BYRON CHIMHAU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 4 March 2022 & 29 April 2022

BAIL APPEAL

Mr T Muganhiri, for the applicant
Mr F Nyahunzvi, for the respondent

MANYANGADZE J: This is an appeal against the refusal of bail pending trial. It arises out of a ruling handed down on 17 February 2022 in the Regional Magistrates Court, sitting at Harare as an anti-corruption court.

The anti-corruption court deals with corruption related offences or offences that appear to be part of organized crime. Drug related offences largely fall in the latter category.

The allegations against the appellant are that he contravened s 156(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], (unlawful dealing in dangerous drugs).

According to the outline of the State case filed of record, detectives from the CID Drugs and Narcotics Division, Harare, received information to the effect that the appellant had imported dangerous drugs under the cover of moringa tea. Acting on this information, they proceeded to Zimpost Harare Central Sorting Office. They took a sample of the suspected dangerous drug, known as khat, and submitted it to the Government Analyst's office for examination. A report was obtained confirming that the substance in question was indeed khat.

On 9 February 2022, the appellant visited Zimpost Harare Central Sorting Office, to collect his "moringa tea'. He was advised that the "tea" was in fact khat, a prohibited drug. A notice of seizure was issued by ZIMRA officials and the appellant placed under arrest.

The khat weighed 18.2 kg, with an estimated value of ZWL$83 000.

The appellant used the national identity card of one Cecilia Chimhau, his wife, when he presented himself at the Zimpost Sorting Office to collect the drug. He led the detectives to his wife's workplace, Eaglesvale Junior School, where she was also arrested. When he appeared before the Regional Magistrate, he appeared as accused two with his wife as accused one. The Regional Magistrate denied both of them bail.

Only the appellant (accused two in the court *a quo*) appeared before me on appeal against bail refusal. It appears accused one is yet to note her appeal. It is not clear why they have not jointly noted an appeal, given that the facts of the matter are the same and they were denied bail after the same bail inquiry.

Be that as it may, I will proceed to consider the appeal that is before me. Accused one's appeal will be dealt with separately, if or when it is noted.

The grounds of appeal are rather prolix and repetitive. They total 7 grounds and cover 4 pages of the record. The appellant will do well to familiarize himself with the remarks of GARWE JA (as he then was) in the case of *Dr Norbert Kunonga* v *The Church of the Province of Central Africa SC* 25/17. The learned judge of appeal, from pages 11-16 of the cyclostyled judgment, extensively highlighted the need for precise and concise grounds of appeal.

The grounds of appeal mainly dwell on the constitutional imperative to release an accused person on bail, and the presumption of innocence on which that imperative is predicated. These are indeed important principles enshrined in s 50(1)(d) and s 70(1)(a) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

The appellant has also referred to the factors set out in s 117(2)(a)(i – iv) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which a court is enjoined to consider in its inquiry on whether or not an accused person should be admitted to bail. This court considers whether there is likelihood that the accused will:-

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the first schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system.

It is important to note that the factors are listed disjunctively and not conjunctively. This means that any one of the factors can constitute a compelling basis for denial of bail.

In the instant case, a look at the court *a quo's* ruling shows that it denied the accused persons bail on essentially three considerations which relate basically to factors (ii) and (iv). These are:

1) the nature and gravity of the offence
2) the strength of the prosecution case
3) the risk of absconding induced by the above two factors

The pertinent question is whether the court *a quo* misdirected itself in taking into account those factors. This court is sitting in an appellate capacity, and dealing with an exercise of discretion by the court of first instance. It will not, in that capacity, readily upset the court *a quo's* decision.

This court cannot substitute the court *a quo's* decision with its own, in the absence of a serious misdirection or irregularity. See *S* v *Ruturi* 2003 (1) ZLR 537 at pages 549 E-H and 550 A-E.

There is no gainsaying the fact that the appellant is facing grave allegations. Dealing in drugs classified as dangerous is a serious offence in our jurisdiction. Where there are aggravating circumstances as provided for in s 156 (2) of the Criminal Code, the appellant faces a mandatory sentence of not less than 15 years imprisonment. In any other case, the sentence is a maximum of 15 years imprisonment. So, whether or not there are aggravating circumstances, the likelihood of a severe penalty is very high.

As for the strength of the case against the appellant, to begin with, it is an established fact that the box that the appellant went to collect contained 18.2 kg of khat, a prohibited dangerous drug. It was not moringa tea. It was coming from across the country's borders, Kenya. There was transportation of contraband across borders. This is strongly suggestive of the existence of a network of drug trafficking.

The manner in which the prohibited substance was transmitted and collected is indicative of premeditated husband and wife teamwork, carefully designed to escape detection. This was not lost on the learned Regional Magistrate who conducted the initial bail inquiry, as reflected in his remarks at page 36 of the record:

> "Be that as it may, as it stands, there is a reasonable apprehension that they knew of the contents. This is because the parcel is addressed to the first accused, who is wife to the second accused. As a married couple, it is doubtful that the wife would do such things without the knowledge of the husband. This clearly shows the two were acting in common purpose".

Thus the gravity of the offence, the likelihood of a conviction with the likely consequence of lengthy imprisonment, are the factors the magistrate took into account. These informed the exercise of his discretion in denying the appellant and his co-accused bail pending trial. In this regard, it is important to bear in mind the fact that the magistrate was not presiding over a trial, where proof beyond a reasonable doubt is required. He was conducting a bail inquiry, where the decisive factors are assessed on a balance of probabilities. The factors he considered are factors a court can indeed properly take into account when balancing the constitutional right to personal liberty against the interests of the due administration of justice. See *The State* v *Chiadzwa* 1988 (2) ZLR 19. In that case, DUMBUTSHENA CJ stated, at page 25F:

> "In my view, the fact that the appellant has a family, business, was once freed on bail and did not abscond, and is a Zimbabwean citizen by birth whose movements can be curtailed by the surrender of his travel documents, would not deter him from absconding or from interfering with the evidence against him because of the gravity of the crime he is alleged to have committed and the possible severity of the sentence".

In the circumstances, I find no basis on which to overturn the court *a quo's* ruling.

It is accordingly ordered that:

The appeal be and is hereby dismissed.

Machaya and Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners