

LOVENESS MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 17 FEBRUARY 2023 & 23 FEBRUARY 2023

Application for bail pending review

N. Sithole, for the applicant

T.M. Nyathi, for the respondent

DUBE-BANDA J

1. This is a bail application pending review. The applicant was charged with the crime of contravening section 3 (1) as read with section 3 (3) of the Gold Trade Act [Chapter 21:03]. He pleaded guilty. The trial court found no special circumstances and he was sentenced to the minimum mandatory sentence of five years imprisonment. Aggrieved by the sentence the applicant filed this application for review.
2. The applicant contends that the presiding Magistrate had no sentencing jurisdiction to pass a sentence of five years imprisonment. The grounds of review are that:
 - i. 1st respondent's decision to hear the matter and pass a mandatory sentence of five years in the circumstances where 1st respondent does not have such sentencing jurisdiction in a matter under cover of case number CRB FIL 09/23 is so grossly irregular in the circumstances and so grossly unreasonable, such that a reasonable court, faced with such a legal question and circumstances could not have heard the matter.
 - ii. 1st respondent's decision to preside and hear the matter under cover of case number CRD FIL 09/23 is grossly irregular and procedurally unlawful where 1st respondent passed a sentence of five years without application and being granted increased jurisdiction whereat 1st respondent's sentencing powers are a maximum of two years.

3. In an application for bail pending review against sentence one of the decisive principles is whether there are reasonable prospects of success on review, i.e. that the sentence will be set aside and a non-prison sentence be imposed. The absence of such reasonable prospects would justify the refusal of bail. Although the personal freedom of an individual is always an important consideration, where a person does not challenge his conviction, the administration of justice requires a speedy serving of the sentence, and no logical or juridical reasons exist why the execution of sentence should be delayed if after review the sentence is unlikely to be reduced to non-imprisonment.
4. The sentencing jurisdiction of the trial magistrate is prescribed in section 50(1) of the Magistrates Court Act [Chapter 7:10]. It says the jurisdiction of a court of a magistrate, other than a senior, provincial or regional magistrate, in respect of punishment for any offence shall be on summary trial imprisonment for a period not exceeding two years; or a fine not exceeding level seven; on remittal by the Prosecutor-General under the increased jurisdiction to imprisonment for a period not exceeding four years; or a fine not exceeding level nine.
5. In passing a sentence of five years the presiding Magistrate exceeded her sentencing jurisdiction. Under the Gold Trade Act [Chapter 21:02] the presiding Magistrate was not given any special sentencing jurisdiction. Therefore the presiding Magistrate had no jurisdiction to sentence the applicant to five years imprisonment. The applicant has prospects of success on review in respect of the sentence. However, this aspect is not dispositive of this matter. It does not mark the end of the inquiry.
6. The applicant pleaded guilty and was duly convicted of contravening section 3 (1) as read with section 3(3) of the Gold Trade Act [Chapter 21:03]. Section 3(1) says *inter alia* no person shall, either as principal or agent, deal in or possess gold, unless he is the holder of a licence or permit. Section 3(3) provides thus:
 - (3) Any person who contravenes subsection (1) shall be guilty of an offence and liable—
 - (a) if there are no special circumstances in the particular case, to imprisonment for period of not less than five years or more than ten years; or
 - (b) if the person convicted of the offence satisfies the court that there are special circumstances in the particular case why the penalty provided under paragraph (a) should

not be imposed, which circumstances shall be recorded by the court, to imprisonment for a period not exceeding five years or a fine not exceeding level nine or twice the value of the gold that is the subject-matter of the offence, whichever is the greater, or to both such fine and such imprisonment.

7. In her review application she takes no issue with conviction. The conviction is unassailable. At this stage the presumption of innocence has ceased to operate in favour of the applicant. She is a convicted person. The trial court made a finding that there were no special circumstances. This finding is not challenged in the review application, although in his oral submissions Mr *Sithole* counsel for the applicant argued that the first ground of review speaks to the attack on the trial's court's finding relating to special circumstances. This is not so. The first ground of review simply speaks to the absence of the trial court sentencing jurisdiction to sentence the applicant to five years imprisonment. No amount of spin nor ingenuity would change this position. It has nothing to do with the aspect of special circumstances. The second ground of review is simply a repetition of the first ground, it also speaks to the absence of special sentencing jurisdiction.
8. Mr *Sithole* submitted that even if the finding on special circumstances is not attacked in the grounds for review, this aspect can still be added in the grounds for review. Even if it is so, such an attack is likely to fail. I say so because the record of proceedings show that the trial court explained to the applicant what special circumstances entail. The argument by Mr *Sithole* that she did not understand the explanation is of no moment. It is of no consequence. She confirmed that she understood the explanation. The argument by counsel was just at variance with the record. I take the view that the finding that there were no special circumstances is very unlikely to be faulted on review.
9. With the conviction being unassailable and without special circumstances as found by the trial court, in terms of section 3(3) of the Gold Trade Act after the review the applicant will still be liable to imprisonment for a period of not less than five years or more than ten years. The review court may only set aside the sentence and remit the matter to a different presiding magistrate with requisite jurisdiction to impose a sentence of five years. On the facts of this case the five years imprisonment is coming back.

10. In an application like this it is an important consideration whether the applicant will serve her sentence if released on bail. Thus the severity of the sentence to be imposed will be an important factor in deciding whether to admit the applicant to bail or not. Particulaly factoring into the equation that she stands convicted and the trial court has found that there are no special circumstances to mitigate the sentence. She will still be sentenced to five years imprisonment. The possibility of absconding is always a very real danger in cases where long terms of imprisonment will be imposed. The prospect of a protracted prison term, coupled with her fresh experience of post-trial incarceration, affords abundant incentive for her to abscond. This increases the risk of abscondment. I agree with counsel for the respondent that the offence with which the applicant stands convicted of is a serious one, and the risk of her absconding if admitted to bail pending review is very high.

11. Her release on bail at this stage could be a danger to the administration of justice. The cumulative effect of these factors constitute a weighty indication that bail should not be granted. See: *S v Myers* 1991 (1) SACR 383 (C); *S v Gomana* SC 166 / 2020. In all the circumstances, I am amply satisfied that the appellant is not a good candidate for bail pending review. It is for the above reasons that this application must fail.

In the result, I order as follows:

The bail application pending review be and is hereby dismissed.

It is so ordered.