REPORTABLE (107)

CECILIA CHIMHAU
v
THE STATE

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHIWESHE JA & MUSAKWA JA
HARARE: 4 NOVEMBER 2022 & 12 OCTOBER 2023

T.T. G Musarurwa, for the appellant

F. I. Nyahunzvi, for the respondent

MUSAKWA JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) in which it dismissed the appellant's appeal against conviction.

FACTUAL BACKGROUND

The appellant was arraigned before the Magistrates' Court facing 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 Code). It was alleged that the appellant and her husband unlawfully imported a dangerous drug known as 'khat' from Kenya amounting to 18.2 kg. The consignment was addressed to the appellant, labelled as moringa tea. When the appellant's husband went to collect the package on her behalf, he was notified by Zimbabwe Revenue Authority (ZIMRA) officials that the package he sought to collect contained dangerous drugs. The drug was seized by detectives from the Criminal Investigations Department, Drugs and Narcotics Unit of the Zimbabwe Republic Police who had been tipped off. He was then arrested by detectives whom he led to the appellant. The detectives sent a sample of the drugs to the government analyst

for testing who in turn forwarded them to the National Herbarium and Botanic Garden who specialize in plant identification. A botanist identified the drug as *catria edulis* (khat).

The appellant and her husband pleaded not guilty to the charge. The appellant's defence was that the package came from her brother's acquaintance, a Chinese national simply known as Fahamo who was based in Kenya. She claimed to have been requested to export it to Hong Kong on Fahamo's behalf as there were no direct flights between Kenya and Hong Kong. She also claimed that she was not aware that the package contained dangerous drugs as she was under the impression that it contained tea and that she had not been involved in drug dealing at any point in her life. The appellant challenged the method of identification of the drug on the basis that the government analyst did not conduct a chemical test but merely forwarded the sample to a botanist. She contended that the botanist lacked the expertise to undertake a chemical test and that he merely identified the plant as khat, which was inconclusive.

From the communication between the appellant and Fahamo presented as evidence, the trial court found that there was nothing that suggested that the package was for onward transmission to Hong Kong but that it was meant for the appellant. The trial court also found that the appellant had failed to prove that there were no direct flights from Kenya to Hong Kong which warranted the package being sent via Zimbabwe. It found that the credibility of the method of testing employed by the botanist could not be questioned as the appellant's expert witness, a pharmacist, had not discredited the findings.

The appellant's husband's defence was that he was merely sent to collect the package on behalf of the appellant and that he was not aware of the background relating to the package. The trial court found the appellant's husband not guilty and acquitted him on the basis that the evidence adduced by the State merely pointed to him collecting the package whose contents were unknown to him. The appellant was found guilty and was sentenced to an effective 3 years' imprisonment.

PROCEEDINGS *A QUO*

Irked by the decision of the Magistrates' Court, the appellant filed an appeal to the High Court (court *a quo*) against conviction. She contended that the trial court had erred in fact and law in finding her guilty when she was not aware that the package contained drugs. She also contended that the State had failed to prove beyond a reasonable doubt that she had the criminal intention to possess the drugs. It was also contended that the identification of the drug was marred with inconsistencies thus, the findings were not credible. However, the State contended that the appellant had intentionally imported an unlawful drug into the country and that her expert witness had admitted that he could not fault the findings of the botanist on the identification of the drugs as he was a reputable expert.

The court *a quo* dismissed the appeal against conviction. It ruled that the examination of the drug and the oral evidence given by the botanist at the trial was not controverted by the appellant's expert witness. Thus, the finding by the trial court that the test that was conducted was credible could not be faulted. Having referred to the definition of 'import' in terms of s 2 of the Customs and Excise Act [*Chapter 23:02*] and 'deal in' in terms of s 155 of the Code, the court *a quo* held that the appellant caused

the drugs to be sent to her and that her beneficial and keen interest in the product was manifest from the continuous follow-ups she made after the arrival of the drugs. It further held that an inference was properly drawn by the trial court that the label 'moringa tea' on the consignment was a secret code to conceal its identity. Thus, the appellant knowingly and intentionally imported the drugs. Lastly, the court *a quo* held that the appellant was not convicted on the basis of her failure to prove that there were no direct flights between Kenya and Hong Kong notwithstanding the remarks made by the trial court.

Aggrieved by the judgment of the court *a quo*, the appellant noted an appeal to this Court on the following grounds:

GROUNDS OF APPEAL

1. "The court *a quo* erred at law and fact in confirming the findings of the trial court regarding the contents of the parcel when;
    a) The evidence led by the State was totally inadequate to establish whether the package actually contained a drug called 'khat'.
    b) The process of collecting, transmitting and testing the 'drug' was marred with a lot of inconsistencies which raise reasonable doubt on the credibility of the botanist's findings.

2. The court *a quo* erred and misdirected itself in holding that the appellant did not dispute the contents of the parcel yet the evidence on record establishes the contrary. The court *a quo*, as a consequence, erroneously omitted to scrutinise the shortcomings in the process of collecting and testing of the alleged drug.

3. The court *a quo* erred and misdirected itself in confirming the appellant's conviction yet the State failed to satisfy the mental element of the offence as contemplated by law. There was insufficient evidence led during trial to establish that the appellant knowingly and intentionally dealt in an unlawful drug.

4. The court *a quo* erred and misdirected itself by failing to appreciate the following;
   a) That the trial court burdened the appellant with an onus to prove her innocence.
   b) That the remarks made by the trial court in its judgment, on the need for the appellant to have availed proof that there were no direct flights from Kenya to Hong Kong at the material time, were part of the court's reasoning (*ratio decidendi*) in convicting the appellant and not mere remarks made in passing (*obiter dictum*)."

Before this Court, the following submissions were made:

APPELLANT'S SUBMISSIONS

Mr *Musarurwa*, counsel for the appellant, began by conceding that leave to appeal was required in terms of s 44 of the High Court Act [*Chapter 7:06*]. He submitted that in terms of the proviso to s 44 (2) (b) leave may be granted at the hearing of an appeal. Counsel thereafter made an oral application which was not opposed by counsel for the respondent. The court proceeded to grant the leave sought by consent.

In motivating the appeal, Mr *Musarurwa* submitted that the standard of how evidence of narcotics is tested and presented in court was not achieved and that without achieving that standard, one cannot proceed to say that the guilt of the appellant's case was proved beyond reasonable doubt. He further submitted that 18.2 kgs of khat which

was packed in different packets was seized. Thereafter, only a sample from one of the packets was tested. He also submitted that it was not clear how much of the substance was taken as a sample. He argued that samples ought to have been taken from all the packets as each packet could have contained something else and not khat.

Mr *Musarurwa* further submitted that there must have been the requisite intention and that the State should have proved that the appellant knowingly and intentionally dealt in the drug. He also submitted that there ought to have been evidence that proved that the appellant knew that the product in the packets was khat. He thereafter argued that there is no reverse onus and that it remained the duty of the State to prove its case beyond a reasonable doubt.

RESPONDENT'S SUBMISSIONS

Mr *Nyahunzvi*, for the respondent made brief submissions to the effect that there was evidence of a botanist who was experienced in the field who examined and confirmed that the drug was khat. He submitted that there was an unbroken chain of evidence from the collection of the samples from the post office to the government analyst and to the botanist. He submitted that the Act does not require that the chemical compound of the drug be established. He finally submitted that it was simply an offence to be in possession of and to deal in the drug.

ANALYSIS

The appellant contends that the court *a quo* erred in confirming the findings of the trial court that she was guilty of dealing in dangerous drugs as defined by the Code.

The definition of 'deal in' is provided for in s 155 of the Code as follows:

> "deal in", in relation to a dangerous drug, includes to sell or to perform any act, whether as a principal, agent, carrier, messenger or otherwise, in connection with the delivery, collection, importation, exportation, trans-shipment, supply, administration, manufacture, cultivation, procurement or transmission of such drug;"

Section 156 (1) of the Code provides that:

*"*A person who unlawfully—
(a) imports, exports, sells, offers or advertises for sale, distributes, delivers, transports or otherwise deals in a dangerous drug; or
(b) cultivates, produces or manufactures a dangerous drug for the purpose of dealing in it; or
(c) possesses a dangerous drug, or any article or substance used in connection with the production or manufacture of a dangerous drug, for the purpose of dealing in such drug; or
(*d*) incites another person to consume a dangerous drug; or
(*e*) supplies or administers to or procures for any person, or offers to supply or administer to or procure for any person, a dangerous drug;
shall be guilty of unlawful dealing in a dangerous drug and liable—
(i) if the crime was committed in any of the aggravating circumstances described in subsection (2) and there are no special circumstances peculiar to the case as provided in subsection (3), to imprisonment for a period of not less than fifteen years or more than twenty years and a fine not below level fourteen or, in default of payment, imprisonment for an additional period of not less than five years or more than ten years; or
(ii) in any other case, to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding fifteen years or both."

Dangerous drugs mean among other things, scheduled drugs as provided in Part 1 or Part 11 of the Dangerous Drugs Act [*Chapter 15:02*]. Part II of the schedule to the same Act provides for prohibited drugs which among others are "Catha, also known as Abyssinian, African or Arabian Tea, Kat, Kath, Khat, or Miraa;"

Mr Musarurwa sought to raise a new argument on the issue of the packaging and sampling of the khat. This argument was not canvassed in the grounds of appeal. He submitted that the issue of packaging falls within ground 1(a) of the notice of appeal. A reading of ground number 1(a) is to the contrary. The ground challenges the sufficiency of evidence led by the State in relation to the identification of the drug. It will also be noted that in her defence outline, the appellant never made issue of the identification of the drug. The essence of her defence was a denial of dealing in and having knowledge that the consignment contained drugs. Clearly, the argument now advanced by Mr *Musarurwa* has no bearing on ground 1 (a). In any event, had she been so inclined, the appellant could have cured this issue by seeking leave to amend her grounds of appeal.

Counsel for the appellant submitted that there was no adequate evidence on the identification of the drug as there was no chemical analysis. This argument by Mr *Musarurwa* is destroyed by the fact that one of the State's witnesses who happens to be a botanist testified that the drug was khat. In the circumstances there was no need for chemical analysis. The botanist is an expert in the field of studying plants, performing tests and deriving theories. In the case of *Nkosiyabo Ndzombane v The State* SC 77/14, this Court stated the following regarding expert opinion evidence:

> "Expert opinion evidence is admitted to assist the court to reach a just decision by guiding the court and clarifying issues not within the court's general knowledge. In *Mandy v Protea Assurance Co. Ltd* 1976 (1) SA 565 at p. 569 it was stated that it was not the mere opinion of the expert witness which is decisive but his or her ability to satisfy the court that, because of the special skill, training and experience, the reasons for the opinion expressed are acceptable. However, in the final analysis, the court itself must draw its own conclusions from the expert opinion and must not be overawed by the proffered opinion, and simply adopt it without questioning or testing it against known parameters."

The test is whether the trial court received "appreciable help" from the expert witness. In this respect see *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A). In keeping with what was stated in *Nkosiyabo Ndzombane v The State supra*, in the present matter, the trial court was satisfied with the botanist's evidence. Through his expertise, the botanist confirmed and testified that the drug was khat. The appellant's own witness (a pharmacist) even acknowledged the expertise of the botanist.

A combination of the evidence of the botanist and the several follow-ups that were made to the Post Office by the appellant as well as her chats with Fahamo leave no doubt that the parcel was not moringa tea as written on the packaging but drugs. The evidence shows that after Fahamo was introduced to her, the appellant was the first to initiate contact by way of a phone call which was not answered. Thereafter, there were chats via WhatsApp spanning from 7 November 2021 to 14 January 2022. The initial chats between the two went as follows:

"Fahamo: I need to send you morning (sic) or camellia tea.

Appellant: My contact details

Cecilia Chimhau

24 Glencairn Drive

Sunridge

Harare

0773334881."

Despite Mr *Musarurwa*'s contention that the State did not prove the appellant's state of mind, some aspects of the case serve to highlight and buttress the

inference that the appellant had the requisite state of mind to commit the crime. She claimed to have offered to render assistance to Fahamo for free. If she had been doing so for her brother, it might have been understandable. She had never met this Fahamo who was using an American mobile number and had told the appellant that WhatsApp was restricted in China. The appellant's husband was not aware of the arrangement. The appellant admitted that she did not question Fahamo about the existence of direct flights between Kenya and Hong Kong. She stated that she never thought about it but conceded that it was possible that there were such flights. To crown it all, the consignment did not have details about the sender.

The evidence regarding the follow-ups to the Post Office came from the appellant herself. The communication with Fahamo culminated with Fahamo telling the appellant to forget about the issue. The appellant did not question Fahamo why she was now abandoning the transaction. Despite that indication from Fahamo, the appellant proceeded with the enterprise. If Fahamo was no longer interested one wonders what the appellant would have done with the consignment had it not been intercepted. The appellant's persistence with the transaction against the background of her purported altruism further buttresses the inference that she had the requisite intention.

DISPOSITION

We are satisfied that there was adequate evidence that the appellant dealt in drugs, in contravention of the Code. The court *a quo* cannot be faulted for upholding the appellant's conviction. In our view there is no misdirection in the court *a quo's* decision. There is no merit in the appeal.

In the result, it is ordered that the appeal be and is hereby dismissed.

MAVANGIRA JA: I agree

CHIWESHE JA: I agree

Kamusasa & Musendo, appellant's legal practitioners.

National Prosecuting Authority, respondent's legal practitioners.