IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA - GHANA

CORAM: ARYEETEY, J.A. (PRESIDING)

MARFUL-SAU, J.A.

MARIAMA OWUSU, J.A.

CRIMINAL MOTION

NO. H3/17/2007

1ST NOVEMBER, 2007

DANIEL ABODAKPI …. APPELLANT/APPLICANT

VERSUS

THE REPUBLIC …. RESPONDENT/RESPONDENT

ARYEETEY, J.A.

On the 5th of February 2007, the applicant was convicted by the Fast Track High Court and sentenced to concurrent terms of ten years imprisonment in respect of various counts of Conspiracy to commit crime namely Causing Financial loss to the state, contrary to Section 23(1) and Section 179A(3)(a) of the Criminal Code, 1960 (Act 29), Wilfully Causing Financial Loss to the State, contrary to Section 179A(3)(a) of the Criminal Code, Conspiracy to commit crime namely; Defrauding by False Pretences contrary to Section 23(1) and section 131 of Criminal Code and Defrauding by False Pretences contrary to Section 131 of the Criminal Code. After filing an appeal against both conviction and sentence he applied to the court below for bail pending appeal. Since that application did not receive a favourable response he has made a similar application for bail before this court.

Counsel for the applicant contended in the main that the trial court failed to discharge its duty of giving consideration to the defence of the applicant which consisted not only of the denial of the charges which he faced at the trial court but also the evidence of credible witnesses. Failure to

give due consideration to the defence of the applicant represents a clear case of error which makes the judgment bad in law. He argued further that several issues were raised by the case presented by the prosecution and failure by the trial judge to make findings of fact on the evidence that the prosecution relied on manifested a clear error on the face of the record which vitiates the judgment of the trial court. Counsel for the applicant further referred to the grounds of appeal and contended that mere disbelief in the case of the accused cannot legitimately form the basis of conviction.

Counsel for the respondent on the other hand argued that the conviction of the applicant was by a court of competent jurisdiction which is valid until set aside on appeal. She submitted further that unless it can be shown that the judgment is clearly indefensible the application for bail should fail. It is only when we have a look at the record of appeal, which is not available at the moment, that we would be in the position to ascertain whether there has been miscarriage of justice or not. According to counsel for the respondent there is evidence on record to support the conviction which the court would not be in the position to verify in the absence of the record of appeal. It is only when the record of appeal is made available that the issues raised by submissions of counsel for the applicant could be gone into.

I have taken some time to consider both the somewhat copious submissions of learned counsel for the applicant as well as the rather brief response from counsel for the Republic being mindful of the fact that the grant of bail is within the discretion of this court. According section 33(1) of the Courts Act, 1993 (Act 459) “The court before which a person is convicted or the court to which an appeal is made may if it thinks fit on the application of an appellant grant the appellant bail pending the determination of his appeal.” I also take into account the guiding principle that in circumstances such as this the question to ask is always whether it would be absolutely unjust that the applicant, a convicted person should continue to serve his sentence before the appeal is heard and disposed of. It follows that an application for bail pending appeal succeeds only in exceptional circumstances. For example what is taken into account is the length of the sentence. It means where the sentence is short and there is the likelihood that the whole or substantial part of it would

be served by the time the appeal is heard an application for bail pending appeal ought to be granted.

Indeed in the case of R. v. Tunwashe (1935) 2 W.A.C.A. 236 these principles have been summarised as follows:

> "(1) That bail will not be granted pending an appeal save in exceptional circumstances or where the hearing of the appeal is likely to be unduly delayed.
>
> (2) That in dealing with the latter class of case the court will have regard not only to the length of time which must elapse before the appeal can be heard but also to the length of the sentence to be appealed from, and further these two matters will be considered in relation to one another."

In the case of Owusu v. The State [1967] G.L.R. 435 the Court of Appeal added a new principle at page 440 of the report, that is *"[W]here the court is satisfied that the conviction is prima facie erroneous either in law or in fact and that there will be an apparent miscarriage of justice if bail is refused"*

Another guiding principle that should guide this court in an application for bail pending appeal is that a conviction is deemed to be right until the contrary is proved. In the Owusu v. The State case (Supra) Ollennu J.A. reading the judgment of the Court of Appeal had this to say at page 441 of the report:

> "The principle to be borne in mind is that a conviction is deemed to be right until the contrary is proved. That being the case, grant of bail after conviction is considered an unusual thing hence it is that it will not be granted unless there are exceptional and unusual reasons: R. v. Fitzgerald [(1923) 17 Cr.App.R. 147, C.C.A.]. Thus, in R. v. Gordon [(1912) 7 Cr.App.R. 182, C.C.A.], Darling J., delivering the ruling of the Court of Criminal Appeal said at p. 183, '*No sufficient reason has been shown to the Court why the unusual course should be taken in granting bail to a convicted prisoner.'* It follows appeal against conviction as was done in State v. Djaba (supra), is inconsistent with the well-known principle of law, and creates a principle based upon no principle."

In actual fact in the case of State v. Djaba [1966] G.L.R. 327 the High Court's decision was that being satisfied that there were valid debatable issues or chances of success in the appeal it was a proper case in which bail pending appeal should be granted. In that case the learned judge expressed his reason for the stand taken by him at page 331 of the report as follows: *"[A]fter all if the judge who granted the bail is wrong in his opinion that there is a chance of success in the appeal and the appeal is dismissed, the appellant will serve his sentence but he will then be satisfied that he has been given a fair chance to explore all avenues. This in my opinion is the justice of the matter".* However, as expressed earlier in the dictum of Ollennu J.A. in the case of Owusu v. The State quoted above, what the High Court in the State v. Djaba case considered *"the justice of the matter"* was not acceptable since *"it was inconsistent with the well-known principle of law, and create[d] a principle based upon no principle."*

I am of the view that since the main focus of applicant's counsel has to do with the validity of the evidence adduced at the trial in support of the prosecution's case and the failure of the court below to give due consideration to the defence of the applicant at the trial as well as the failure of the trial court to make a relevant finding in respect of the issues raised at the trial, it would be appropriate for us to look at the whole of the record of appeal. There is no indication that the appeal would not be ready for hearing for hearing for some time and I do not think that taking into consideration the sentence of ten years I ought to exercise my discretion in favour of the applicant. The application for bail pending the hearing of the appeal is therefore refused and accordingly dismissed.

(SGD) B. T. ARYEETEY

JUSTICE OF APPEAL

MARFUL-SAU J.A.:

The applicant in this proceedings, Dan Abodakpi is a former Minister of Trade and Industry. He together with the late Victor Selormey, also a former Deputy Minister of Finance, were tried by the Fast Track High Court, Accra. From the charge sheet recited in the judgment of the trial Court, they were charged with two counts of conspiracy to commit crime, namely Wilfully Causing Financial Loss to the State contrary to Section 23(1) and 179A (3) (a) of the Criminal Code 1960 (Act 29) as amended and two counts of Wilfully Causing Financial Loss to the State contrary to Section 179A(3)(a) of the Criminal Code1960(Act29). They were further charged with the offence of conspiracy to commit crime, namely defrauding by false pretences contrary to Sections 23(1) and 131 of the Criminal Code 1960 (Act 29) and two other counts of defrauding by false pretences, contrary to Section 131 of the Criminal Code.

The Applicant pleaded not guilty to all the seven counts and after a full trial, he was convicted on all the seven counts, and sentenced to a custodial term of 10 years to run concurrently. Judgment was delivered on the 5th of February 2007 and on the next day 6th February, the Applicant herein filed an appeal against the conviction and sentence. Then on the 25th June 2007 the Applicant filed the present application for bail pending the determination of his appeal.

By this application, the Applicant is praying that notwithstanding his conviction and custodial sentence, which has not been set aside or reversed, he should be at liberty to stay outside the prison until the outcome of his appeal.

It has always been held that, applications such as this, are very unusual, because the legal principle is that a judgment remains valid until it is set aside or reversed on appeal. Though unusual, the courts are vested with power to consider and grant such application in appropriate cases.

Section 33 (1) of the Court Acts of 1993 (Act 459) as amended provides as follows:

> "The court before which a person is convicted or the court to which an appeal is made may if it thinks fit, on the application of an applicant grant the appellant bail pending the determination of his appeal"

The Section vest discretionary power to this court to grant bail pending the determination of the Applicant's appeal, if the court thinks it fit. Like the exercise of all discretionary powers the powers given to the court under Section 33(1) of the Courts Act must be exercised judicially.

Learned Counsel for the Applicant has forcefully argued and submitted that the Applicant be admitted to bail, because his appeal is likely to succeed. Counsel for Applicant has submitted that the judgment which is keeping the applicant in custody is prima facie wrong and hence there is no legal justification for the continued incarceration of applicant. Counsel raised two major grounds to demonstrate that the conviction of the Applicant is prima facie wrong. These are: -

(1) That there are inconsistencies in the case of the prosecution which the trial Judge ought to have resolved in favour of the Applicant, the failure of which vitiates the judgment and conviction.
(2) That the trial Judge failed to examine the explanation offered by the Applicant to rebut the charges preferred against him. To Counsel for Applicant the trial Judge was required by law to examine the explanation offered by the Applicant to ascertain whether or not it was reasonably probable. This according to Counsel was not done and by that, the conviction is wrong in law.

The Learned Counsel for the Republic opposed the application and submitted that, from the evidence adduced at the trial, the trial court was right in its judgment. Counsel for the Republic further argued that even if the trial court failed to examine the case of the Applicant, as alleged, which she denied, there was still enough evidence on record that can support the conviction of the Applicant. Counsel therefore prayed that bail be refused especially so when from all indications the record of appeal was ready for the substantive appeal to be heard.

As observed earlier in this ruling, this application call's for the exercise of the Courts discretion, which must be exercised lawfully. The subject of this application, that is, bail pending appeal is now settled law in our criminal jurisprudence. Research in this area of our criminal law, reveals that, this subject has had a chequered legal history, which had its origins from the oft cited case of R v. Tunwashe 1935 2 WACA 236, with cases like State V. Owusu 22nd June 1967 Court of Appeal, unreported, and State V. Holm Court of Appeal 27th July 1967 unreported, Halm v. Republic, Court of Appeal 4th June 1963 unreported, State v. Djaba Supreme Court 20th June 1966 unreported and a list of others in its train.

In the case of Fynn and Another v. The Republic 1971 2 GLR 433, Taylor J as he then was conducted an exposition on the law and after reviewing 43 Local and English authorities stated the principles that should guide a Court in such application as follows:

1. That there are exceptional or unusual grounds for the application.
2. That the conviction is prima facie wrong and the appeal has obvious prospect of success.

3. That the case is of a nature that it would be of real assistance for the preparation of the appeal that the appellant should be free to confer with his Counsel in order to facilitate the preparation of his appeal.
4. That having regard to the sentence there is going to be a considerable delay either in preparing the record of appeal or hearing of the appeal is likely to delay resulting in the appellant serving the whole or substantial portion of his sentence.

Hearing Counsel for Applicant, I think applicant's affidavit reveal one ground on which the application for bail is founded. That ground is that the conviction is prima facie wrong and the appeal therefore has obvious prospects of success. This ground relates to the substance of the case as well as the trial.

Counsel for Applicant has argued that applicant did not do anything wilfully to cause the State to lose the sum of $400,000 as alleged by prosecution. Indeed the prosecutor's case as can be deduced from the charges and the judgment is that the applicant wilfully caused the state to lose $400,000 by requesting the Ecobank to transfer a total of $400,000 to the account of one Dr. Boadu on a representation that the said Dr. Boadu had conducted and presented a feasibility report whilst no such report had been submitted by Dr. Boadu. The case for the Applicant as argued by his Counsel is that no such representation was made by the Applicant. Tendered in evidence during the trial is Exhibit P written by the applicant to the then Deputy Minister of Finance, the late Victor Selormey. This Exhibit, which was reproduced by the trial Judge and is at page 9 of the judgment, is clear that the Applicant did not request that Dr. Boadu be paid for a Feasibility Report. In the said Exhibit P, the Applicant requested for payment for consulting services for a study proposal to create a Science and Technology Community. The term feasibility report did not appear anywhere in Exhibit P.

According to Counsel for Applicant this letter Exhibit P flows from the contract for Consulting Service between the Ministry of Trade & Industry and Dr. Boadu out of which Dr. Boadu was required to submit a report on the study proposal. It has been argued by Applicant's Counsel that the said Dr. Boadu submitted the Report on the Study Proposal, for which he was paid the $400,000, so to Applicant the state had lost nothing. Counsel further argued that the contract was in pursuance of the Gateway Project, a project approved by the government of Ghana. In the trial the contract for the consulting services was tendered as Exhibit G and the Report on Study Proposal submitted by Dr. Boadu was tendered as Exhibit H.

Reading the judgment under appeal, it is obvious that the contract for the consultancy Service formed the basis for the trial of the Applicant. Exhibit A and B which were letters written by the late Selormey to the Ecobank to instruct the transfer of the $400,000 to Dr. Boadu's account all has its basis from the contract for consultancy service.

Even though by the nature of this application it ought to be argued on the strength of affidavit evidence, I am of the strong conviction that nothing prevented Counsel for Applicant from exhibiting in this proceedings certified copies of the contract, and the Report on Study Proposals submitted by the Consultant. These documents or exhibits constituted the basis of the transaction out of which the Applicant was charged and tried. If these exhibits were annexed to this application, it would have afforded this Court the opportunity not only to holistically consider the case put up by the Applicant but also enable the Court come out with a ruling that could measure with the standard required by law. My ability to effectively evaluate the substance of the case against the applicant is thus limited in this proceedings since I have not seen nor read the contract for the Consultancy Service and the Report on Study Proposals. These documents as I have observed would have advanced the case for the Applicant further, had they been made part of this proceedings.

On the trial, I must confess that some legal issues have been raised by learned Counsel for the Applicant that calls for very serious considerations. Examining the judgment of the trial court it is apparent that on the face that Applicant's defence was not considered by the trial court as by law required. In Lutterodt v. C.O.P 1963 2GLR 429 the Supreme Court laid down three principles that ought to be observed by the court after forming an opinion that a prima facie case has been made against an accused. This principles have indeed become a ritual that ought to be observed or adhered to in all criminal trials. They are as follows. That the court should proceed to examine the case for the defence in three stages,

(a) If the explanation of the defence is acceptable, then the accused should be acquitted.
(b) If the explanation is not acceptable but is reasonably probable, then the accused should be acquitted.
(c) If quite apart from the defence explanation the court is satisfied on a consideration of the whole evidence that the accused is guilty it must convict.

This procedure is a legal requirement in criminal trials because in such trials the burden of proof is always on the prosecution to discharge. Indeed appeals have been affirmed and convictions set aside

due to trial courts failure to observed the above principles as established by the Supreme Court, especially where the non observance of the procedure occasions serious miscarriage of justice to the appellant.

Again I think that the case for the applicant would have been much stronger if a certified copy of his evidence had been exhibited to this application. This Court has no opportunity of assessing the defence put up by the Applicant to determine whether the failure by the trial Judge to consider it had occasioned serious miscarriage of justice. This determination can only be done judicially, if the evidence of the Applicant is examined side by side with the Prosecution Witnesses. It is only when the entire record of appeal is made available that such a determination can be made.

I began this ruling bearing in mind the principle that a judgment or conviction is valid until set aside by a court of competent jurisdiction. This principle is a presumption that can be rebutted. Indeed in a case such as the instant proceedings the onus was on the Applicant to demonstrate clearly that his conviction was prima facie wrong and on the face of the judgment and process filed alone the appeal has a very good chance of success. I have said that serious legal issues have been raised in this proceedings, concerning the trial, however I am still handicapped in view of the fact that I have had no opportunity to see the contract for consultancy Service and the Report on the Study Proposal. In view of my handicap, I am unable for now, to displace the presumption that a judgment is valid till set aside. I will therefore for the same reasons refuse the application for the bail. I will however add my voice to the call that the Registrar of this Court ensure that the substantive appeal is listed for the merits of the appeal to be determined.

I accordingly dismiss the application for bail.

(SGD) MARFUL-SAU
(JUSTICE OF APPEAL)

MARIAMA OWUSU, JA:- I have had the benefit of reading the Ruling of my colleague learned brothers. I agree with the decision arrived at. I have nothing further to add. The application should be dismissed.

(SGD) MARIAMA OWUSU (MS)

(JUSTICE OF APPEAL)

COUNSEL

Ms. Gertrude Aikins (DPP) with Valerie Amate (CSA) for respondent.

Tony Lithur with Carlos De-Souza for applicant.