CECILIA CHIMHAU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO AND MANYANGADZE JJ
HARARE, 21 July and 3 August 2022

Criminal Appeal

P P Musendo with *W Kamusasa*, for the appellant
F I Nyahunzvi, for the respondent

CHIKOWERO J:

1. This is an appeal against conviction only.
2. The appellant was, following a plea of not guilty, convicted of unlawful dealing in dangerous drugs as defined in s 156 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
3. She was sentenced to 48 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual conditions of good behaviour.
4. Mr *Musendo* correctly conceded that there was no appeal against sentence because such intended appeal was invalid. This is in view of the fact that the notice of appeal contained no prayer in respect of the intended appeal against sentence.
5. In respect of the appeal against the conviction, the further concession was properly made that the first, fourth, sixth, eighth and tenth grounds of appeal were invalid for want of compliance with the rules of the court. Those intended grounds merit no further attention.

THE BACKGROUND

6. The magistrates' court was satisfied that the State had proved beyond reasonable doubt that the appellant had, on 9 February 2022 and at Zimpost Harare Central Sorting Office, unlawfully dealt in dangerous drugs in that she had imported 18.2 kilograms of Khat from Kenya.

7. Her husband, whom she had sent to Zimpost to collect the parcel containing the drugs on her behalf, was found not guilty and acquitted. The court found that besides being sent to collect the parcel, he was admittedly not involved in the importation of the drug and there was no evidence to prove that he knew that the parcel contained Khat.
8. As for the appellant, the trial court rejected her defence that she merely assisted her brother's acquaintance to import from Kenya what she was told and believed to be moringa (also known as green tea) for onward export to Hong Kong in China.
9. It was satisfied that the appellant imported the Khat from Kenya well knowing that it was such a drug and with the intention to import the same. The text messages between the appellant and Fahamo, the supplier, which suggested that what was being imported was green tea, as was the label on the parcel, were intended to disguise the drugs. This was to ensure undetected passage of the contraband to the appellant. The court rejected too the appellant's explanation that she believed that the parcel contained moringa which she was to re-export to Hong Kong. It found that the text messages proved that the parcel's destination was the appellant, in Zimbabwe. There was no Hong Kong address.
10. We turn to examine the grounds of appeal.

KHAT

11. The second and third grounds of appeal attack the factual finding that the parcel contained Khat.
12. These grounds are misplaced Christopher Chapano is a botanist. He examined a sample of the drugs and concluded that it was Khat. He gave oral evidence explaining his finding. His testimony, not having been controverted by other expert testimony, was correctly accepted by the trial court. John Gobvu and Stephen Ndambakuwa, the police officers who obtained a sample of the drug and Munyaradzi Masiyambiri, the director at the Government Analytical Laboratory who received the sample and forwarded it to Chapano for the actual testing, testified on the chain of custody of the sample. That chain was not broken. This means that the trial court's finding that the test result was credible cannot be faulted.
13. Dexter Tagwireyi is a Toxicologist. He was called by the appellant as a defence witness. He conceded under cross-examination that his knowledge of Khat was not practical but academic. He did not examine the drug in question only to set his eyes on it for the first time in court. He admitted that a botanist was able to examine a plant

and, if it be Khat, to so conclude without the need to conduct a chemical examination. Indeed, Tagwireyi was candid to disclose that Chapano was an excellent botanist as the former at times sent samples to the latter for testing as he reposed trust in his findings. The learned magistrate acted properly in seeing no value in the bulky academic literature on Khat produced through Tagwireyi, because it was completely irrelevant to the determination of whether the parcel imported from Kenya contained Khat.

14. In any event the appellant himself, under cross-examination, did not dispute that the parcel contained Khat. What is not disputed in court proceedings is taken to have been admitted. Resultantly, it ceased to be an issue before the court below that the parcel contained Khat the moment that the appellant did not dispute that fact. Since it was no longer an issue before the trial court it cannot be an issue for the first time at appeal stage. We reiterate that the second and third grounds of appeal are misplaced. Nothing turns on them.

DEALING

15. The fifth and seventh grounds of appeal overlap.
16. The former reads as follow:

> "The court *a quo* erred in finding appellant guilty when the State had not demonstrated that all the elements of the offence had been satisfied, especially knowledge, guilty mind and intention. The court *a quo* convicted on speculation and possibility."

17. The seventh ground is in these terms:

> "The court *a quo* erred in making a finding that appellant imported a prohibited drug when her conduct did not satisfy the statutory definition of 'import' and 'importer'."

18. Section 2 of the Customs and Excise Act [*Chapter 23:02*] contains these definitions:
    - "import" means to bring goods or cause goods to be brought into Zimbabwe
    - "importer", in relation to goods, includes any owner of or other person possessed of or beneficially interested in any goods at any time before entry of the same has been made and the requirements of this Act fulfilled.
19. Section 156 (unlawful dealing in dangerous drugs) falls under Chapter VII of the Criminal Law Code. The Chapter is headed "CRIMES INVOLVING DANGEROUS DRUGS". The definition section of the Chapter is s 155. In interpreting the meaning of "dealing" for the purposes of s 156, therefore, one resorts to s 155.
20. Therein, the following appears:

- "deal in", in relation to a dangerous drug, includes to sell or to perform any act, whether as a principal, agent, carrier, messenger or otherwise, in connection with the delivery, collection, importation, exportation, trans-shipment, supply, administration, manufacture, cultivation, procurement or transmission of such drug.

21. Importation of dangerous drugs is just but one of the many things that qualifies one as unlawfully dealing in such drugs.
22. For the appellant to have been correctly found to have dealt in Khat, she had first to be found to have imported the Khat with the knowledge that it was such and with intention to unlawfully import the Khat. Hence grounds of appeal five and seven converge.
23. We agree with Mr *Nyahunzvi* that there is no merit in the two grounds of appeal.
24. The appellant was a key player in the bringing of the Khat from Kenya to Zimbabwe. She caused those drugs to be brought into the country. She is the one who communicated with Fahamo resulting in the latter sending the Khat from Kenya to Zimbabwe. She is the one who provided Fahamo with her full name and physical address to which particulars enabled the drugs to reach this country. Fahamo, in Kenya, was the exporter. The appellant, in Zimbabwe, was the importer. Fahamo's text message to the appellant in this regard, reads:

    "I need to send to you morning or Camellia tea from Kenya."

    The appellant's response was:

    "My contact details
    Cecilia Chimhau
    24 Glencairn Drive
    Sunridge
    Harare
    0773334881."

25. It is naïve to effectively argue that the appellant did not know that Fahamo was sending Khat to the appellant in Zimbabwe because Fahamo's text message to the appellant did not read:

    "I need to send to you Khat from Kenya."

26. Equally, there was no way that the parcel was going to be labelled "Khat".
27. The appellant made numerous follow-ups for the parcel to the extent that she went so far as to send her husband to collect it even after Fahamo had repeatedly alerted her not to do so. Hence, the appellant's beneficial interest in the Khat is manifest.

28. The appellant's interest is evident also from the sustained exchange of text messages between the two. Some of those, initiated by the appellant read:

> "Did you manage to sent tea?"
> and
> "Hie Fahamo. Is the tea you sent in tea bags."

29. We agree with the learned Magistrate that if the appellant genuinely thought that the parcel contained moringa tea and that she was meant to further export it to Hong Kong she would not have exhibited the keen interest reflected in her text messages. There certainly was something in the deal for the appellant and for that to be so she had to, and we agree she did, know that it was Khat.
30. The communication between Fahamo and the appellant ran from early November 2021 to mid-January 2022. What is striking is that despite the ample opportunity thus availed to obtain the purported Hong Kong forwarding address, the same was never furnished to the appellant. In these circumstances, we share the learned magistrate's finding of fact that the destination of the Khat was the appellant at the address reflected on the parcel containing the drugs.
31. The court below made a finding of fact that reference to "tea" in the text messages and the label "moringa" on the parcel was meant to disguise the fact that the appellant was dealing in the dangerous drug called Khat. The proven facts show that the inference was properly made. Indeed, the terms "morning or camellia tea from Kenya" and "moringa" were used as secret codes to conceal the true identity of that which the appellant imported from Kenya. The only reason for employing that secret code was to evade detection. Resultantly, the conclusion that the appellant unlawfully dealt in Khat by knowingly and intentionally importing it from Kenya cannot be impeached.

ONUS TO PROVE INNOCENCE

32. The complaint that the trial court misdirected itself at law by placing an onus on the appellant to prove her innocence is premised on this excerpt at p 11 of the judgment *a quo*:

> "Suffice to note that no evidence has been tendered by the accused to prove that indeed there were no direct flights from Kenya to China during the material time which would justify why the package had to be sent via Zimbabwe. This was particularly important having regard to period in question i.e. October 2021 Covid-19 restrictions had been uplifted in many countries and operations had gone back to normalcy. Thus such evidence was very crucial."

33. Despite these remarks, the appellant was not convicted because she had failed to prove that there were no direct flights between Kenya and China during the period that the offending parcel was imported to Zimbabwe.
34. Accordingly, the appellant's last ground of appeal is founded on remarks made by the court in passing. Nothing turns on such obiter. This matter is no exception.

DISPOSITION

35. The appeal can only but fail.

ORDER

36. The appeal against conviction be and is hereby dismissed.

CHIKOWERO J……..

MANYANGADZE J, agrees:……..

Kamusasa and Musendo, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners