

TONDERAI MUZONDO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 27 August 2021 & 6 September 2021

Bail Ruling

E. Matsanura, for applicant
Kangai, for respondent

MUCHAWA J: This is an appeal against refusal by the magistrate to grant bail pending trial.

The appellant was arraigned before the court a quo facing one count of unlawful possession of dangerous drugs as defined in section 157 (1) of the Criminal Codification and Reform Act as read with section 14 (2) of the Dangerous Drugs Act.

The facts giving rise to the charges are that, on the 11th August 2021, police from CID Drugs and Narcotics unit set up the appellant following a tip off that he was dealing or was in possession of methylenedioxy- methamphetamine also known as crystal methamphetamine. The appellant proceeded to sell a sachet for \$5.00 to one of the detectives who then identified themselves and arrested him. A search in his room led to the recovery of six more sachets. Upon weighing, the crystal methamphetamine was approximately 6.80 grammes and the street value was put at ZWL 6800.00

The State was opposed to the granting of bail when the appellant appeared before the magistrate on the grounds of his having been caught red handed in possession of the dangerous drug. It was argued that there was a strong case against him and he was likely to abscond to evade justice.

The magistrate was alive to the provisions of section 50 (1) (d) of the Constitution which provides that any person who is arrested must be released unconditionally or on reasonable conditions pending trial unless there are compelling reasons justifying the continued detention. Some of the factors to be cumulatively considered were listed as:

- nature and character of charges

- strength of the State's case
- likely sentence in the event of a conviction
- nature of defence of the accused person
- risk of abscondment etc

It was noted that the presumption of innocence is one of the cornerstones of the Constitution as set out in section 70. The magistrate concluded that the applicant was not a good candidate for bail on the following grounds:

That the appellant was caught red handed and sold part of the drugs to one of the police officers. That six more sachets were recovered from his room. That therefore the state has a strong case against him and conviction is likely. That the charge is fairly serious and is likely to attract a long prison term, likely to induce abscondment. Considered too that drug dealing is rampant and nature of drugs involved have serious effects on society and likely to attract a serious sentence.

Noted that charged in terms of s 157 (1) (a) for possession of dangerous drugs but circumstances show the more serious offence of dealing in dangerous drugs in terms of s156 therefore lengthy custodial sentence.

On appeal the appellant avers that there are no compelling reasons justifying denial of bail as guaranteed under s50 (1) (d) of the Constitution.

Further it is stated that the appellant should be presumed innocent until proven guilty thus balancing his right to liberty with the interests of justice.

It is also argued that the State's fears of abscondment can be cured by sufficient bail conditions.

Another ground put forward is that the alleged seriousness of the offence alone cannot be used to refuse appellant bail considering that the penal provision for unlawful possession of dangerous drugs has an option of a fine.

The appellant contends that he was not found in possession of methylenedioxy-methamphetamine but crystal methamphetamine and the two are different.

The Court's impression that the facts warranted a section 156 charge of dealing which is more serious than possession under section 157(1)(a) Of the Code was said to be a misdirection as he was placed on remand for possession

The last ground raised is that the quantity of the drug he was found in possession of is unlikely to attract a custodial sentence.

The state response basically avers that there was no misdirection on the part of the Court *a quo* in denying bail to the appellant.

This Court, as an Appeal Court, cannot substitute its own discretion except where there is a misdirection or irregularity that is shown to exist. See *AG v Ruturi* HH – 26 -03.

Granted, in this case there was indeed overwhelming evidence\as the appellant was caught red handed and even sold a sachet to a police officer. He was however charged of unlawful possession of dangerous drugs in terms of section 157(1)(a) of the Code. It was a misdirection for the Magistrate to consider the seriousness of the offence against what the circumstances pointed to, and not what the charges reflected.

The sentence imposable for possession of a dangerous drug in section 157(2) are a fine not exceeding level ten or imprisonment for a period not exceeding five years or both. The appellant referred the Court to several cases where persons were convicted of possession of dagga. In *S V Mugabe* HH -192 – 86 the accused who was found in possession 399 grammes of dagga was fined \$400.00 with an alternative period of 3 months imprisonment. In *Mapurisa v S HB 95/93* possession of 35 cobs of dagga weighing 611 grammes attracted a fine of \$1000.00 with an additional sentence of imprisonment conditionally suspended for 5 years since the accused was a 50 year old first offender. In *S v Mugugu* HH 386-13, the accused who was found in possession of 1.2 kilograms of dagga was sentenced to 12 months with 6 suspended.

It was therefore a misdirection for the Magistrate to make a finding that possession of 6.80 grammes of the dangerous drug in issue would attract a lengthy custodial sentence. Since the State's position was essentially that the state case is strong and the charges are serious and likely to attract a lengthy custodial sentence, there is no need for me to delve into the other grounds of appeal. I have already shown that the charges preferred are possession of dangerous drugs, the penalty has the option of a fine and case law in the circumstances of the amount of the drug does not point to a lengthy custodial sentence.

Given the misdirections I have pointed out I order as follows:

1. This appeal succeeds
2. The decision of the Court *a quo* of denying bail to the appellant is set aside and substituted as follows,
 - 2.1 The applicant is admitted to bail pending trial on the following condition:

- 2.2 Applicant deposits \$Z10 000.00 with the clerk of Court Harare Magistrates Court (CRB Number ACC 146/21)
- 2.3 The applicant resides at No 4008, 167 Street, Warren Park D; Harare until the matter is finalised
- 2.4 The applicant reports at Warren Park 1 Police Station every Friday between 6am and 6pm until the matter is finalised
- 2.5 The applicant does not interfere with state witnesses.

Mawire J. T. & Associates, applicant's Legal Practitioners
National Prosecuting Authority, respondent's legal practitioners