DAVISON GOMO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 21 and 28 June 2023

Bail Appeal

G Nyandoro, for the appellant
F Kachidza, for the respondent

CHIKOWERO J:

[1] This is an appeal against the judgment of the magistrates court dismissing an application for bail pending.

[2] The appellant is appearing before the magistrates court sitting at Harare on a charge of unlawful dealing in dangerous drugs as defined in s 156(1)(c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as read with s 14(2) of the Dangerous Drugs Act [*Chapter 15:02*].

[3] The court dismissed the application for bail on being satisfied that the State had established, on a balance of probabilities, that there was a likelihood that the appellant, if he were released on bail, will not stand his trial.

[4] The court's reasons for so finding were these. Firstly, that the offence itself was not only serious but that its gravity was enhanced by the huge quantity of drugs involved. In this respect, the allegations were that the appellant was unlawfully dealing in 21.713 kilograms of crystal methylene – dioxymethamphetamine and 1 kilogramme of cocaine whose combined street value was two hundred and ninety-seven million one hundred and thirty thousand dollars, although the currency was not indicated.

Further, since the likely sentence for dealing in dangerous drugs was a lengthy prison term, the fear of incarceration would induce the appellant not to stand trial.

Secondly, the court took the view that the prosecution had a strong case and there was therefore a correspondingly greater incentive for the appellant to flee.

{5] What is attacked on appeal is the finding that the prosecution has a strong case against the appellant. Inevitably, the appellant took issue with the related finding that the appellant did not tender a meaningful or probable defence to the charge. I am thus called upon to determine whether the court grossly erred and misdirected itself in making the two interwoven findings that I have mentioned.

[6] I pause to note that the third ground of appeal was - correctly so - abandoned at the hearing. The court had been criticized for grossly erring, and misdirecting itself in finding that the State had established compelling reasons for denial of bail. In effect, as conceded by Mr Nyandoro, this was a repetition of the first ground of appeal.

[7] The annexure to the Request for Remand Form reflects that on a date not material to my decision members of the Criminal Investigations Department received information to the effect that the appellant had delivered at Robert Gabriel Mugabe International Airport a certain parcel for transportation to Manila, Phillipines. This prompted then to proceed to the Aviation, Ground Services at the Robert Gabriel Mugabe International Airport in Harare to check the parcel. On arrival, their informant, whose name appears in the annexure, presented to them the parcel which contained twenty-three metal pulleys placed in three cardboard boxes. They inspected the metal pulleys, opened one using a metal grinder at the Aviation Maintenance workshop and discovered that it contained satchets of what, on field testing, turned out to be the drug commonly referred to as crystal meth. The seizure and testing of the contents of the other twenty-one pulleys rendered the same result while one pulley was found to contain cocaine. I have already indicated the weight and street values of these drugs.

[8] The determination of a bail application involves the exercise of discretion on the part of the court seized with such an application. The grounds on which the exercise of discretion can be interfered with on appeal are settled. See *Barros &Anor* v *Chimphonda* 1991(1) ZLR 58(S) at 62-63; *Reserve Bank of Zimbabwe* v *Granger & Anor* SC 341/01; *S* v *Chikumnbirike* 1986(2) ZLR 145(S) and *S* v *Madamombe* SC 117/21. An appellate court can only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision.

[9] Despite Mr *Nyandoro's* valiant efforts to persuade me otherwise and Ms *Kachidza's* concession to the appeal, I am satisfied that the threshold for interference with the exercise of discretion by the court *a quo* was not met in this case.

[10] The informant, who was the clearing agent, linked the appellant to the commission of the offence. That much was not in dispute at the hearing of the appeal. Whether the trial court will repose credibility in the agent is not of present concern. It was not in dispute also that drugs in the quantity in question were seized by police with the agent, according to the investigating officer (who testified at the bail hearing) telling the police that the appellant had delivered the drugs to the clearing agent for processing of the paperwork so that the consignment would be shipped to Manila in the Phillipines. The blue and white boxes containing the drugs, in an endeavor to conceal the true nature of the consignment, had been labelled "gear size 61x264mm". This was hardly surprising considering that what was contained therein were cocaine and crystal meth. It would have been naïve to expect the consignment to be correctly labelled. The learned magistrate, correctly in my view, took into account that the police had also recorded a statement from the person who had transported the consignment from what was referred to as the main gate to the clearing agent's office. The name of that transporter was mentioned. Details relating to who, if any, was into the transporter's company at the material time will be ventilated at the trial.

The investigating officer told the learned magistrate that there was a record of calls made by the appellant to the clearing agent, although the investigating officer was not privy to the subject of those calls. The appellant's defence was a complete denial of commission of the offence. It is counsel told the court *a quo* that the appellant never possessed the drugs, never delivered them to the clearing agent and that he did not know that person at all, yet the call history suggests that the appellant only knew but interacted with clearing agent. That the appellant was not in physical possession of the drugs at the time of his arrest and that no paperwork was recovered tracing the drugs to him does not, in my judgment, detract from the strength of the case for the prosecution. What matters is the element of control of drugs by him, per the allegations. It would appear that the documentation to facilitate the transportation of the consignment from Harare had not been compiled when the clearing agent blew the whistle.

[10] In the circumstances, the learned magistrate did not misdirect himself in finding that, on a balance of probabilities, the prosecution appeared to have a strong case against the appellant and, of necessity, that his bare denial was a flimsy defence. There was no unreasonable exercise of discretion as to vitiate the decision rendered. The materials placed before the court *a quo* justified the finding made – that the prosecution appeared to have a strong case against the appellant.

[11] In the result, the appeal against the judgment of the magistrates court refusing to admit the appellant to bail pending trial in CRB ACC 91/23 be and is dismissed.

Hamunakwadi and Nyandoro, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners
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