EDITH MUSONZA
and
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE; 27 & 30 June 2023

Bail Appeal

K Maeresera, for the appellant
F Kachidza, for the respondent

CHIKOWERO J:

1. This is an appeal against the judgment of the Magistrates Court refusing to admit the appellant to bail pending her trial.
2. The appellant is appearing before the Magistrates Court on a charge of unlawful possession of dangerous drugs as defined in s 157(1)(a) 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 Request for Remand Form explains how the matter came to light. It does so as follows. On 19 May 2023 around 1pm, detectives from the Criminal Investigations Department Drugs and Narcotics Section based at Harare Central Police Station arrested one Pride Isaac Mashaba on a charge of unlawful possession of dangerous drugs, namely cocaine. They interviewed him regarding the source of the drugs he was found in possession of Mashaba indicated that the source was the appellant, who was at Gazaland Shopping Centre, Highfield in Harare. They pursued this lead by appearing at the said shopping centre where they identified themselves to the appellant, in her liquor shop. The female police officer conducted a body search on the person of the appellant and recovered what was suspected to be cocaine concealed in the bra. A field test, conducted

in the presence of the appellant, reflected that what was recovered from the appellant was indeed cocaine whose street value is given as ZWL$1200 000.00.

4. The Magistrates Court refused to admit the appellant to bail on being satisfied that if she were released she will not stand trial.
5. In my own words, the single ground of appeal impugns the judgment rendered *a quo* on the basis that the court misdirected itself in how it approached the application which was before it. The criticism is that the court did not consider the factors set out in s 117(3)(b)(i)-(vii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], and consequently did not apply them to the circumstances of the matter before it in rendering its decision. Put differently, the contention is that there was no judicious exercise of discretion by the bail court.
6. I have no difficulty in finding, as I do, that the magistrates court did not judiciously exercise its discretion in disposing of that which was before it. The court simply re-stated some of the arguments by the parties and, without any application of the legal principles to the circumstances of the case before it, pronounced that the appellant will not stand trial. There was, in my judgment, no analysis, no thought process brought to bear on the matter leading to the refusal of bail. The relevant legal principles in an application for bail not having been considered and applied to the circumstances of the matter, I interfere and exercise fresh discretion in determining whether compelling reasons exist for the continued detention of the appellant pending her trial. See *Barros* and Anor v *Chimphonda* 1999(1) ZLR ZLR58(S); *Chakanyanyaand Anor* v *State* HH 235/17 and State v Malunjwa 2003(1) ZLR 275(H).
7. The appellant resides at a given address in Harare. She is mother to a twenty-three year old University of Zimbabwe student; a fourteen year old form 2 pupil at a certain school in Harare and an eight year old child in Grade 2, again in Harare. The appellant is not married and is the sole breadwinner to these children. She runs a liquor shop in Harare. Nothing is disclosed relating to her assets and savings, if any.
8. The appellant is forty-five years old. She is a holder of a Zimbabwean passport. She offers to surrender it to the clerk of court to demonstrate, taken together with other proposed conditions, that no compelling case has been established that she will not stand

trial. Those conditions are as follows. First, she offers to pay either ZWL $100 000 or any other amount determined by the court as bail deposit. Second, she offers to reside at her given address, which is in Harare, until the matter is finalised. Third, she undertakes not to interfere with state witnesses and police investigations. Fourth, she offers to surrender her passport, the number of which is given, to the clerk of court. Finally, she proposes that she be ordered to report at Harare Central Police Station once a fortnight on a Friday between 6.00am and 6.00pm until the matter is finalised.

9. There can be no doubt that the unlawful possession of cocaine is a grave offence and ordinarily attracts a custodial sentence. In *State* v *Schlz* HB 234/17 the court underscored this in the following words:

> "There is no doubt that cocaine is definitely treated as a dangerous drug across the globe and its possession is certainly treated far more strictly than the possession of dagga, or marijuana, as it is better known in some countries. In his pursuit of bail pending appeal, appellant's counsel was not able to draw this court's attention to any cases of possession of small amounts of cocaine where an accused had gotten away with a fine. What is of significance is that the relevant provision under which he was charged permits a sentence of a fine up to level ten or imprisonment up to a period of five years or both such fine and imprisonment. Sentence is in the discretion of the trier of fact."

It was not contended –correctly so-that a non-custodial sentence is likely to be imposed on the appellant in the event that she were convicted.

10. Mr *Maeresera* argued, and Ms *Kachidza* conceded, that the prosecution does not have a strong case against the appellant. Both counsel took the view that, in the circumstances of the matter, the appellant's defence was probable because the prosecution did not rebut that defence. Counsel said the investigating officer did not testify when it was necessary to do so in light of the serious allegations of police impropriety that the appellant had raised in her defence. What the appellant said was that the two police details stage-managed the "recovery" of the cocaine. It was the female police officer who planted the cocaine inside her bra as the other detail was leading her outside the liquor shop. This they did because they were aggrieved that she had in the past been acquitted on a charge of contravening the same section of the Criminal Law Code. The police officers also applied pressure on her to name the person who supplied her with cocaine. If the appellant obliged, the defence proceeded, the police officers had promised that they

would not detain her. The appellant is said to have resisted the pressure. Further, in light of the anti-drug campaign in the country, the two police details who arrested her felt obliged to be seen to be doing something about it by creating false criminal allegations against her in the manner that I have already explained.

11. I do not think the case for the prosecution is weak. I do not share the view that the prosecution, at the stage of the bail application, bore the burden to rebut, which means to refute, discredit or disprove, the defence. The need to do so arises at the trial proper. I am not persuaded that the fact that the arresting details did not testify *in casu* means that the case for the prosecution becomes weak. I have already pointed out the background to the arrest of the appellant. The police arrested Mashaba for unlawful possession of dangerous drugs, namely cocaine. They interviewed him. He implicated the appellant as the supplier. He stated where the appellant would be found. When the police acted on that information the result was what I see in the Request for Remand Form, namely the allegations that on being searched at Gazaland Shopping Centre the police recovered 4.3 grammes of cocaine from the appellant's bra. I have not ignored the appellant's defence but the background to that arrest is what sways me to think, on a balance of probabilities, that the prosecution appears to have a strong case against the appellant. I have noted too that the appellant went beyond disclosing what her defence was. She effectively outlined that defence as if the matter were already at the trial stage. Her efforts notwithstanding, my view, already expressed, is that the prosecution appears to have a strong case.
12. On the face of it, the appellant's personal circumstances, combined with stringent conditions, may suggest that the appellant will stand trial. However, her ties to the place of trial do not, on the evidence, appear to be strong. I see nothing on record suggesting that she is the owner of immovable property situate in this jurisdiction. No immovable property was offered as security that she will stand trial. I have found that the case for the prosecution appears to be strong. There is no doubt that the charge is serious. There is no doubt, so it seems to me, that if the appellant is convicted, which to me seems likely, she will be severely dealt with in respect of the sentence. The fear of such incarceration, that she does not appear to own assets in this country combined with the

strength of the case for the prosecution is what has persuaded me to find that if she were admitted to bail the appellant will not stand trial. See *State* v *Jongwe* 2002(2) 209(S).

13. Even if I were to order her to surrender her passport, and were to impose stringent bail conditions, what induces her not to stand trial, with or without a passport, and in spite of any bail conditions, still stands. The applicant is human and is swayed by what ordinarily sways human nature.
14. In the result IT IS ORDERED THAT:

    The appeal against bail refusal be and is dismissed.

Chizengeya Maeresera and Partners, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners