

BERLIN DOMBODZVUKU  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
FOROMA J  
HARARE, 19 July and 16 September 2021

### **Appeal Against Refusal of Bail by Magistrate**

*E. Dera*, for the applicant  
*A. Muziwi*, for the respondent

FOROMA J: Appellant Berlin Dombodzvuku, a member of the Zimbabwe Republic Police forces Charges of unlawful possession 143.95 kg of dagga in contravention of s 57(i)(a) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. He applied for bail pending trial before a Magistrates' court at Marondera after being apprehended by police on the 8 of July 2021 for being in unlawful possession of 143,95 kg of dagga packed in 6 bags loaded in his motor vehicle. Bail was refused by the magistrate on the ground that as a member of the police force if convicted of the very serious offence he would face a lengthy prison sentence and also that his release on bail might jeopardize public confidence in the criminal justice system as provided in s 117(3)(e)(v) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. Dissatisfied with the refusal of his bail application appellant filed a Notice of appeal against the decision of the magistrate denying him bail pending trial.

A brief background to the allegations preferred against the appellant are that Police Marondera got tipped off that accused who was driving a Toyota Sienta Registration number AEH2141 was carrying bags of dagga from Macheke. Police then driving in an unmarked vehicle and dressed in civilian clothing intercepted appellant who refused to stop when waved down to stop resulting in police chasing him for a distance of about 5 km passing through Marondera CBD before appellant got involved in an accident with a stationary vehicle resulting in appellant's, vehicle developing a puncture. Upon realising that his vehicle had developed a flat tyre appellant

disembarked and took to heels with police giving chase. Unfortunately for the appellant, police caught up with him and arrested him, searched and found him in possession of the 143.95 kgs of dagga the subject of the charges against him.

At the hearing of the bail application in the magistrate's court the State called one of the arresting details who testified to how when accused refused to stop police chased him and ended up seeking reinforcements until the applicant got involved in an accident resulting in him disembarking and attempting to flee before they caught and arrested him. It was on the basis of the refusal to stop when waved down by the police resulting in a chase until they caught appellant that the State considered that appellant was a flight risk and opposed bail on that basis. Fortunately for appellant the magistrate was persuaded by accused's contention that he would not stop as he did not realise those in pursuit of him were members of the police as they were not in uniform or driving a vehicle marked as a police vehicle and suspected them to be robbers. Despite dismissing the basis on which State considered appellant to be a flight risk the court still found appellant as a flight risk on the basis that the offence he was facing was very serious and that as a member of the police force if convicted of the offence (as the evidence was overwhelming) he would face a lengthy imprisonment sentence. The court *a quo* went further to find that releasing appellant on bail would result in jeopardising the public confidence in the criminal justice system as provided in s 117(3)(c)(v) of the Criminal Procedure and Evidence Act. It also considered that despite dismissing the ground for opposing applicant's bail application he could still deny bail on some other basis in terms of s 117(5) of the Criminal Procedure and Evidence Act. This was a misdirection as there was no concession to the grant of bail by the State which would have required the court *a quo* to satisfy itself that the concession was proper in the circumstances. For the avoidance of doubt. Section 117(5) reads as follows:

“(5) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interest of the accused against the interests of justice as contemplated in subs 4.” Clearly therefore finding some other basis for denying bail after dismissing the State's ground for opposing bail is tantamount to the court descending into the arena and a misdirection. The onus is always on the State to provide compelling reasons justifying refusal of bail and such onus is not on the court.

In the circumstances the court's denial of appellant's application for bail was on account of a misdirection. In terms of section 121(5) this court having found a misdirection and consequently setting aside the decision of the court *a quo* is at large as to the decision the court *a quo* ought to have arrived at on the facts.

Although the court *a quo* found that appellant was justified in fleeing from the pursuing police believing those pursuing him to be robbers this finding cannot be justified on the evidence presented by the state namely

- (i) The police had been tipped that the vehicle that appellant was driving was carrying large quantities of dagga.
- (ii) Appellant had no reason to escape from those pursuing him if he was not carrying contraband.
- (iii) The coincidence that he was carrying large quantities of dagga and the fact that he did not escape to the police station from the suspected robbers or drive into a service station or crowded place e.g. a busy shopping centre in the CBD betrays a person seeking to escape from an imminent lawful arrest.
- (iv) Besides, when the appellant got involved in a minor accident which resulted in a puncture to his vehicle tyre appellant did not give up on his attempt to escape as he disembarked from the vehicle and took to heels in an effort to make good his escape from police. It must have dawned upon him by then that law enforcement agents were in pursuit of him.

Appellant's persistent effort to escape even after abandoning his vehicle after an accident betrays a guilty conscience. The evidence presented by the State namely recovery of large quantities of dagga and appellant's spirited but abortive attempt to escape from arrest as testified to by the police witness gives rise in light of the seriousness of the offence (i.e. possession of large quantity of dagga) to a conclusion that imprisonment on conviction was meritable and further justifies the inference that appellant is a flight risk and for that reason appellant would not be a proper candidate for bail. Appellant's status as a police detail would not make matters any lighter for him as infact that is an aggravating feature of the offence. The appellant's suggestion that he was not the owner of the dagga which he made on appeal against refusal of bail does not avail appellant much as in the course of the bail application the appellant did not specifically plead that

the dagga did not belong to him, and that it belonged to one or other of the persons he gave a lift to. It is also important to note that police pursuing appellant lost track of the appellant for about 3 minutes. If he had not been owner of the dagga and assuming it belonged to some other persons whom he gave a lift pursuing appellant lost track of the appellant for about 3 minutes. If he had been owner of the dagga and assuming it belonged to some other person whom he gave a left to he would not have allowed the passengers to disembark leaving their goods behind in his possession. In any event this court not being a trial court has no duty to establish the validity of appellant's defence.

In the circumstances the appellant is a flight risk and his application ought to have been dismissed and is hereby dismissed.

*Mazani & Associates*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners