

BELLINGTON MARONGA
and
TAFADZWA MADZIYA
and
TERRENCE DENGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 14 & 30 July 2021

Bail Application

LT Muringani, for the appellants
Ms K H Kunaka, for the respondent

CHAREWA J: The appellants are being charged with unlawful dealing in dangerous drugs as defined in s 156(1)(c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Their application for bail pending trial was refused by the Magistrates Court on the basis of the strength of the state case and the consequent likelihood to abscond given the likely sentence that may ensue.

The appellants contend that the court *a quo* committed an irregularity or misdirected itself by

1. Failing to consider all relevant factors as a whole and not individually and in particular by disregarding appellants personal circumstances,
2. Concluding that appellants would abscond because other suspects in the same offence had fled when there was no evidence of any attempts to flee
3. Failing to give due weight to appellants explanation of what transpired and therefore their defence to the charge

4. Concluding that the state case is strong when there is no evidence to support the mental element
5. And finally, by relying on the unreliable evidence of the investigating officer.

The grant of bail is a matter of discretion by the court. Therefore, it is trite that in matters such as this, it counts for nought that this court might have reached a different conclusion and may have granted appellants bail. The superior court will not normally interfere in the exercise of its discretion by the lower court unless the appellant is able to show that the court a quo committed an irregularity or misdirected itself and exercised its discretion in an unreasonable or improper manner to such an extent that its decision cannot be upheld. The emphasis is mine and serves as a reminder that it is not every irregularity or misdirection that leads to the setting aside of the decision of the lower court. And further, even where the decision of the lower court is set aside, it does not automatically follow that the higher court will grant bail as it is still at liberty to consider whether an applicant merits pre-trial liberty.¹

Neither can it be gainsaid that bail is a constitutional right, albeit limited by the interests of justice and the need to balance an applicant's rights with those of the public.² The provisions relating to pre-trial liberty encapsulated in s 117(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] serve as a framework within which the entitlement to bail and the commensurate limitation to the right to grant bail must be exercised.

In casu, first appellant is the owner of the vehicle which was carrying a 50kg bag of dagga en route to Mbare. Acting on a tip off that the vehicle was being used for drug dealing, the police followed the vehicle. When it parked and the police approached, first appellant and his three co-accused ran away. Unfortunately, he was caught together with one accomplice after warning shots were fired. The two of them led police to 12480 Budiro 5B where second and third appellants were sleeping in the house and tuckshop respectively. A further 2 x 50 kg bags of dagga were recovered in the room where second appellant was sleeping together with

¹ See *S v Malunjwa* 2003(1) ZLR 275 (H). See also *S v Ruturi* 2003(1) ZLR 259 (H) and *Gaill Muroyi v The State* SC11/20

² See s50(1)(b) as read with s86(2) of the Constitution of Zimbabwe Amendment (No. 20) of 2013 .

another plastic bag with more dagga. Third appellant is apparently the tenant or owner of the room and house that the drugs were stashed in.

It is instructive to note that a bail application is not a trial where proof beyond reasonable doubt is required, but is an application predicated on a balance of probabilities. The nature and tone of the appellants bail statements seems to conflate trial issues and bail issues. So does a reading of the submissions by the appellants' legal practitioner in the court *a quo*. All the respondent was required to show was that on a balance of probabilities, there are compelling reasons not to admit appellants to bail. This, the respondent did by leading evidence from the investigating officer showing the role each of the applicants played, the quantity of dagga recovered from, and through, them and the circumstances of their arrest. It is from this evidence that the court *a quo* concluded that the state had a strong case regarding a serious charge, which if successfully prosecuted, would lead to lengthy custodial sentences for appellants. The court *a quo* concluded that such lengthy prospective sentences could reasonably induce them to flee particularly since some of their accomplices had already fled arrest.

I cannot find any misdirection of a nature serious enough, in the reasoning of the magistrate or any irregularity that warrants interference with this court. The ruling of the magistrate reveals that the court *a quo* was not only alive to the fact that bail is a right but that it needed to balance the interests of the individual with the interests of justice. More particularly, the court was conscious of the requirements of s 117(2) as shown at pp 22-24 of the record, which traverses all relevant issues including the reliance on hearsay evidence, the part played by each of the appellants, the nature and gravity of the offence, the evidential strength of the State case, the likely penalty and the defences raised by the appellants. The court *a quo* went further to discuss the case law with respect to the conclusion it reached on the likelihood of abscondment. Even this court would have been hard pressed to find justification for personal circumstances to tip the balance in appellants favour and grant them grant bail where the evidence suggests that appellants are dealing in large quantities of dagga to the serious detriment of the public interest, in circumstances where their accomplices are still at large.

In the premises, the appeal against refusal of bail is dismissed.

LT Muringani Law Practice, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners