

TENDAYI CHIYANGWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 4 February 2015 and 11 February 2015

Application for bail pending appeal

B Chidenga, for applicant
R Chikosha, for respondent

TAGU J: The applicant was jointly charged with one Onismas Chitemere, a truck driver who was acquitted, on a charge of unlawful dealing in dangerous drugs as defined in s 156 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23.*] The applicant was convicted after a contested trial, and was sentenced to eight years imprisonment of which two years imprisonment were suspended for five years on the usual conditions of good behaviour.

Dissatisfied with the conviction and sentence she noted an appeal to this court under case number HC 656/14. Pending the determination of her appeal, she has approached this court for bail.

The application is opposed by the respondent.

The allegations were that the applicant unlawfully imported, delivered or transported 76.96 kilogrammes of dagga from Mozambique into Zimbabwe through Nyamapanda Boarder Post. The dagga was being ferried in a vehicle, a Load Master horse registration numbers BM08PLGP, and a trailer bearing registration numbers BM03LSGP being driven by Onismas Chitemere.

The undisputed facts were that the applicant boarded the said vehicle in Malawi which was enroute to Durban in the Republic of South Africa. It is not in dispute that the vehicle was occupied by two people only, that is, the applicant and the driver. When the vehicle arrived at

Nyamapanda Boarder Post the driver declared his consignment. The applicant did not declare anything. She proceeded to the Zimbabwean side of the boarder. The dagga was discovered by ZIMRA Officials by use of sniffer dogs when they were searching the said vehicle.

Upon discovery of the dagga, the driver was very cooperative. He immediately told the ZIMRA Officials that the dagga belonged to a passenger he had given a lift, and had crossed the Zimbabwean Boarder Post. He further told the officials that the said passenger was waiting for him. He asked the officials to hide in the vehicle so that he could show them the owner of the dagga. This led to the arrest of the applicant.

The applicant's defence is simply that the dagga did not belong to her. She shifted the possession to the driver of the vehicle. She did not dispute the fact that she was a passenger in the said vehicle. Other than being a passenger she told the court that she was now in love with the said driver who had proposed love to her.

The principles governing applications of this nature were well settled in the cases of *S v Dzawo* (1) 1996 ZLR 536, *S v Musasa* SC 45/ 02 and in *S v Labuschagne* 2003 (3) ZLR 644 (S). The following were held to be the primary considerations:

- i) The prospects of success on appeal
- ii) Likelihood of abscondment
- iii) The rights of an individual to liberty and
- iv) The potential length of delay before the appeal is heard.

I carefully perused the record of proceedings attached to this application. There is nothing untoward on the manner the officials testified. They gave their evidence very well. They even corroborated the driver on the fact that applicant admitted that the dagga was hers. She even asked to be pardoned. When she was arrested she even asked to collect her \$ 100-000 which she had stashed in the dash board of the vehicle. When they arrested her she was the one who was calling the driver to find out where the driver was. This is contrary to her evidence that when she got at the boarder she left the driver so that she proceeded on her own to Harare. The driver was not initially arrested, but was actually a state witness. He was made an accused by the prosecutors after the accused was now denying possession of the dagga. The court therefore, from the evidence on record did not misdirect itself when it acquitted the driver.

The court properly found the driver to be a credible witness though he was an accomplice. While it is trite that the State must prove its case beyond a reasonable doubt, and that an accused has no onus to discharge, the findings of the court on p 219 of the record is

unassailable. The appellant contradicted herself in material respects leaving her defence unreasonable. The court said:-

“ upon arrest accused (1) admitted to the offence. At one point she indicated that she admitted to the offence on the instruction of accused (2) and because she deeply loved him. At another point she admitted fearing assaults which threats she indicated at some point came from accused (2) and later stated that it was from the manner she was arrested. Surprisingly according to her testimony at Zimra yard she tried to dispute or deny the offence but she was threatened with assaults by an unspecified person.....In the foregoing, I found inconsistencies in the evidence of accused (1) which attacks credibility. This against the background of the two state witnesses which accused (1) indicated had no reason whatsoever to lie against her and their evidence was corroborative...Circumstantially, the defence of accused (1) is not only improper but cannot be accepted”.

Having gone through the record of proceedings I share the same views. There are therefore, no prospects of success in this appeal.

Given the fact that applicant was sentenced to an effective sentence of six years, there is a likelihood that she would abscond once released on bail. Further, it must be noted that the applicant has a heavy onus to prove. She is no longer presumed innocent. Her presumption of innocence has fallen away. Hence her rights to liberty are weighed against that of the administration of justice. The amount of dagga she imported into the country is very substantial. A sentence in the region of 10 years imprisonment was called for. She was lucky to get away with an effective sentence of six years imprisonment. This however, is appropriate given that she was a female offender. A different court would not impose anything less than six years imprisonment. The applicant therefore, is not a good candidate for bail at this stage.

Lastly, on the potential length of delay before the appeal is heard, this is no longer a valid ground for admitting a convicted person to bail. Appeals are currently being expeditiously dealt with.

In the result, and for the foregoing, the application for bail pending appeal is dismissed.

Makiya and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners.

