

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM REGISTRY
MISC. ECONOMIC CAUSE NO. 30 OF 2017

*(Originating from the Resident Magistrates' Court of Dar es Salaam
at Kisutu in Economic Crime Case No. 68 of 2017)*

1. ALLY ABDALLAH ALLY
2. JUMA AMOUR JUMA }**APPLICANTS**

VERSUS

THE REPUBLIC RESPONDENT

Date of Last Order: - 03/07/2018

Date of Ruling: - 06/7/2018

R U L I N G

F.N. MATOGOLO, J.

The applicants namely Ally Abdallah Ally and Juma Amour Juma along with other eleven, were charged in the Court of Resident Magistrate of Dar-es-Salaam at Kisutu with three counts for trafficking in narcotic drugs c/s 15(1)(b) of the Drug Control and Enforcement Act, No.5 of 2015 read together with paragraph 23 of the first schedule to the Economic and Organized Crime Control Act [Cap.200 R.E.2002] as amended by the Written Laws (Miscellaneous Amendments) Act, No.3/2016. The applicants through their advocate Mr. Juma Nassoro filed this application for bail.

The application is by chamber summons made under Section27(2) of the Drugs and prevention of illicit Traffic in Drugs Act, Cap.95 R.E.2002, section 29(4)(d) and section 36(1) of the Economic and organized crime

Control Act as amended by Act No.3 of 2016. The same is supported by an affidavit taken by Mr. Juma Nasoro advocate for the applicants.

After been served with the chamber summons and an affidavit, the respondent filed counter-affidavit objecting for the application. At the hearing, Mr. Juma Nasoro learned advocate appeared for the applicants while Mr. Turumanywa Majigo learned State Attorney appeared for the respondent.

It is the submission of Mr. Juma Nassoro that the two applicants along with eleven others are charged with three counts as appear in the copy of charge sheet in the Court of resident Magistrates Court of Dar es Salaam at Kisutu.

That the offences the applicants are charged with are bailable ones and that under Article 13(6)(a) of the constitution of the United Republic of Tanzania, this Court has to treat the applicants as innocent until when they will be proved guilty. The applicants have no previous criminal record, they are good citizens the fact which was not even disputed by the respondent in their counter-affidavit.

He said taking the number of accused persons and the amount of alleged trafficked narcotic drugs, the applicants are entitled to bail.

On his part, Mr. Majigo learned State Attorney submitted that they object for the application on the ground that the charged offences especially counts one and two they are not bailable. Both are in respect of trafficking in narcotic drugs which is heroin weighing 111.02 kgs. In the second count they are charged with trafficking in bhang weighing 235.78 grammes. He said by the nature of the narcotic drugs applicants were

found trafficking and their weight, the applicants are not entitled to bail. He said Section 29 of the Drug Control and Enforcement Act, No.5/2015 as amended by Section 13(i)(ii) of the Drug Control and Enforcement Act, No.15/2017 prescribe the amount of narcotic drug in which the charged person can be granted bail, that is 20 grams and below be it heroin or bhang. He said although there are many accused persons jointly charged, but what is to be looked at is the amount of narcotic drugs mentioned in the charge sheet the same cannot be divided among them to make them less. As to Article 13(6)(b) of the constitution and principle of presumption of innocence, Mr. Majigo said the law denying bail to the accused persons were enacted according to the constitution. He therefore prayed that the applicants should not be released on bail. In rejoinder Mr. Juma Nassoro learned advocate stated that the provision talks of amount of narcotic an accused person is found possessing or trafficking and does not refers to many accused persons, so the amount which is alleged the 13 accused persons were found trafficking has to be divided among them. He stated further that the learned State Attorney has made reference to Act No.15/2017 amending Act No.5/2015 at Section 29 where the amount was reduced from 200 to 20 grams but he quickly said the offence against the applicants is alleged to have been committed on 25/10/2017 before the named amendment Act came into operation, as the same came into force on 1st December, 2017. That law therefore cannot be used retrospectively and there is no provision to that effect.

These are two opposing view by the learned State Attorney and learned counsel for the applicants.

From the above facts and arguments raised there are emerging questions to be determined by this Court

- 1) whether the charged offences are bailable or non bailable
- 2) whether the principle of sharing can be applied in the circumstances where there are many accused persons jointly charged so as each accused can bear his/her share of amount in the alleged trafficked narcotic drug as his/her amount he/she was found trafficking.

The argument by Mr. Turumanywa Majingo learned State Attorney is that though there are many accused persons jointly charged of trafficking in narcotic drugs, the amount of narcotic drugs they were found trafficking is above the amount in which bail is permitted and he cited Section 29(1) of the Drug Control and Enforcement Act, No.5 of 2015.

In that provision, before an amendment made by Section 13 of the Drug Control and Enforcement Act, No.15/2017 an accused who is charged with trafficking, in narcotic drug mentioned in paragraph (a) of section 29(1) of the amount weighing 200 grams or more is not entitled to bail. The learned state Attorney also said by the amendment made in Act No.15 of 2017 that amount was reduced to 20 grams or more.

But on the other hand Mr. Juma Nasoro learned advocate first correctly pointed out that Act No.15/2017 cannot apply in this case as the offence is alleged to have been committed on 25/10/2017 before the Act came into force which was gazetted on 1st December 2017.

It is true as correctly submitted by the learned advocate that Act No.15/2017 cannot apply retrospectively. And there is no any provision for

retrospective application of that law. But the learned advocate main argument is that although the alleged trafficked narcotic drug is said to have weight of 111.02 kgs, but in this case there are 13 accused persons, so if that weight is divided among them then the offences charged become bailable. He argued that the word used is accused person and not accused persons then the alleged trafficked narcotic drugs are to be divided to 13.

Section 29(1) of the Drug Control and Enforcement Act, No.5/2015 (the Act) provides as follows:

"29(1) A police officer incharge of a police station or an officer of the Authority or a Court before which an accused is brought or appear shall not admit the accused person to bail if:-

- (a) that accused person is charged of offence involving trafficking of Amphetamine Type Stimulant (ATS), heroin, cocaine, mandrax, morphine, ecstasy cannabis resin, prepared opium and any other manufactured drug weighing two hundred grams or more, and
- (b) that accused is charged of an offence involving trafficking of cannabis that and any other prohibited plant weighing one hundred kilogram or more..."

According to the charge sheet, as stated above, the accused persons were found trafficking in 111.02 kgs of heroin in the first count and 235.78 grams of cannabis Resin in the second count. That being the position therefore the amount the accused persons were found trafficking is over and above the 200 grams mentioned in the law.

I cannot buy the argument by the learned advocate that the law refers to an accused person and not accused persons, then the amount of narcotic drugs the accused persons were found possessing must be divided among the 13 accused persons. It is unfortunately Mr. Juma Nasoro did

not refer any provision or decided case to back up his argument. But accused person can imply accused persons as well, as words in the singular number include the plural and words in the plural number include the singular as provided under Section 8(e) of the interpretation of Laws Act [Cap.1 RE.2002].

But this issue was properly addressed by the Court of Appeal of Tanzania in its decision in the case of **Silvester Hillu Dawi & Stephen Leons Mwanbene Vs. The Director of Public prosecutions**; criminal Appeal No.250/2006, DSM, which held at page 13 of the typed judgment from first line to 10th line as follows

"It goes without saying, therefore, that the words "any person" or "that person" or "the person" appearing in the sections under scrutiny should be taken also to mean "persons", "these persons" and/or "the persons".

Therefore Section 148(5)(e) of the CPA, shall be accordingly construed to read that a Court shall not admit persons jointly charged to bail if the offence with which those persons are charged involves actual money or property whose value exceeds ten million shillings unless those persons jointly deposit cash or other property equivalent to half the amount or value of the actual money or property involved."

The argument by the learned advocate that as the law in question states in singular, then the amount of narcotic drugs be divided to 13 accused persons as were jointly charged trafficking that amount of narcotic drug. The sharing principle established in **Silvester Hillu Dawi** (supra) does not entail amount of subject matter mentioned in the charge sheet.

But the value of the property involved in the case for those exceeding ten million shillings.

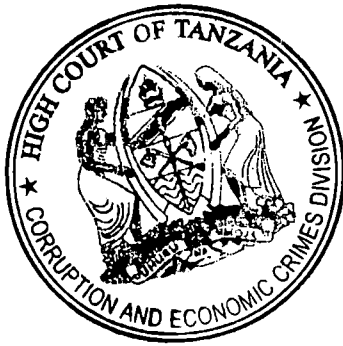
It is obvious therefore that the amount of 111.02 kilograms of Heroin and 235.78 grams of cannabis Resign found being trafficked by the 13 accused persons jointly as alleged in the first and second counts respectively cannot be divided among them. But each of the 13 accused persons the applicants inclusive was found trafficking in that mentioned amount of Heroin and cannabis Resign respectively. As the law under Section 29(1) of the Act, has set the amount of narcotic drug which if the accused is found possessing or trafficking cannot be granted bail, therefore the offences allegedly committed by the applicants, especially first and second counts are not bailable.

This therefore answer the first question to the effect that the charged offences are non bailable offences. As to whether the principle of sharing can be applied in this case where many persons are charged. The answer is in the negative as I have demonstrated here in above.

It follows therefore that given the type and amount of narcotic drugs involved, and the relevant law, the applicants are not entitled to bail because the law prohibits. There is another thing I have observed relating to the competency of the application itself that is worthy to be put to the attention of the learned advocate for the applicants. As pointed out earlier above, the application was made under Section 27(2) of the Act and Section 29(4)(d) of Cap. 200, but Section 27(2) has nothing to do with bail applications, it is on penalty. Apart from Section 29(4)(d) the other applicable provision for bail applications in drug cases is Section 148 of the CPA as clearly provided under Section 29(3) of the Act. I would have

declared the application incompetent before this Court for wrong citation of enabling provision, but provided there is another proper provision cited that is why this Court did not take that course. But for reasons above explained, the application is hereby dismissed.

Dated at Dar-es-Salaam this 6th day of July, 2018.




F.N. MATOGOLO
JUDGE
06/7/2018

Date: 06/07/2018

Coram: Hon. F.N. Matogolo, J.

For Applicant: Absent

1st Applicant: }
2nd Applicant: } Present

Respondent: Mr. Majigo, State Attorney

C/Clerk: Mr. B. Lukindo.


Mr. Majigo – State Attorney

My Lord the case is for ruling today. The applicants are present. But their advocate is not present. We are ready.

COURT

Ruling delivered today this 6th day of July, 2018 in the presence of Mr. Majigo learned State Attorney and in the presence of the applicants but in the absence of their advocate.




F.N. MATOGOLO
JUDGE
06/7/2018