trial despite them having expressed the same views as he communicated in the tweet. In advocating for a corruption free society, so the exception proceeded, the applicant had not committed the offence with which he was charged. Amplifying the fight against corruption in a democratic society was not a crime, he said in the exception whose contents he stood by under cross-examination.

[8] I see no reasonable prospect of the applicant persuading the appellate court to find that the trial court misdirected itself in fact in finding that the twitter account in question was his and that he posted the message thereon. The applicant would not have been complaining of selective prosecution and would not have taken the point that the message was an exercise by him of his constitutional right of freedom of expression if he had not in fact posted that message on his twitter account in the first place. To seek to reason otherwise appears nonsensical.

[9] Indeed, despite the trial court having relied on the implications of the exception in convicting, the applicant has in his grounds of appeal not taken issue with the correctness of the court's advertence to the content of the exception in rendering its verdict.

[10] The photograph derived from the tweet depicted the picture of the applicant with his posture akin to that of a person addressing a gathering. It reads:

> "31 JULY DEMO
> THIS IS NOT POLITICS, IT'S A MATTER OF LIFE AND DEATH
> WE HAVE BEEN PATIENT, TOLERATE AND QUIET
> BUT
> THESE CORRUPT CRIMINALS ARE DESTROYING OUR FUTURE……
> LET'S BRING OUR SUFFERING TO THE GOVERNMENTS ATTENTION.
> LET'S COME TOGETHER AS CITIZENS AND SAY ENOUGH IS ENOUGH"

[11] The learned magistrate reasoned that the applicant, being an influential person by dint of his position as President of a political party called Transform Zimbabwe, intended to incite members of the public to commit the offence of public violence by posting, on his twitter account, the message that I have reproduced above. It was not in dispute at the trial that no arrangements had been made by the applicant to hold a demonstration on 31 July 2020. The message was very strongly worded. I do not think that a serious argument can be made on appeal that the learned magistrate misdirected himself in finding that the appellant's intention, gleaned from the message itself, was to incite members of the public to resort to lawlessness come 31 July 2020. In short, it would be far-fetched for the applicant to suppose that the appellate court would likely credit his contention that the mental element of the offence with which he was charged was not proved.

[12] It is correct that the warned and cautioned statement did not mention the twitter account in question. But the point was there made, repeated in the charge sheet, that the twitter account belonged to the applicant. In these circumstances, my view is that the appellate court is likely to agree with the trial court that the applicant's failure to mention his defence to the police at the time of the recording of his warned and cautioned statement justified the lower court's resort to the provisions of s 257 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The applicant's defence at the trial was a denial of communication of the message on the twitter account, by himself, because he did not have a twitter account at the time that the offence was said to have been committed. The magistrate found that his defence was an afterthought on the basis that he should have told the police that he did not commit the offence since he did not have a twitter account at the material time. This was so because the allegations in the warned and cautioned statement made it crystal clear that the offence was

committed by him on his twitter account. He could not have required further particulars of the twitter account in question if in fact it was always his defence (even as he was warned and cautioned) that he did not have a twitter account at the time that the offence was committed. The twitter account details would not have been an issue at all, both at the time of the recording of his warned and cautioned statement and at the trial.

[13] In regards the appeal against the sentence I am of the opinion that the applicant enjoys reasonable prospects of success. It suffices in my view to mention that, indeed, the learned magistrate sentenced the applicant as if he stood convicted of the offence of public violence as defined in s 36 of the Criminal Law Code. The reasons for sentence are clear in this respect.

[14] Having said that, without the benefit of sentencing trends in this jurisdiction for the offence of incitement to commit public violence (both counsel did not draw my attention to any), I am not prepared to go so far as to say that the appellate court is likely to substitute a non-custodial sentence for that imposed by the trial court.

[15] The learned magistrate has already commented on the grounds of appeal. The record has been paginated. There appears to be nothing standing in the way of the applicant filing heads of argument to facilitate an expeditious set down and hearing of the appeal.

[16] The applicant has already tested prison life. For the President of a political party in particular, I proceed on the basis that the applicant's stint in prison is not one that he is prepared to endure again, should he be released on bail pending the determination of his appeal.

[17] I have found that the appeal against the conviction is without reasonable prospect of success. I have found also that although the applicant enjoys reasonable prospects of success on appeal against the sentence such prospects do not appear to attain the threshold of the likelihood of the appellate court interfering with the sentence to the extent of imposing a non-custodial sentence.

[18] Besides being a politician who is married and resident in this jurisdiction the papers placed before me do not speak to the applicant as being rooted in his country to such an extent as to allay the danger of abscondment if he were to be released on bail pending the

determination reasonable of his appeal. I have already indicated that in addition to showing the existence of prospect of success of the appeal the applicant bears the onus of satisfying me that there are positive grounds for his release on bail pending determination of his appeal. I do not think his offer of a bail deposit in the sum of ZWL $500 000, to reside at his given address, to report once per week at the named police station and to surrender his passport to the clerk of court tilt the balance in his favour particularly when regard is had to what I have found in respect of the prospect of his appeal succeeding and the absence of any delay before the appeal itself is heard. I say this fully cognisant of the invitation by Mr *Madhuku* that I consider granting bail on any other conditions that I may think reasonable. This is not a matter where in the imposition of bail conditions is decisive. On appeal, the applicant is likely to be required to still serve some custodial sentence. I am of the view that his admission to bail endangers the interests of justice in that fear of resumed incarceration will trigger abscondment. It is in the interests of the administration of justice that he prosecutes his appeal while serving his sentence.

[19] In the result, the application for bail pending appeal against the conviction and sentence be and is dismissed.

DNM Attorneys, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners