OLGA CARLOS JOAO BACAR
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND TAGU JJ
HARARE, 8 September 2014

Criminal Appeal

A Rubaya, for the appellant
Mrs *F Kachidza*, for the respondent

TAGU J: The appellant, a 20 year old woman, was convicted after a fully contested trial of contravening section 156 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as read with s 14(a) (i) (a) of the Dangerous Drugs Act [*Chapter 15:02*], that is to say, 'unlawfully dealing in a Dangerous drug.'

The appellant was sentenced to 36 months imprisonment of which 12 months imprisonment were suspended for 5 years on the usual conditions of future good conduct. The cocaine which was subject of the trial was forfeited to the state and the appellant was to be deported back to Mozambique after serving the sentence.

Aggrieved with both conviction and sentence, she noted an appeal to this court.

On the 8th September 2014, after reading documents filed of record and hearing counsels, we gave *ex tempore* reasons and dismissed the appeal. The appellant has requested written reasons for our decision. The following are our reasons.

The facts upon which this matter was based were that on the 23 November 2012 at about 1800 hours detectives from CID Drugs picked information that the appellant was selling cocaine. The appellant was hunted for and was located at Chester Court along Fife Avenue, Harare. She was taken to her house where a thorough search was conducted in her bedroom resulting in the recovery of a creamish substance suspected to be cocaine stashed in her shoes. Upon interviewing the appellant, she indicated that the substance belonged to her

and she used it to lubricate her vagina. Preliminary tests were done in her presence and the substance proved to be cocaine. The substance was later sent to forensic laboratory for analysis. It was confirmed to be cocaine weighing 10 grams with a street value of US$ 800.00.

In her grounds of appeal, the appellant attacked the decision of the trial court on the following basis, which I will paraphrase as follows-

1. That the court *a quo* erred in finding that the appellant was in possession of the alleged drug when she did not have the requisite physical control of the drugs in question.
2. That the court *a quo* erred in convicting the appellant who had her own substance to lubricate her vagina, which surprisingly turned to be cocaine now contained in a different package. It was therefore contented that there was of tampering with evidence.
3. That the court *a quo* erred by ignoring the possibility that the cocaine could have been planted by the appellant's ex-boyfriend one Themba Hlongwane who wanted to fix her.
4. That the court *a quo* erred in finding that the appellant intended to deal in cocaine with one Shaniel. It was contented that there was no evidence linking appellant to Shaniel.
5. That the court *a quo* erred in convicting the appellant of dealing in cocaine when appellant's brother and the ex- boyfriend had access to her room.
6. That the court *a quo* erred by sentencing appellant to a custodial sentence when the penal provision provided for a non – custodial sentence. It was contented that community service was appropriate.
7. That the court *a quo* erred by paying lip service to mitigatory factors.

The respondent opposed the appeal. It was submitted by Mrs *Kachidza* for the respondent that there were no merits in the appeal against both conviction and sentence.

After perusing the record, we were persuaded by the written and oral submissions made by Mrs *Kachidza*. She dealt in detail with each of the grounds of appeal.

In casu, the issues for determination were therefore, in our view, whether or not the appellant possessed the cocaine in question or whether it was planted on her. We were of the view that the reasons advanced by the appellant were not sustainable.

The word "possession" is commonly used to denote physical custody. However, in the context of the criminal law the meaning of the word is rather more complex. When it is in issue, as the case here, the prosecution can only prove, beyond a reasonable doubt, two elements. Firstly, it must prove that the accused had physical custody or control over the thing in question. Secondly, it must prove that the accused was aware of the presence of the thing in his/her possession. This second element, that is, the knowledge of possession is often referred to as the "*animus possidendi*", which means the intention to possess. For the distinction between these two elements see *S* v *Smith* 1965 (4) SA 166 (C) and *S* v *Cleminshaw* 1965 (3) SA 685 (C). The latest case is *AG* v *Mbewe* 2004 (2) ZLR 86 (H) where it was held that-

> "the prosecution had to show only that the respondent had physical detention of the dagga but also that the detention was accompanied by *mens rea*."

It was therefore enough if it was proved that the drugs were found in the appellant's room and in her shoes. Knowledge that she physically detained cocaine was there and thus had *mens rea* hence the cocaine was found in her shoes. The state managed to prove its case beyond a reasonable doubt. The appellant alleged that she only had a substance which is not cocaine for purposes of lubrication which turned out to be cocaine and was now contained in a different package.

The evidence showed that Detectives went to the appellant's place with a search warrant after receiving information that she and her friend Shaniel were dealing in drugs. It was not in dispute that a female police officer Musungwa conducted a search in the appellant's room. Further, it was not in dispute that a substance was recovered by Musungwa from the appellant's shoes. On p 94 of the record of proceedings the appellant was asked:-

> "Q: A substance was recovered by one Musungwa during the search?
> A: Yes
> Q: It was recovered from your shoes?
> A: Yes"

What is in dispute is whether the substance was planted on the appellant or not, and whether that substance was cocaine or a mere substance for lubrication. The record of proceedings clearly discounted that the substance was planted. Secondly, as we will show below, the substance was cocaine.

The appellant's contention was that the substance was either planted by either the police or the ex – boyfriend. The appellant was present when Musungwa was carrying the

search. She claimed that Musungwa planted the substance. On page 95 of the record she was asked:-

" Q: Did you see her (Musungwa) plant the substance?

A: No

Q: You were threatened by Temba your ex- boyfriend?

A: Yes

Q: Therefore you think there was a link between the threat and the search?

A: Yes

Q: Do you know whether any witness had any contact with Temba?

A: No"

There was therefore, no basis for the appellant to suggest that the police planted the drug on her. Mpandawana, a police detail, told the court that it took them close to 30 minutes to search the appellant's room. If the police intended to plant the substance they would not have bothered themselves in spending so much time looking for the cocaine. Furthermore, this witness indicated on p 55 that prior to the search they were not known to the appellant. The appellant was thus blowing hot and cold. When cornered, she changed and alleged that she was talking to Chibage when Musungwa was conducting the search. She was not being truthful. The claim that the cocaine was planted by ex-boyfriend Temba Hlongwane was far-fetched. The appellant intended to blame anyone without any good reason at all.

That the substance found in the appellant's shoes was cocaine was proved immediately after it was recovered in her room. It was not disputed that some preliminary tests were done on the substance. On p 69 of the record Mpandawana was asked-

"What do you mean by physical tests?

A: The test of smelling, testing on the tongue were done

Q: Who did this?

A: I did this whilst we were at Watling Close and at the police station tests were also done."

The above piece of evidence was confirmed by the appellant herself on page 89 when she said- "the police officers indicated that they had recovered cocaine. One of the police officers said he knew what it was and the other one tested it by the tongue". The appellant's brother one Ayamu corroborated the evidence of the police officers when he said at p 108 that-

"When the plastics were opened there was a brownish substance. One of the police officers said he knew what it was and the other one tested it by the tongue"

The trial magistrate, in our view, did not err at all when he made the finding that the appellant's explanation of possessing cocaine was not reasonable. The only reasonable inference that could be drawn as to her possession was therefore that she intended to deal with it together with her friend Shaniel. The appellant led detectives to Shaniel court but they could not locate her. The evidence that appellant led police to Shaniel's house was not challenged.

Section 156 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in which the appellant was charged makes it an offence for a person to possess and or deal in dangerous drugs. Cocaine is a foreign drug that is normally imported. "Deal in" is defined in s 155 of the same Act. In relation to a dangerous drug, dealing in includes to perform any act whether as a principal, agent, carrier messenger, or otherwise, in connection with the procurement of such drug.

What the appellant did in order to be in possession of the drug fits well in the definition above. She told the court that the drug was not cocaine but a substance for lubrication which her mother got from Mozambique. We are therefore, unable to disturb the conviction. The evidence was over whelming against the appellant.

Coming to the issue of sentence, a person who is convicted of contravening s156 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*], shall be liable, if the crime was committed in any of the aggravating circumstances, and there are no special circumstances peculiar to the case to imprisonment for a period of not less than 15 years or more than 20 years and a fine not below level 14, or in default of payment, imprisonment for any additional period of not less than 5 years or more than 10 years.

Section 156 (2) states that the crime of unlawful dealing in dangerous drugs is committed in aggravating circumstances if the dangerous drug in question was a dangerous drug other than any cannabis plant, prepared cannabis or cannabis resin. The appellant was fortunate that no enquiry was done, otherwise this was an offence committed in aggravating circumstances. The court *a quo* erred on the side of lenience. Be that as it may, the trial court was right to observe that this was a serious offence as the drug in question was a mood altering drug which had serious health and social effects on human beings.

In *S* v *Sixpence* HH 77/03 it was stated that-

> " imposing a fine trivialises the offence. It must always be borne in mind that dagga is a mind bending and habit forming drug. The court must be seen to be discouraging the use of the drug with all its dangerous consequences to the youth and the community at large."

In casu, cocaine is even more dangerous than dagga.

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

CHATUKUTA J agrees ……

Mambosasa, appellant's legal practitioners
Prosecutor- General's Office, respondent's legal practitioners