RANGANAI SAMHEMBERE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 7 May, 2019 & 16 May, 2019

Application for bail pending appeal against conviction and sentence

Advocate T Mpofu, for the applicant
R Chikosha, for the respondent

CHIKOWERO J: Despite *Advocate Mpofu's* herculean effort to persuade me otherwise, I find that the applicant's appeal against conviction does not have reasonable prospects of success.

If I had found otherwise, this would have been a suitable case for imposition of stringent conditions to minimize the risk of abscondment pending the determination of the appeal.

In this respect, I agree with his counsel that applicant has an incentive not to abscond so as to secure release of his forfeited vehicle should the appeal against conviction and/or sentence, even to the limited extent of the forfeiture order relating to his vehicle being set aside or the custodial sentence being reduced.

I make these observations because the cumulative effect of the forfeiture order and the custodial sentence of nine years imprisonment, none suspended, appears to me to be on the harsh side. This was a first offender.

The reason why I have not admitted applicant on bail pending appeal against sentence, the above notwithstanding, is this. Even if the forfeiture order in respect of the motor vehicle is set aside and the custodial sentence is reduced on appeal applicant cannot escape incarceration.

I do not consider that he would have finished serving such reduced sentence, if he gets it, by the time his appeal is heard. I say this because I heard this application with a transcript of the record of the proceedings *a quo* put before me. Only a few things were outstanding before the

record is ready for transmission to the Registrar of this court for purposes of the appeal. For example, I did not see the magistrate's response to the grounds of appeal.

On 22 March 2019 the applicant was convicted by the Regional Magistrates Court Harare of the offence of unlawful dealing in dangerous drugs as defined in s 156 (1) (c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In sum, the allegations were that on 13 April 2018 and along an unnamed road in Damafalls, Harare, he unlawfully possessed drugs, namely 29 bags of dagga weighing 700 kgs for the purpose of dealing in such drugs.

The sentence imposed was nine years imprisonment. The applicant's motor vehicle, a Toyota Regius Registration Number AEL 2429, was declared forfeited to the State. The 29 bags of dagga were also forfeited to the State.

Dissatisfied with both the conviction and sentence, the applicant appealed. He has now petitioned this court for bail pending determination of such appeal.

The factors applicable in determining an application such as the present are trite. They are four, namely the prospects of success on appeal, the likelihood of the applicant absconding pending determination of the appeal, the individual's right to personal liberty as well as the likely delay before the appeal is heard.

I have already dealt with the last factor.

The conviction and sentence means that the applicant has now lost his right to personal liberty. The presumption of innocence no longer applies to him.

I have likewise already dealt with the likelihood of abscondment. I have found that there is no such likelihood. In addition, I have concluded that stringent conditions would have sufficed to allay any such lingering fears, if any. In my view, it is however unnecessary to set out what conditions I would have imposed in light of the position I take on the prospects of success on appeal.

This application turns on the prospects of success on appeal against the conviction coupled with the fact that the applicant has a fighting chance on appeal in respect of the sentence imposed. Even the likelihood of such partial success on appeal in respect of the sentence, in my view, would still leave him with a custodial sentence to serve.

I add that it appears undesirable to release applicant on bail pending appeal, even when it is my finding that he enjoys reasonable prospects of partial success in the appeal against sentence, because he would still be required to serve a not insubstantial custodial sentence.

My sense of justice precludes me from ordering his release when it is clear to me that he would still be required to serve a custodial sentence whatever the outcome of his appeal against the sentence would be. It would be unfair even to him. A person must not jump in, out of and back into prison. It clearly would be unnecessarily disruptive to his life.

Twenty nine bags of dagga were involved. The dagga weighed 700 kg. They had a street value of US$49 000.00.

The vehicle was forfeited to the state in terms of s 62 (1) (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. It reads:

> "62 Forfeiture of article to state
> (1) A court convicting any person of any offence may, without notice to any other person, declare forfeited to the state—
> (a) …
> (b) If the conviction is in respect of an offence specified in the Second Schedule any vehicle, container or other article which was used for the purpose of or in the connection with the commission of the offence in question…; and which was seized in terms of this Part…"

The Second Schedule reads in relevant part:

> "SECOND SCHEDULE (SECTION 62)
> OFFENCES IN CONNECTION WITH WHICH THINGS MAY BE SEIZED AND CONFISCATED IN TERMS OF SECTION 62
> 1. Any offence under any enactment relating to the unlawful possession, conveyance or supply of habit-forming drugs or harmful liquids."

An affidavit was deposed to by S Gozho on 25 April 2018 at Harare. He is a Principal Forensic Scientist employed as such in the Department of Forensic Science, Ministry of Home Affairs.

The affidavit was prepared in terms of s 278 (1) (a) and (b) of the Criminal Law & Evidence Act [*Chapter 9:07*].

The pertinent portion of that affidavit reads as follows:

> "On 17 April 2018, the following exhibit samples of plant materials were collected from Vehicle Theft Squad Exhibit room:
> FOUR TRANSPARENT PLASTIC SATCHETS CONTAINING GREENISH PLANT MATERIAL.

The examination was carried out and the following observations noted:

1. The dry greenish brown plant material comprised of leaves, stems, florets and brown oval shaped seeds.
2. The leaves, stems and flowering parts had microscopic characteristics of cannabis sativa L plant."

The affidavit was produced by consent at the trial.

It was not in issue at the trial that the dagga in question fell within the definition of dangerous drugs as provided for under Chapter VII section 155 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Accordingly, it being a habit forming drug, the trial court had the discretion, having convicted the applicant, to declare fortified to the State the vehicle in which the drugs were being transported. Section 62 (1) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] gave the sentencing court that discretion.

Sentencing is a matter of discretion. Such discretion reposes in the trial court. There are limited parameters within which an appeal court may properly interfere with such discretion. I reiterate that this is a matter where the appeal court may or may not interfere with the sentence imposed. I am not required to answer that question definitely because it would be remiss of me to do so. Indeed, there is a wider scope for a difference of opinion in an appeal against sentence. The reasonable prospects of success on appeal against the sentence, which I have found to exist, are on the circumstances of this matter not a good ground to order his release on bail pending appeal.

I turn now to determine the prospects of success on appeal against the conviction.

I confine myself to the remaining material portions of the State outline in analysing the prospects of applicant on appeal.

Paragraphs 4 to 11 of the outline of the State case read as follows:

"(4) On Friday 13 April 2018, police detectives from Criminal Investigation Department Vehicle Theft Squad Harare, received information to the effect that there were dealers in dangerous drugs loading some bags of Dagga into Toyota Hiace vehicles with supplied registration numbers AEL2492 white in colour and AEI 6094 silver in colour in Damafalls area in Harare.

(5) Acting on a tip off the detectives reacted to the information and drove to Damafalls area in Harare.

(6) Armed with the supplied registration numbers AEL 2492 and AEI 6094, the team drove along an unnamed dust road in Damafalls.

(7) While driving along the unnamed dust road leading to Damafalls the team intercepted a Toyota Regius, white in colour on (*sic*) registration numbers AEL 2492.

(8) The team stopped the motor vehicle and discovered that it was carrying various bags of dagga.
(9) The accused Ranganai Samhembere was driving the motor vehicle and he was arrested for dealing in Dangerous Drugs and recovery of 29 bags of dagga and the Toyota Regius AEL 2492 used in transporting the dagga.
(10) The accused was taken to Criminal Investigations Department, Vehicle Theft Squad were (*sic*) the recovered bags of dagga and motor vehicle was taken as exhibits.
(11) Investigations revealed that the recovered motor vehicle Toyota Regius registration number AEL 2492, Chassis number KDH2000053187, Engine Number 2KD1494024, is owned and registered in the name of the accused."

I must assess whether the appeal against conviction is "reasonably arguable and not manifestly doomed to failure." *S* v *Robert Martin Gumbura* SC 349/14.

Mr *Mpofu* urged me to find that the applicant had a "fighting chance" on appeal. He was so confident of his client's prospects as to go on to argue that applicant had "more than a fighting chance" on appeal.

I see no difference in the various formulations of the test for reasonable prospects. It really is matter of semantics. After all, it boils down to assessing whether the appeal may or may not succeed. That means I must decide whether the appeal is arguable. That question must be answered without determining the appeal itself.

This I now proceed to do.

I start with the statute itself.

The Criminal Law (Codification and Reform) Act [*Chapter 9:3*] reads in relevant part as follows:

"Chapter VII

Crimes Involving Dangerous Drugs

155 Interpretation in Chapter V11

"In this Chapter –

'deal in', in relation to a dangerous drug, includes to sell or to perform any act, whether as 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." (underlining mine for emphasis).

The applicant was charged with contravening s 156 (1) (c) of the same Act, under the same chapter. It runs as follows:

"156 Unlawful dealing in dangerous drugs.

(1) A person who unlawfully –
(a) ….
(b) ….
(c) possesses a dangerous drug … for the purpose of dealing in such drug … shall be guilty of unlawful dealing in a dangerous drug and liable –
(i) if the crime was committed in any of the aggravating circumstances … (subparagraph not relevant); or
(ii) in any other case, to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding fifteen years or both."

I think that the state could perfectly have preferred a charge under s 156 (1) (a) of the Act in view of the words "deliver, transports or otherwise deals in" contained therein. But the result would have been the same, in the present circumstances, with charging for unlawful possession for the purpose of dealing under s 156 (1) (c).

To me, the staggering quantity of the dagga is adequate evidence on its own that the possession thereof was for the purpose of dealing. This means the correct charge was preferred. My further view is that it was partly to deal with the grey areas and challenges in prosecuting commercial cases concerning dangerous drugs that the provisions of Chapter V11 are so wide. I see examples of such challenges and grey areas in *S* v *Mhuriro* 1985 (1) ZLR 197 (H).

The key to interpreting the entire Chapter V11 is contained in s 155. What this means is that when determining whether a charge ought to be preferred in terms of s 156 or 157 (unlawful possession or use of dangerous drug) the respondent must never lose sight of the wide definition of dealing in a dangerous drug set out in s 155. Obviously, the respondent looks at the particular circumstances of the matter in selecting the most appropriate charge. In the present matter, the appropriate charge was the one preferred and not mere unlawful possession under s 157 (1) (a). The fact that the police thought that the correct charge was possessing a dangerous drug does not matter. What matters is the charge preferred by the respondent. The arresting police officers are not the respondent.

Further, it was not just unlawful possession of a large quantity of a dangerous drug. It was possession thereof on an unnamed road in a moving vehicle. The resort to use of such road was, in my view, to avoid and, failing that, to minimise the chances of detection. It goes without saying that the drug was being transmitted from one place to another. It would be to defeat the intention of the Legislature in Chapter V11 to argue that the circumstances of this matter do not constitute possession of a dangerous drug for the purpose of dealing in such drug.

That the dagga was recovered from the applicant's vehicle which vehicle was intercepted and stopped by the first to third State witnesses (all police officers) was never in issue.

Further, that the same witnesses thereafter shortly intercepted and stopped another vehicle after firing at it, also containing a further consignment of dagga, was never an issue.

The only issue was whether the applicant was the driver of his forfeited vehicle carrying the 29 bags of dagga. The evidence led by the prosecution was that he was the driver, and was alone in that vehicle.

His argument that he was not driving his vehicle at the material time, was not in that vehicle and was therefore not arrested on the unnamed road in Damafalls but at his house in Budiriro is, on appeal, destined to fail. It was correctly rejected by the magistrate.

The three police witnesses did not know him prior to his arrest. They had no reason to fabricate any evidence against him. Their informer did not supply them with the names or identities of the persons who were loading dagga into the two vehicles.

The police officers, who were on a different assignment, simply acted on the basis of the bare bones supplied to them by the informer and apprehended the applicant.

It is manifestly clear that applicant was caught red handed.

His *alibi* was correctly rejected by the magistrate. It was not to put an onus on the applicant to prove that his *alibi* was true to require him to lay the foundation for such *alibi*. All that he was required to do was to call the two minor children whom he alleged to have been present at his house in Budiriro where he claimed to have been arrested. He did not call them as his defence witnesses.

My finding in this regard is that the state had no *alibi* to disprove a *quo* because the requirements for such a defence were not met by applicant. Put differently, the state had nothing to disprove.

There is nothing in the record of proceedings reflecting that the three state witnesses were alerted by the applicant prior to the commencement of the trial of the existence of Reuben Chimanja and Johannes Moyo. These are some of the persons whom he avers in his defence outline to have been in charge of the vehicle when the police witnesses stopped it in Damafalls. I pause to remark that it is startling for applicant to say that if he was not on that unnamed road in Damafalls in the first place.

It is apposite that I quote para 3 of his defence outline:

> "3. The accused will state that he was not arrested at the alleged scene as alleged by the State but at his place of residence. At the relevant point in time the motor vehicle in question was in the control of one Johannes Moyo and his other colleagues including Reuben Chimanja who had hired the motor vehicle from him. These are the persons who might have some explanation as to the commission of the alleged offence…"

At pp 248 to 249 of the record, as part of mitigation by the applicant, the value of the forfeited vehicle was given as US$10 000. This was on March 25th 2019. So this particular motor vehicle was an important and valuable asset to the applicant. He certainly could not have hired it out to strangers or persons known to him but whose residential addresses he did not know.

I have carefully and painstakingly read through the record of proceedings *a quo*. My efforts have not yielded Johannes Moyo and Reuben Chimanja's residential addresses. Neither is there evidence on record that applicant claimed to have led the police to their places of residence upon his arrest.

No particulars of Reuben Chimanja and Johannes Moyo are on record. In addition to the absence of their residential addresses, their mobile numbers were never given. I take judicial notice of the fact that virtually every adult urbanite in Zimbabwe now owns a mobile phone. For persons in commerce, payment for services rendered, which includes hire, are frequently made through ecocash. One has to have a mobile phone to do that.

The conclusion is inescapable that Reuben Chimanja and Johannes Moyo are just names concorted by the applicant when preparing his defence outline in a desperate bid to evade liability. If these were actual persons, they should have testified as his defence witnesses. They did not.

Considering the totality of the evidence on record, the inconsistencies between the witnesses on the route they took to station from Damafalls and the variances in the time of applicant's arrest were inconsequential. That was not the crux of the matter.

Further, the conspiracy argument raised by the applicant was a red herring. I am unable to see how it stands any chance of success on appeal. Applicant admitted the three police witnesses were unknown to him. How would they conspire to fabricate a case against a person unknown to them?

It follows also that the non- production of the record of the first three state witnesses' mobile call history on the day in question does not detract from the cogency and sufficiency of the

evidence upon which the conviction was founded. The state is not required to prove a criminal case beyond a shadow of doubt. Proof beyond reasonable doubt suffices.

Having earlier testified in the other matter involving seizure of dagga from the second vehicle, the last state witness, a vendor, was understandably regretting why he had come forward to testify in the present matter in the first place. His informal business operations remained unattended to. He was suffering losses. Applicant cannot on appeal hope to make a mountain out of this anthill. In my judgment, it would be an exercise unprofitable.

In the result, the appeal against conviction being headed towards predictable failure, the application for bail pending appeal against both conviction and sentence be and is hereby dismissed.

Rubaya and Chatambudza, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners.