

OLGA CARLOS JOAO BACAR
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 13 May 2015

Application for leave to appeal

TAGU J: This is an application for leave to appeal to the Supreme Court in terms of s 44 (4) and 44 (2) of the High Court Act [*Chapter 7.06*] against a judgment of this Court handed down on 8 September 2014, in case number HH104/15. This court became seized with the matter by way of appeal from a decision of the magistrate whereby the applicant was convicted of contravening s 156 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] as read with s 14 A(1) (a) of the Dangerous Drugs Act [*Chapter 15.02*], (unlawfully dealing in dangerous drugs).

On 8 September 2014 this court gave an *ex-tempore* judgment dismissing the applicant's appeal against both conviction and sentence. This court upheld the sentence of 36 months imprisonment of which 12 months imprisonment were suspended for 5 years on the usual conditions of future good conduct. The cocaine which was subject of the trial was forfeited to the state and the applicant was to be deported back to Mozambique after serving the sentence.

Firstly, it was argued on behalf of the applicant that the court *a quo* erred in finding that the applicant was in possession of the alleged drugs in question.

Secondly, it was argued that the court *a quo* erred in convicting the applicant on the basis of the explanation given by the police yet the substance which later turned out to be cocaine, was for purposes of lubricating her vagina. It was alleged that there was evidence of tempering with the package.

Thirdly, it was argued on behalf of the applicant that the cocaine could have been planted by the applicant's boyfriend, one Themba Hlongwane.

Fourthly, it was contented that the court *a quo* erred in finding that the applicant intended to deal in cocaine with her friend Shaniel when there was no evidence linking applicant to the alleged drug dealing.

The fifth ground of appeal was that the applicant was not the only one who had access to the room in which the cocaine was found. It was argued that the applicant's brother also had access to her room.

Sixthly, the conviction was attacked on the basis that the state had failed to prove its case beyond a reasonable doubt.

Finally, the attack against sentence took the usual argument that the sentence imposed was excessive in light of the strong mitigatory factors and that the appropriate sentence was one of community service.

The applicant has now raised 4 grounds of appeal to the Supreme Court against the decision of this court. Surprisingly, the applicant has raised issues as follows-

- “1. Whether or not section 50 (1) (a) of the Criminal Procedure and Evidence Act [*Chapter 9.07*] is Ultra Vires section 57 of the Constitution of Zimbabwe, 2013 to the extent that it allows officers of the Zimbabwe Republic Police to obtain Search Warrants from themselves rather than from an independent judicial function.
2. Whether or not, the fact that the police officers in this case applied for a search Warrant from an inspector in the police force rather than from an independent judicial function (*sic*) violated the Applicant's right to privacy as provided in section 57 of the Constitution of Zimbabwe, 2013;
3. Whether or not the evidence of drugs obtained as a result of the search Warrant granted by an inspector in the police force is admissible in light of section 70 (3) of the Constitution of Zimbabwe that prohibits the adduction of evidence that is obtained in a manner that violates provisions in Chapter 3 of the Constitution of Zimbabwe, 2013.
4. Whether or not the applicant is not to be acquitted on the ground that the entire trial was based on evidence which was obtained in a manner that violates the rights provided in Chapter 3 of the Constitution of Zimbabwe”

The main consideration in an application of this nature is whether there are prospects of success on appeal to the Supreme Court.

In our view there are no merits in the appeal on Constitutional grounds. The appeal was brought and argued before this Honourable Court on points of law and points of fact. When the appeal was argued before us the parties were confined to the four corners of the record. Nothing was said vis a vis the constitutional points which are now being raised. Our

determination of the appeal was based on the grounds of appeal and heads of argument filed of record. The appellant does not state in what way our finding was not properly premised.

The fact of the matter, and this emerged from the record, is that the police acting on a tip off that the applicant was dealing in cocaine together with her friend Shaniel, thoroughly searched the applicant's room. The police recovered 10 grammes of a substance from her shoes in her own room which was examined and found to be cocaine. She admitted being in possession of that substance which she claimed to have been given to her by her mother who brought it from Mozambique, and that she was using it to lubricate her vagina. The only reasonable inference that could be drawn as to her possession was therefore that she intended to deal and was thus dealing with it together with her friend Shaniel.

The applicant therefore, contravened section 156 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*].

On the question of sentence the court a quo erred on the side of lenience when it passed its sentence since the offence was committed in aggravating circumstances and there are no especial circumstances peculiar to the case. In fact the applicant was liable to imprisonment for a period not less than 15 and not more than 20 years.

There appears in our view to be no prospects of success in the intended appeal. For this reason the application fails. It is thus dismissed.

Mambosasa, applicant's legal practitioners

The Prosecutor-General's Office, respondent's legal practitioners