

**IN THE HIGH COURT FOR ZANZIBAR**

INDUSTRIAL DIVISION

HELD AT VUGA

CRIMINAL APPEAL/ APPLICATION NO. 41 OF 2017

FROM CRIMINAL CASE NO. *170* OF *2017*

SULEIMAN KHATIB KHAMIS           ...   ...   ...   **APPLICANT**

***VERSUS***

DIRECTOR OF PUBLIC PROSECUTION ...   ...   ...   **RESPONDENT**

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**RULING.**

**Mwampashi, J.**

This is an application for bail brought by Suleiman Khatib Khamis Under S. 150(4) of the Criminal Procedure Act No. 7 of 2004. The applicant whose case for being found in possession of dangerous drugs c/s 15(1)(a) of the Drugs and Prevention of illicit Traffic Drugs Act No. 9 of 2009 as amended by Act No. 12/2011 is still pending before the Regional Court at Vuga has been denied bail by the trial court because the quantity of the drugs he is accused of being found with is, under the Legal Notice No. 65/2017, big. S. 25(1) of the Drugs and Prevention of illicit Traffic Drugs Act No. 9 of 2009 restricts bail in cases where the quantity of drugs concerned is higher.

The application is supported by an affidavit sworn by Ms. Elizabeth Lazaro Mayala an advocate representing the applicant. It is stated in the affidavit among other things that before being charged, the applicant was granted the police bail and he never jumped the bail or tempered with the police investigations. It is further stated in the affidavit that the applicant has no criminal record, is a person of good character, has permanent residence, has reliable sureties and has dependants and also that when the charge was to be preferred before the court, he was simply summoned or called by the police via phone call.

The respondent DPP has opposed the application by filling a counter affidavit affirmed by Mr. Omar Makungu Omar learned State Attorney. Although most of what has been stated in the supporting affidavit has not been denied, it has been firmly stated in the counter affidavit that the applicant is charged with the offence of being found in possession of dangerous drugs of a higher quantity the offence which is not bailable.

At the hearing of the application the applicant was represented by Ms. Elizabeth Lazaro Mayala learned advocate, while the respondent DPP was represented by Mr. Omar Makungu Omar learned State Attorney assisted by Ms. Zalha Makame learned State Attorney.

In her submission in support of the application it was argued by Ms. Mayala that even though it is said that the quantity of the drug the applicant is accused of being found with is higher and also although under S. 25(1) of Act No. 9 of 2009 the offence is not bailable still this court has power and can order the applicant to be released on bail under S. 150(4) of the Criminal Procedure Act, 2004.

Ms. Mayala further contended that generally two things must be put into consideration when deciding the issue of bail. One is that the accused's liberty should not be curtailed by denying him bail because doing so is denying his constitutional right as guaranteed by S. 14 (1) of the Constitution of Zanzibar of 1984. Further denying the accused bail is infringing the principle of presumption of innocence which is provided under S. 12(6)(b) of the Constitution. Ms. Mayala did also point out that where bail has to be denied it should be proved by the state that if the accused is released on bail he will abscond or interfere with the police investigations.

It was also submitted by Ms. Mayala that since almost everything stated in the supporting affidavit is not denied by the respondent then the application has to be granted. She contended that in principle the application has not been opposed. He insisted that since the investigations of the case are complete and as there is

therefore no likelihood of the applicant interfering with the investigations then the application has to be granted. She lastly referred the court to the Indian case of **Sanjey Chandra v Central Bureau of Investigation**, Criminal Appeal No. 2178/2011 as well as to the Kenyan Case of **R.v Asbel Kiprop Malel**, Criminal Appeal Case No. 54 of 2013.

The application was vehemently opposed by Mr. Makungu the learned State Attorney for the respondent DPP. He firmly argued that there are no good grounds to support the application because the offence the applicant faces is an offence to which bail is restricted under S.25(1) of Act No. 9/2009 read together with Legal Notice No. 65/2017. He further argued that the court can only invoke its discretionary powers under S.150(4) of the Criminal Procedure Act, 2004 and grant bail to the applicant where there are peculiar or special grounds in support of the application. He reminded the court that discretionary power must always be judiciously exercised and on this he cited the case on **DPP v Daudi Pete** [1993] TLR 22.

It was therefore finally prayed by Mr. Makungu that since the applicant faces the offence which is not bailable and as no special or good grounds have been raised to support the application, then the application has to be refused.

In her short submission in rejoinder Ms. Mayala did reiterate her argument that since the supporting affidavit has not been opposed then the grounds listed in the affidavit are enough to support the application. She insisted that the grounds or reasons stated in the supporting affidavit are the main grounds which must be considered in every application for bail. It was therefore prayed by Ms. Mayala that the application has to be granted.

It is not disputed that the quantity of heroin the applicant is accused of being found in possession with in both two counts he faces. i.e. 10.1556 gms 37.36 gms is, in accordance with the Small Quantity of Narcotic Drugs and Psychotropic Substances Regulation of 2017, of higher quantity. According to the Regulations the quantity of heroin specified as small quantity is up to 1 gm. 10.1556 gms and 37.36 gms of heroin is therefore not a small quantity. What is also not in dispute is the fact that under S.25(1) of the Drugs and Prevention of illicit Traffic Drugs Act. No. 9 of 2009 no person shall be admitted to bail if he is accused of being found in possession of heroin which its quantity is specified by the Regulations as higher quantity.

S.25(1) of the Drugs and Prevention of illicit Traffic Drugs Act No. 9 of 2009 provides as follows:-.

***“Notwithstanding anything contained in this section, no person shall be admitted to bail pending trial if he is accused of an offence involving heroin, cocaine, prepared opium, opium poppy, (papaver setigerum/papaver somniferous), poppy straw, coca-plant, coca leaves and imported cannabis or cannabis resin (Indian hemp) or any other psychotropic substances which has higher quantity as specified by Commission in the regulations and published in the Gazette”.***

The offence of being found in possession of illicit drugs which its quantity is not a small quantity as specified by the Small Quantity of Narcotic Drugs and Psychotropic Substances regulations of 2017 is therefore an addition of the offences listed under S. 150(1) of the Criminal Procedure Act No. 7 of 2004 to which bail is generally restricted.

The restriction of bail on offences of being found in possession of illicit drugs which has higher quantity by S. 25(1) of the Drugs and Prevention of illicit Traffic Drugs Act No. 9 of 2009 as it is for offences listed under S. 150(1) of the Criminal Procedure Act, 2004 is however the restriction that binds subordinates courts and not this court. This court has powers and can grant or direct that any person facing any offence be admitted to bail under S.

150(4) of the Criminal Procedure Act, 2004. It is provided under sub-section (4) of Section 150 of the Act that;-

***“Notwithstanding anything contained in subsection (1) the High Court may in any case direct that any person be admitted to bail or that the bail required by a subordinate court or police officer be reduced”.***

Under S. 150(4) of the Criminal Procedure Act, 2004 this court is empowered to admit an accused person to bail even in the so called unbailable offences like murder, drug trafficking or treason. In such cases, however, bail is normally not easily granted as it is for other offences. In cases where bail is generally restricted by the law bail can be granted by this court on exceptional grounds or special circumstances. The reason why bail is not rightly granted on such offences is the fact that the offences to which bail is restricted are more serious attracting stiffer punishments hence so tempting to even courageous accused persons to jump the bail.

Coming to the case at hand it is a considered view of this court that since bail on the offence the applicant faces is restricted by the law then, as rightly argued by Mr. Makungu, this court can only exercise its discretionary powers under S. 150(4) of the Criminal Procedure Act, 2004 and admit the applicant to bail if

there have been raised special grounds in support of the application. It is not enough for the applicant's counsel to argue that the applicant is of good character, has no criminal record, has reliable sureties or that he is not likely to interfere with the police investigations. An applicant facing the offence to which bail is restricted by the law must raise or meet not only those normal conditions or factors that must be met on bailable offences but he must raise additional and peculiar grounds to support his application if the court has to release him on bail.

It should be emphasized that the fact that the applicant is of a good character, honest, submissive, with reliable sureties and family dependent on him or that he has permanent resident in Zanzibar and that he will not interfere with the police investigations or jump bail if admitted to bail as deposed in the supporting affidavit and as argued by the applicant's counsel are facts that are not sufficient for this court to admit the applicant to bail on the offence to which bail is restricted by the law. The applicant ought to have raised or proved that there are other special facts or grounds for this court to exercise its discretionary power under S. 150(4) of the Criminal procedure Act, 2004 and admit him to bail.



It is on the above reasons and observations that this application fails and accordingly refused.

Sgd: Abraham Mwampashi – J

Date: 06/12/2017

Delivered in court this 06<sup>th</sup> day of December, 2017 in the presence of the Applicant with his counsel Ms. Elizabeth Lazaro Mayala. Also present is Mr. Mohamed Saleh (SA) and Ms. Zalha Makame (SA) for the Respondent DPP.

Sgd: Abraham Mwampashi – J

Date: 06/12/2017

***I certify this is a true copy from original.***



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REGISTRAR  
HIGH COURT  
ZANZIBAR