

REPORTABLE (38)

(1) PETER SIGAUKE (2) ENOCK MUKWEKWE
v
THE STATE

**SUPREME COURT OF ZIMBABWE
UCHENA JA, CHIWESHE JA & CHATUKUTA JA
HARARE, 30 JUNE 2023, & 19 APRIL 2024**

L. Uriri, for the appellants

C. Muchemwa, for the respondent

CHATUKUTA JA: This is an appeal against the whole judgment of the High Court (court *a quo*) in which it upheld the conviction and sentence imposed on both appellants by the Magistrates Court for criminal abuse of duty as public officers as defined in s 174 (1) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*] (the Act).

The first and second appellants were employed by Mutoko Rural District Council (the Council) as Chief Executive Officer and Planning Officer respectively. They were each convicted in the Magistrates Court of three counts of criminal abuse of duty as public officers, as defined in s 174 (1) (a) of the Act. All counts were taken as one for purposes of sentence and each appellant was sentenced to 36 months imprisonment of which 12 months' imprisonment was suspended on the usual conditions of future good conduct.

PROCEEDINGS BEFORE THE TRIAL COURT

The charges against the appellants arose from the manner in which they dealt with and disposed of Council land around the Chinzanga Beerhall. They were alleged to have subdivided the land into a number of stands without Council's resolution authorizing the subdivision and without Ministerial approval. They sold the stands to Gabriel Karimazondo, Tinashe Mazarura and Sarah Chipunga. The appellants sold the stands to the three purchasers with the intention to show favour to them as the sale of the stands was not advertised as was required and the purchasers therefore did not compete with anyone. Each of the three purchasers paid the purchase price to the second appellant. The purchase price was not remitted to Council. No receipts were issued to the purchasers. The appellants acted in connivance and benefitted from the sales.

The respondent led evidence from thirteen witnesses. Among these witnesses were the Chairperson of Mutoko Rural District Council, councillors and the appellants' former co-workers. The cumulative effect of the evidence led from these witnesses was that the procedure for the sale of council land was not followed. The procedure was that Council had the ultimate decision on the sale of land to interested parties. It would pass a resolution on how it intended to dispose of the property. It would seek the approval of the relevant Minister before the sale. Once the approval was at hand, it would task the Management Committee to implement the approved resolution. The witnesses testified that Council had resolved that corner shops be created at the Chinzanga Beerhall stand. These were to be allocated to local women to carry out their income generating projects.

Unbeknown to Council, the Management Committee altered its resolution, created the stands which were sold to the three purchasers. The witnesses testified that the creation and subsequent sale of the stands was not sanctioned by the Minister. It was further testified that there

was no record at Mutoko Rural Council of any of the three transactions or of any payments made by the purchasers.

Gabriel Karimazondo, Tinashe Mazarura and Sarah Chipunga testified on how they purchased the stands and paid the full purchase price for the stands to the second appellant either directly or through intermediaries.

Karimazondo testified that he approached the second appellant and inquired from him if there were any stands available for sale. The second appellant referred him to Councillor Jembere who confirmed availability of vacant stands near Chinzanga Beerhall. Jembere however referred him back to the second appellant for the values of the stands. Karimazondo approached the second appellant at the council offices. The second appellant told him that the stand which was available was valued at US\$8 000. He paid the purchase price in two instalments of US\$4 000 each. Payment was made to the second appellant at the council offices. He did not get any receipts for the payments. When he next visited council, following up on the receipts, the second appellant told him that he was required to submit a plan for the buildings that were to be constructed on the stand. An offer letter would thereafter be issued. He paid the second appellant US\$250 for preparation of the plan. When he followed up with the second appellant for the receipt, Saungweme gave him the approved plan and an offer letter dated 21 October 2019. The offer letter had been signed by the first appellant. He later realized that Saungweme had drawn the plan although he did not ask for payment. He then commenced construction of the building as per the plan by digging a foundation. He delivered some bricks on the stand. He was surprised when the second appellant told him to stop work as there was a misunderstanding amongst some councillors over the stand. After some time, police approached him in 2020 regarding the purchase of the

stand. He again approached the appellant asking for his receipts. The second appellant directed him to some officer at the council offices to sign some documents and get his receipts. When he arrived at the council offices, he met the officer who identified him by name. He was made to sign a lease agreement. The agreement was however dated 5 July 2019 although he signed it in 2020 and after police had commenced their investigations into the allegations leading to the conviction of the appellants. He was subsequently advised by the second appellant that Council had resolved that the stand be leased to him for a period of between five and ten years and that the lease agreement would be renewable after that period. He persisted with his evidence under cross examination that he had purchased the stand. He maintained that he had at all material times dealt with the second appellant. He further maintained that he received the offer letter in October 2019 before signing the lease agreement in 2020 although the agreement was dated 5 July 2019.

Karimazondo's evidence was corroborated by the evidence of Rabson Jembere. Jembere confirmed having been approached by Karimazondo and in turn inquired with the second appellant who confirmed that there were stands for sale. He relayed the information to Karimazondo and directed him to go to the second appellant for information on the purchase price. That was the extent of his involvement.

Tinashe Solomon Mazarura testified as follows. He inquired from one Douglas Chitsindi, an ex-council employee, if there were stands available for sale. Chitsindi made some inquiries with someone at the council offices and was advised that stands were available for sale and were valued at US\$4 000. He gave Chitsindi a sum of US\$2 000 to pay as a deposit for the stand. He was not given a receipt. He asked for the receipt from Chitsindi. Chitsindi referred him to the second appellant. He went to see the second appellant at the council offices to get the receipt.

The second appellant referred him to some young man to go and sign a lease agreement. The second appellant told him that the land was going to be his after a period of two to three years. The agreement had been signed by the first appellant prior to him affixing his signature. He signed the agreement sometime in 2019 prior to becoming aware of police investigations. He was not given an offer letter.

Mazarura's evidence was corroborated by Douglas Chitsindi who confirmed that he was approached by Mazarura to make inquiries on his behalf if there were stands for sale. He confirmed approaching the second appellant who confirmed the availability of a stand for sale valued at US\$4 000. He further confirmed that he gave the second appellant the US\$2 000 at Chinzanga Township as a deposit. The second appellant did not issue them with a receipt. He testified that the second appellant gave him US\$150 from the deposit as a token of appreciation. He denied under cross examination that the second appellant told him that the stand was for lease.

Sarah Chipungu testified as follows: Sometime in 2019 she sent Trust Kachidza, a councillor, to inquire on her behalf from council on the availability of stands for sale. Kachidza advised her that the stands were available and they were being sold for US\$2 400 each. She sent her nephew, one Itai Chibanda, to go with Kachidza to pay the purchase price. Chibanda reported back that payment had been made to the second appellant but no receipt was issued. When she later asked for a receipt, she was given an offer letter issued by the first appellant and dated 26 August 2019. The offer letter was purported to be the proof of payment. She had constructed a slab when she was told to stop all construction works. She was never advised of the Build-Operate-Transfer (BOT) project. She was not given a lease agreement.

Itai Chibanda and Trust Kachidza confirmed paying US\$2 400 to the second appellant as purchase price for a stand sold to Sarah Chipungu and that no receipt was issued. They further testified that when they asked for a receipt, they were told by the second appellant that Chipungu would be given an offer letter as proof of payment. They both denied being advised by the second appellant that the payment was for the BOT project. They were satisfied that the payment made on behalf of Chipungu was the purchase price and that the offer letter was proof that full payment had been made. Had the second appellant explained to them about the BOT project, they would have relayed the information to Chipungu.

The State further produced through the purchasers offer letters signed by the first appellant and issued to Chipungu and Karimazondo respectively. The offer letters reflected that payment was made in full in each case. Also produced were two lease agreements concluded with Mazarura and Karimazondo.

At the time the offer letters and lease agreements were issued. Oscar Katuka, a former Human Resources and Administration Officer, was the first appellant's personal assistant. Sometime in 2020, and after investigations into allegations surrounding the three stands had commenced, he was tasked by the second appellant to prepare lease agreements between Council and Karimazondo and Mazarura. The agreements were however, backdated to July 2019. He signed both agreements as a witness. The first appellant signed the lease agreement for Mazarura on behalf of Council. The second appellant signed the agreement for Karimazondo also on behalf of Council.

Christopher Shumba, who was, at the relevant time, the chief director in the Ministry of Local Government and Public Works responsible for rural district authorities, confirmed that rural authorities were directed by central government to implement the Ease of Doing Business policy. He however testified that whilst the policy gave greater latitude to executive management to deal with processes expeditiously, it was not intended for management to operate without any accountability to council. He further testified that the policy was not intended to take away the role of rural councils and councillors to oversee management of the council. He confirmed that the decision whether to implement BOT projects was a decision for council and not management. Management had arrogated itself council powers when it decided to implement the BOT policy without reverting to Council. After perusing offer letters issued by the first appellant, he testified that there were anomalies on the offer letters. The first anomaly was that the stands offered to the purchasers were not properly described and identified as to their extent and location. The second anomaly was that the price of the stands or the amount said to have been paid in full was not stated in the offer letters. He testified that there was a further anomaly in the offer letter issued to Karimazondo in that it was issued after the lease agreement with Karimazondo was allegedly concluded.

Both appellants pleaded not guilty. They were the sole witnesses in their own defence. They denied selling any stands to the trio and receiving any payment for the stands. They further denied acting contrary to their duties. Their defence was that they were members of the management committee of Council. Full Council had resolved to delegate powers to management to enter into lease agreements with those who needed commercial stands on the piece of land on which Chinzanga Beerhall stood. This was in compliance with the directive issued by central government on the Ease of Doing Business which was intended to curtail the laborious procedure

of going through full Council. The lessees would put up temporary structures. They would then operate from those structures, rent free for five years. Thereafter, Council would take over the structures without paying any compensation to the former lessees. It was in terms of this (BOT) model that the management committee of Council agreed to lease the stands to the three purchasers being Gabriel Karimazondo, Tinashe Mazarura and Sarah Chipungu. Although Council had resolved to allocate stalls to some local party women, management agreed that the allocation would not financially benefit council hence the decision to adopt the BOT project. They did not revert to Council when the management committee decided to alter an earlier decision of Council because Council had delegated to them powers to implement the BOT policy.

The following documents were produced before the trial court through the appellants:

- (a) Circular 1 of 2017 dated 5 June 2017 and headed “ADOPTION OF EASE OF DOING BUSINESS IN RURAL LOCAL AUTHORITIES” issued by the Secretary of Rural Development, Promotion and Preservation of National Culture and Heritage addressed to all Rural Local Authorities. The Circular set out the steps that rural local authorities were required to take in implementing the Ease of Doing Business.
- (b) Minutes of the Meeting of Full Council held on 7 August 2017. The concept of Ease of Doing Business was presented to the full Council. The Council resolved to create a website for online applications for stands, business licenses. It further resolved to delegate “appropriate powers to the Executive to form a Committee to allocate land, approve business licenses, plan and permits.”

- (c) Minutes of the Meeting held by the Management Committee on 8 May 2017. Both appellants, being part of management, were members of the Management Committee and were in attendance. The meeting was chaired by the first appellant. The Management Committee resolved, in relation to the agenda item on the “Construction of corner shops at Chinzanga Beerhall”, as follows:

“The house agreed that market stalls be established under the Build-Operate-Transfer system. In this regard, the House agreed to locally advertise for prospective individuals who are interested in developing Chinzanga beerhall premises for the aforementioned purpose. Successful candidates will use the premises for the period of 5 years without paying rentals to the Council. The engineering department was tasked to spearhead the project.”

- (d) Document titled MASHONALAND EAST TECHNICAL DEPARTMENTS EASE OF DOING BUSINESS: NEW PROCEDURES (hereinafter referred to as “Ease of Doing Business Procedures”). The document set out the procedures that management was to follow in applications for stands and licenses.

The appellants testified that it is on the strength of these documents that they allocated stands to the purchasers. The Management meeting had agreed that local advertisements be flighted for the stands in issue and that those who were successful be awarded 5-year leases under BOT policy.

The first appellant, in addition to the above evidence, testified that he relied on information placed before him from the engineering department when he issued the offer letters. The department would, as a practice, submit letters that required his signature only. He trusted that the department would have verified all the information in the letter and therefore he did not require them to produce the relevant information. His evidence was that his conduct, in issuing

the offer letters and signing the lease agreement, would amount to negligence in the discharge of his duties and did not constitute a criminal offence.

In addition to the evidence common to the appellants, the second appellant admitted demarcating the stands and supervising the team that worked on the ground. He also admitted to placing identity tags on the stands allocated to Mazarura and Karimazondo.

FINDINGS OF THE COURT TRIAL COURT

The trial court made the following findings: The evidence of the three purchasers confirmed that the stands had been sold to them. They respectively paid the purchase prices to the second appellant who played a pivotal role in the sale of the stands. Although the purchasers were not issued with receipts, their evidence was substantially corroborated by documentary evidence, being the offer letters which reflected that full payment had been made. The sale of the stands was not in accordance with the laid down procedures and the sales were intended to favour the purchasers. The appellants failed to explain why it was necessary to issue offer letters and lease agreements in relation to the allocation of the same stands. The lease agreements had been backdated with the intention to support the appellants' assertions that the stands had been leased out and not sold to the purchasers. The appellants had the responsibility, as public officers to account for the payments made to council. They failed to do so and failed to produce proof of any payments made by the purchasers. They connived with each other. The first appellant's conduct went beyond lack of diligence. His responsibilities required him to go beyond simply affixing a signature on the offer letters and the lease agreements. His failure to conduct the requisite validation was intended to favour the purchasers and this was contrary to his duties. The State had therefore proved its case beyond reasonable doubt. As regards sentence, it held that an effective

custodial sentence was warranted because of the nature of the offence as a non-custodial sentence would trivialize the offence.

Disgruntled by the trial court's conviction and sentence, the appellants appealed to the court *a quo*.

PROCEEDINGS BEFORE THE COURT A QUO

Before the court *a quo*, the appellants argued that the trial court had misdirected itself by making findings of fact without assessing the credibility of most of the State witnesses. They further argued that the trial court overlooked the inconsistencies, imperfections and inadequacies in the evidence of the various State witnesses which vitiated the conviction. It was submitted that some of the witnesses ought to have been arraigned before the court as co-accused persons to the appellants. It was argued that the trial court did not exclude the danger of false incrimination of the appellants by those witnesses.

The appellants argued that the sentence imposed by the trial court induced a sense of shock. They submitted that the trial court ought to have sentenced each appellant to pay a fine of RTGS 10 000 and in default 3 months imprisonment. In addition, it ought to have imposed 6 months imprisonment suspended on the usual conditions of good behaviour.

The respondent argued that the trial court properly convicted the appellants after being satisfied that the evidence as adduced by the State managed to prove its case beyond reasonable doubt. It was further argued that the trial court properly exercised its sentencing discretion and arrived at a proper and just sentence in the circumstances.

The court *a quo* held that it is trite that findings of fact cannot be lightly interfered with on appeal in the absence of gross irrationality. It held that there was no basis for interfering with the judgment of the trial court as the decision of that court was not irrational. It held that the trial court was correct in all its findings.

The court *a quo* further held that the inconsistencies, imperfections and inadequacies in the evidence of the State witnesses alluded to by the appellants did not go to the root of the matter. Consequently, it upheld the conviction.

Regarding the appeals against sentence, the court *a quo* held that the sentence imposed by the trial court on each appellant did not induce a sense of shock as it was in line with similar decided cases on corruption. It further held that the trial court justified the sentence and thus properly exercised its discretion in assessing an appropriate sentence

Disgruntled by the findings of the court *a quo*, the appellants filed the present appeal on the following grounds:

**“AD CONVICTION
FIRST APPELLANT**

1. The High Court misdirected itself and therefore erred in law by confirming and endorsing the lower court’s finding that first and second appellants connived and colluded in the commission of the offences in circumstances where the actions of the appellants were separate and distinct thus each’s culpability should have been considered individually depending on what role each played.

2. The High Court grossly misdirected itself and therefore erred in law in making an adverse finding that the first appellant had instructed his personal assistant Oscar Katuka to backdate the lease agreements in circumstances where the witness had testified that it was the second appellant who had given such instructions.

FIRST AND SECOND APPELLANTS.

3. The High Court misdirected itself and therefore erred in law in confirming the convictions in circumstances where suspect witnesses who testified during the trial were not warned in conformity with the provisions of section 267 of the Criminal Procedure and Evident Act [*Chapter 9:07*].
4. The High Court misdirected itself and therefore erred in law by confirming the convictions in circumstances where the trial magistrate failed to warn himself of the dangers of convicting appellants on the basis of the evidence of accomplice witness.
5. The High Court misdirected itself and therefore erred in law in holding that the inconsistencies in and between the evidence of State witnesses was immaterial in circumstances where the inconsistencies went to the root of the matter as the inconsistencies related to the evidence of suspect witnesses who had not been warned.
6. Having made a finding that Exhibits DC Exhibit 1, DC Exhibit 2 and DC Exhibit 3 were genuine and therefore resonated with the appellants' defence, the High Court misdirected itself and therefore erred in law in proceeding to reject the appellants' defence which was reasonably possibly true and in those circumstances the benefit of doubt should have been resolved in their favour.

7. The High Court misdirected itself and therefore erred in law in confirming the convictions in circumstances where the appellants' guilt was not proved beyond a reasonable doubt.

AD SENTENCE.

8. The High Court misdirected itself in confirming the effective sentence of 24 months' imprisonment in circumstances where adequate consideration was not given and the reasons thereof for not imposing the option of community service.
9. The High Court misdirected itself in confirming the sentence in circumstances where the option of a fine coupled with a wholly suspended term were not considered and in circumstances where the penal section provided for the imposition of a fine.
10. The High Court misdirected itself in confirming the sentence in circumstances where the reasons for sentence were scanty and consideration was not given to the compelling circumstances of mitigation that were advanced on behalf of the appellants.
11. The High Court misdirected itself in confirming an overall sentence which was so harsh as to induce a sense of shock.”

SUBMISSIONS MADE IN THIS COURT

Appellants' submissions

At the hearing of this appeal, counsel for the appellants submitted that the court *a quo* erred in confirming the conviction of the first appellant on the basis of connivance with the second appellant. He averred that the threshold of proof was one beyond a reasonable doubt and

not probability of connivance. He submitted that the evidence adduced before the trial court did not point to connivance and once it was established that there was no connivance, the first appellant could not have been found guilty of the offence. Counsel further submitted that the evidence showed that there was no sale of stands. He further submitted that each of the purchasers produced an offer letter although they misunderstood the offer letters to be agreements of sale. He averred that there was a distinction between an offer letter and an agreement of sale.

Counsel for the appellants further submitted that the evidence of the witnesses, particularly one Kachidza, showed that the trial court ought to have taken into account that some of the witnesses were councillors and hence there was conflict of interest. He argued that Kachidza was an accomplice witness and the court should have warned itself of the dangers of relying on accomplice witness.

Counsel also argued that the evidence before the trial court was largely circumstantial and could not point to one reasonable conclusion that the appellants committed the offence as other inferences could be drawn from the evidence. He also stated that the majority of the State witnesses had direct interest in the matter and consequently the finding of guilt was predicated on circumstantial evidence below a reasonable doubt.

In relation to the offer letters signed by the first appellant, it was submitted that the letters originated from heads of departments. The first appellant had assumed that the heads had complied with all procedures and verified the contents of the letters. It was argued that the most the first appellant could be found guilty of is failure to follow due diligence. It was further argued that failure to exercise due diligence did not translate into a criminal offence.

On sentence, counsel for the appellants submitted that the court *a quo* ought to have considered the imposition of community service. He further submitted that the defense proffered by the appellants had a probability of truth hence a custodial sentence was inappropriate in the circumstances.

Respondent's submissions

Mr *Muchemwa*, for the respondent, initially submitted that the first appellant had been wrongly convicted as there was no evidence adduced proving that he ever acted in connivance with the second appellant. He submitted that the second appellant had been properly convicted. Upon engagement with the Court, he capitulated and submitted that both appellants had been properly convicted. He submitted that the first appellant had signed the offer letters given to the purchasers. He further submitted that the court *a quo* could not be faulted for upholding the conviction of the appellants as all the circumstantial evidence adduced before the trial court pointed to one reasonable inference, and that is, that the appellants, acting in connivance, had sold the stands to the purchasers and pocketed the proceeds.

In relation to the sentence imposed, counsel submitted that the sentence did not induce a sense of shock and that the appellants had been convicted of three counts of abuse of public office which they had also benefitted from. Counsel thus moved for the dismissal of the appeal.

ISSUES FOR DETERMINATION

One broad issue commends itself for determination, that is, whether or not the court *a quo* misdirected itself in confirming the conviction and sentence of the appellants by the trial court.

APPLICATION OF THE LAW TO THE FACTS

1. Whether or not the court *a quo* erred in confirming the conviction of the appellants by the trial court.

The appellants were charged with contravening s 174 (1) (a) which reads:

“Criminal abuse of duty as public officer

- (1) If a public officer
 - (a) does anything which he or she knows is contrary to or inconsistent with his or her duty as a public officer; or
 - (b);
with the intention of conferring an undue or illegal benefit on someone else or of unfairly or illegally prejudicing someone else, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level 13 or imprisonment for a period not exceeding fifteen years or both.”

The totality of the evidence that was led by the State before the trial court proved beyond reasonable doubt that the appellants did not comply with Council procedure on the subdivision and sale of Council land. The appellants sought to argue in their defence that they, as part of management, were given authority by Council to deal with Council land in accordance with the Ease of Doing Business policy. Evidence adduced by the appellants themselves did not support their defence. It in fact corroborated the State evidence.

The appellants relied on minutes of their management meeting of 8 May 2019. The meeting resolved that market stalls be built under the BOT project. It also agreed to locally advertise the project. Successful candidates would put up structures and use them for a period of

5 years without paying rent to Council. The engineering department was tasked with spearheading and running the project. Despite testifying that local advertising was done, both appellants failed to prove when and how the advertising was done. The applications by the three purchasers were not produced. No evidence was adduced as to how many individuals responded to the advertisement and competed with the three purchasers. The criterion used in assessing the suitability of the three purchasers was not disclosed. The State evidence was that there was no record of the sales and of the remittance of the money paid to the second appellant to Mutoko Rural District Council. Neither was there proof of any payments made by the three purchasers which is reflected in the offer letters as “full payment”. The appellants argued that there were records at Council but they were not able to access the documents as their bail conditions precluded them from visiting council offices. They, however, did not adduce any evidence on any legal steps taken to secure the documents yet they were legally represented throughout trial and appeal proceeding in the court *a quo* and before this Court. Had they been self-actors they would have been excused for not knowing that there were legal channels available to them to access any documents from Council and place them before the court.

With respect to the first appellant, his conduct was further contrary to or inconsistent with his duty by virtue of the office he held. He was the executive officer of Mutoko Rural District Council and had held that office for 20 years. His responsibility was to oversee the entire management of Council and he was the accounting officer. The buck therefore stopped with him. He was required under the Ease of Doing Business Procedures, which he relied on in his defence, to review and approve recommendations made to him. The requirements for applications in relation to stands were set out in the Ease of Doing Business Procedures. A person interested in a stand was required to complete an application form. He/she was required to produce his/her

National ID and proof of capital. The completed application form would be submitted to the revenue officer who would submit same to the Lands Management Committee. The Committee would review the application and then submit its recommendations to the first appellant. The first appellant was required to approve or review the recommendations. As correctly found by both the trial court and the court *a quo*, the appellant's duties went beyond the mere affixing of a signature on documents. He was required to review or approve recommendations submitted to him. Once approved, the planning department would issue the applicant with an offer letter. The applicant would then pay the deposit, and thereafter any instalments due. The applicant would be required to submit building plans for approval. The lease agreement would then only be issued upon approval of the plan. None of the procedures were followed by the appellants. In fact, the first appellant was required to act on the recommendations of the Lands Management Committee and not the Chief Engineer. He also usurped the responsibilities of the planning department when he issued the offer letters. The first appellant signed the offer letters issued to Sarah Chipungu and Gabriel Karimazondo dated 26 August 2019 and 21 October 2019 respectively. The offer letters were issued well after the management committee had agreed on 8 May 2019 on the BOT project.

As regards the second appellant, the same *modus operandi* was used in all three sales. The second appellant engaged the services of councillors and ex-council employees to communicate with the purchasers. He personally received payment from the purchasers or their intermediaries. He admitted demarcating the stands allocated to Chipungu and Karimazondo. Karimazondo and Muzarura entered into lease agreements with Council on the instructions of the second appellant. The lease agreements however did not refer to the offer letters. They reflected that they were concluded prior to the issuance of the offer letters.

Reason Makore, the district engineer and head of the engineering department, which department had been tasked with running the Ease of Doing Business project, testified that he was not aware of the subdivision by the second appellant. He was not aware of any advertising of the stands or that stands had been allocated or sold to the purchasers. He testified that he was surprised to find developments at different stages coming up at the Chinzanga Beerhall yet he was responsible for planning, pegging of stands, allocation of stands and planning of roads and sewer systems. Although the second appellant was his subordinate, he did not report to him about the subdivision. He did not give instructions to the second appellant and no records on the subdivisions were filed in his office.

It is therefore evident that the purchasers obtained the stands without going through any process other than consult their councillors who connected them to the second appellant and ultimately to the first appellant who then issued the offer letters and lease agreements in order to sanitize an otherwise unprocedural allocation of stands. The procedures set out for the Ease of Doing Business were curtailed in favour of and to the benefit of the three purchasers.

Counsel for the appellants argued that the evidence before the trial court was largely circumstantial and did not point to one reasonable conclusion that the appellants committed the offence as other inferences could be drawn from the evidence. The question of circumstantial evidence relates mainly to the first appellant. There was direct evidence with respect to the second appellant. The purchasers and their intermediaries gave direct evidence of their interaction with the second appellant.

The law on circumstantial evidence was summed up in *R v Blom* 1939 AD 188 where WATERMEYER JA referred to “two cardinal rules of logic” which govern the use of circumstantial evidence in a criminal trial. These are:

- (1) the inference sought to be drawn must be consistent with all the proven facts;
- (2) the proved facts should be such that they exclude every possible inference from them save the one to be drawn.

It is trite that an appeal Court cannot lightly interfere with the factual findings of a lower court. It can only do so where the findings are, *inter alia*, grossly unreasonable and cannot be supported by the evidence before the court. See *RBZ v Granger & Anor* SC 44/15 at 5-6 and *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670 C-D.

As correctly found by both the trial court and the court *a quo*, the evidence before the trial court which has already been related to in this judgment was largely common cause. The findings of the trial court were not irrational and yielded to only one conclusion; that the appellants acted in connivance in contravention of s 174 (1) of the Act. It cannot be mere coincidence that the second appellant received payment from the three purchasers, and that the first appellant unprocedurally issued offer letters to Karimazondo and Chipungu, and signed lease agreement for Karimazondo (who are the same three purchasers). The two had participated in the meeting that passed resolutions usurping Council powers and clearly with the intention to facilitate the unholy scheme. The court *a quo* therefore did not misdirect itself in upholding those findings. There is no basis for this court to interfere with the findings of the court *a quo*.

As rightly submitted by both counsel, the conviction of the first appellant was on the basis of circumstantial evidence. The court *a quo* held that the only reasonable inference to be drawn from the circumstantial evidence was that the first appellant acted in connivance with the second appellant and was guilty as charged. The court *a quo* cannot be faulted.

Once conduct is found to be unprocedural, it becomes contrary to or inconsistent with one's duty. The court *a quo* therefore correctly upheld the findings of the trial court in that regard. The appellants were therefore placed squarely within the ambit of s 174 (1) of the Act.

The finding that the State managed to prove that the appellants' conduct was contrary to or inconsistent with their duties to the favour of any person triggers s 174 (2) of the Act. Section 174 (2) reads:

- (2) If it is proved, in any prosecution for criminal abuse of duty as a public officer, that a public officer, in breach of his or her duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he or she did or omitted to do the thing for the purpose of showing favour or disfavour as the case may be, to that person."

There is a presumption that when the State proves that a public officer has acted contrary to his/her duties he did so for the purpose of showing favour to that person. The onus shifts to the accused person to show on a balance of probabilities that he/she did not have the intention of showing favour to any person, in other words he acted with an innocent mind. See *S v Chogugudza* 1996 (1) ZLR 28 (SC) and *Steven Musimuke v The State* SC 104/22.

The facts upon which the State was found to have established the appellants' guilt show that the appellants failed to discharge the onus placed on them. Other than their mere so, the appellants failed to adduce any evidence to support their compliance with the Ease of Doing

Business policy and the decision of the Management Committee in the implementation of that policy.

There was therefore no basis for the court *a quo* and consequently for this Court to interfere with the factual findings of the trial court.

2 Whether or not the court *a quo* erred in confirming the sentence imposed on the appellants by the trial court.

It has been repeatedly stated that the guiding principle in an appeal against sentence is that punishment is preeminently within the discretion of the trial court. If the sentence complies with the relevant principles, even if severe, an appeal court will not interfere with it. See *S v Nhumwa* SC 40/88; *S v Sidat* 1997 (1) ZLR 487 (S) at 491 B-D; *Muhomba v The State* SC 57/13. An appeal court should only interfere with that discretion where the sentence is disturbingly inappropriate and the court exercised its discretion improperly or unreasonably. See *S v Ramushu & Ors* SC 25/98 and *S v Matondora* SC 146/20.

In motivating the appeal against sentence both in the court *a quo* and in this Court, counsel for the appellants submitted that community service or a fine ought to have been considered by the trial court. It was argued that the reasons for sentence were scanty and did not disclose why the other sentencing options were excluded.

The court *a quo* held that the trial court gave sound reasons for excluding a non-custodial sentence. Such finding cannot be faulted. The trial court held that:

“An effective term of imprisonment is appropriate since a non-custodial sentence will trivialize the accused persons’ conduct”.

It is implicit in that finding that the trial court discounted non-custodial sentences such as community service and the payment of a fine. It is apparent that the trial court therefore applied its mind to the various sentencing options available to it. The failure to refer to the non-custodial sentence by name does not form a basis for interfering with the sentence. In *S v Gono*, 2000 (2) ZLR 63 (HC) it was remarked at 66 D - F that:

“It does not seem to me that it necessarily follows that because the judicial officer does not expressly mention that he has considered alternative punishments and given reasons why he has rejected those punishments, the judicial officer has not applied his mind to them. An express statement that all the alternative punishments have been considered and that the one imposed has been chosen for the particular reasons set out in the judgment is certainly the best evidence that all the appropriate factors have been taken into account and that they have been correctly applied.”

The above remarks are apposite. Whilst the reasons for sentence were terse, they were adequate.

Counsel for the appellants was criticized in the court *a quo* for not relating to the plethora of cases on the appropriate sentence for abuse of public office. The court *a quo* remarked as follows:

“36, There is a long line of cases stressing the need to adequately punish those convicted of offences involving corruption. The point is there made that deterrence and public indignation are the factors which must predominate above all others in the assessment of the sentence. See for example *State v Ngara* 1987 (1) ZLR 91 (S) at 101C; *State v Mukwezva* 1992(2) ZLR 283(S). Counsel for the appellant did not draw our attention to any case authorities indicating that there now is a different approach to sentencing in a matter such as the present. We are not aware of any.”

Appellants’ counsel in this appeal did not fare any better. He did not take heed of the criticism by the court *a quo*. He concentrated on general sentencing principles to the exclusion of sentencing trends specific to the offence the appellants were convicted of. Contemporary

sentencing trends in convictions for abuse of office or corruption by public officers can be found, *inter alia*, in the following cases:

- (i) *Admire Chikwayi v The State* HB 166/16- The appellant, who was a public prosecutor, was convicted of one count of contravening s 174 (1) having solicited a bribe of US\$300. The High Court upheld, on appeal, the sentence of 24 months imprisonment of which 6 months imprisonment was suspended on condition of future good behavior
- (ii) *S v Vincent Shava* HB 179/17- The appellant, another public prosecutor was convicted of one count of contravening s 174 (1) having solicited a bribe of US\$200. The High Court upheld, on appeal, a sentence of 5 years imprisonment of which 2 years was suspended on condition of future good behaviour.
- (iii) *S v Paradza* 2006 (1) ZLR 20 (H)- The accused was a High Court judge. He was convicted by the High Court of two counts of contravening s 4 of the Prevention of Corruption Act [*Chapter 9:16*] having tried to influence another judge in a bail application of his business partner. He was sentenced to 3 years imprisonment of which 1 year was suspended on condition of future good behaviour.
- (iv) *S v Samuel Undenge* HH 368/20- The appellant was a former government cabinet minister. He was convicted by the High Court of one count of contravening s 174 (1) having been found guilty of unlawfully influencing the Zimbabwe Power Company (ZPC) to deal with a communications company despite ZPC having a publicity department. He was sentenced to 4 years' imprisonment with 18 months suspended on condition of future good behaviour.

- (v) *Francis Pedzanai Gudyanga v S* HH 549/22- The appellant, then a Permanent Secretary in the Ministry of Mining and Mining Development, was convicted of one count of contravening s 174 (1)(a). A sentence of 4 years imprisonment of which 18 months suspended on condition of future good behaviour was upheld on appeal.
- (vi) *Douglas Tapfuma v S* HH 254/21 The appellant, then Principal Director in the Department of State Residences was convicted by the Magistrates Court of three counts of contravening s 174 (1)(a) having imported eight personal vehicles purporting that the vehicles belonged to the Department of State Residences so as to evade paying duty. He was sentenced to 2 years imprisonment on each count. Of the total 6 years imprisonment 2 years imprisonment was suspended for 5 years on the usual conditions of good behaviour. The High Court upheld both the conviction and sentence on appeal

It is clear from the above authorities that a conviction of a public officer for criminal abuse of office attracts an effective custodial sentence. The rationale for such a sentence, as correctly noted by the court *a quo*, is found in *State v Ngara* 1987 (1) ZLR 91 (S) where this Court held at 101 B-E that:

“Any form of corruption resorted to by government servants, especially police officers whose duty it is to uphold the law and by their conduct set an example of impeccable honesty and integrity, is rightly viewed by the courts with abhorrence. It is a dangerous and insidious evil in any community and in particular requires to be guarded against in a developing country.

Corruption is a crime difficult to detect and more difficult to eradicate. 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...”

The contemporary sentencing trends are consistent with the sentences previously imposed for convictions for bribery and under the Prevention of Corruption Act [*Chapter 9:16*]. In *S v Ngara* the accused was convicted of three counts of contravening s 3 (1) (a) of the Prevention of Corruption Act. He was sentenced to six months imprisonment for each count. Of the total of 18 months, six were suspended on appropriate conditions. In *S v Chogugudza (supra)* a public prosecutor was convicted of contravening s 4 (a) of the Prevention of Corruption Act. This Court upheld a sentence of 15 months of which 8 months were suspended on conditions. In *S v Mukweza*, the accused was convicted of bribery and sentenced to a total of 10 years of which 3 were conditionally suspended.

In light of the above, the court *a quo* was correct in upholding the sentence imposed by the trial court. The appellants were each convicted of three counts of abuse of office. Nothing was recovered, so the appellants benefitted from the commission of the offences. It would have brought the administration of justice into disrepute in the circumstances of this case, had the appellants been sentenced to either community service or the payment of fine. An effective custodial sentence was warranted.

DISPOSITION

The appeal by both appellants against both conviction and sentence lacks merit.

In the result, the appeal is hereby dismissed.

UCHENA JA : I agree

CHIWESHE JA : I agree

Mushangwe & Company, appellants' legal practitioners

National Prosecuting Authority, respondent's legal practitioners