

LOVEMORE DHLAYANI
and
NHAMO NYARARAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 15 and 29 April 2021

Bail Appeal

T Mbwachena, for the appellant
Mrs J Matsikidze, for the respondent

MWAYERA J: The appellants have approached this court on an appeal against refusal of bail by the magistrates court. The appeal is opposed by the respondents.

The appellants were arraigned before the magistrates court facing allegations of unlawful dealing or possession of dangerous drugs as defined in s 156(1)(a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] in that they were arrested by police in possession of 60kg of dagga. Secondly appellants were charged with contravening s 25(2) of Statutory Instrument 10 of 21 in that the appellants were disregarding curfew regulations when they were apprehended at 2000 hours.

The Law

In an application for bail pending appeal the court seeks to strike a balance between the right to liberty and the interest of administration of justice. The right to liberty is a constitutionally guaranteed right anchored on the all-time criminal hallmark of presumption of innocence till proven guilty. Section 50 of the constitution is instructive, it states

“Any person who is arrested must be released unconditionally or on reasonable conditions pending a charge or trial unless there are compelling reasons justifying their continued detention.”

See also *AG v Phiri* 1998 (2) ZLR 33 and *Munasva v The State* HB 55/16. In circumstances where the release or applicant on bail does not undermine or jeopardise the objectives of proper functioning of the criminal justice system then the court should lean in favour of upholding the right to liberty. The interests of administration of justice on the other

hand is anchored on the societal interests of ensuring that matters are prosecuted to their logical conclusion to ensure that justice is done. In the event of the court finding compelling reasons not to admit the applicant as occurred in the present case in the magistrate court the applicant has leeway to appeal to this court.

This is what happened in this case. It is settled in an appeal against bail refusal the appeal court is to consider whether or not the court *a quo*'s decision is correct and took into account the principles that fall for consideration in a bail pending trial application. Once a finding is made that the decision was properly reached with the court of first instance properly exercising its discretion then the appellate court should not be quick to interfere. If the discretion was improperly exercised leading to a wrong decision then the appellate court is at liberty to interfere. See *S v Mahachi* HH 4/19 and also *S v Malunjwa* 2003 (1) ZLR 275 (H), *S v Chikumbirike* 1986 (2) ZLR 145 and *Chimwaiche v The State* SC 18/13.

The appellants attack the decision of the court *a quo* on the basis that the court denied bail because the appellants are facing serious allegations, further that the state case is strong and that the court did not consider the appellants' personal circumstances. The appellants argued that the court *a quo* failed to seriously take into consideration that s 50 of the Constitution provides that bail is a fundamental right of an accused person. I now turn to juxtapose the grounds and the ruling of the court *a quo*.

1. *The seriousness of the offence as a reason for refusal of bail.* The ruling of the court *a quo* clearly captured the reasons for refusal of bail. The court correctly observed that the seriousness of an offence on its own is not good enough reason to interfere with an individual's right to liberty. The court *a quo* considered cumulatively the seriousness of the offence, the strength of the state case, the quantity of the dagga (60kg) and the likely sentence to be imposed and concluded that the circumstances amounted to compelling or forceful and convincing grounds that admission of the appellants to bail would prejudice the administration of justice.
2. *That the state case is strong considering the circumstances of the matter.* The court *a quo* cannot be faulted for holding that the state case is strong. The police acted in a tip off and intercepted the two appellants and found the 60kg of dagga in the appellant's vehicle. The explanation by the appellants that police imposed the contraband on them, was held to be fictitious as there was no reason for the

police to plant the dagga on the appellants. The court *a quo* considered the appellants' explanation and the circumstances of the alleged possession and concluded that the state case was not only strong but that accused were facing serious allegations.

The ruling is clear that all factors were considered holistically. Alleged possession of 60kg dagga is a serious offence which considering the strength of the state case would in the event of conviction call for a length imprisonment term. See *S v Sixpence* HH 77-03 and also *S v Muura* HH 178-17. The emphasis is that for dealing with large quantities of dangerous drugs effective custodial sentence are imposed because of the negative and disastrous effects the supply of drugs has on minds of people leading them to committing grave offences.

The court *a quo* alive to the seriousness of the offence, the strength of the state case correctly deduced that there was a huge incentive to abscond and thus prejudice the administration of justice. It is settled that the strength of the state case, the prospects of conviction and the likelihood of a lengthy custodial sentence when combined boost the temptation to abscond. See *S v Jongwe* SC 251/2002. Also *S v Hudson* 1980 (4) SA 145 which the court *a quo* relied on, it was stated:

“The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country.”

It is apparent from the ruling of the court *a quo* that the court in an endeavour to strike a balance between the applicant's right to liberty and interests of administration of justice took into account the personal circumstances of the applicants, the combination of the seriousness of allegations and the strength of the state case and came to a proper informed decisions that there were compelling reasons why the applicants should not be admitted to bail. See *State v Felody Minsaku* HB 55/16. The court *a quo* properly concluded that in the circumstances of this matter placement of the applicants on bail would be prejudicial to the interest of administration of justice.

In the result, there is no basis warranting this court to interfere with the properly and well thought out decision of the court *a quo*. There are compelling reasons why the appellant should not be admitted to bail. The appeal has no merit and it must fail.

Accordingly the appeal against refusal of bail by the magistrates court Chipinge is dismissed.

Ruvengo Maboke & Company, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners