

THE STATE
versus
TENDAI MUYAMBO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 2 February 2015

Criminal Review

TSANGA J: The accused was convicted of unlawful possession of dagga as defined in s157 (1) (a) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]. She was sentenced to 5 years imprisonment. The dagga was forfeited to the state for disposal.

The brief facts were that on 12 October 2014 she had been found by the police acting on a tip off in possession of 7 kilograms of dagga while intending to board a vehicle to Beitbridge. She admitted that she intended to sell the dagga. In mitigation she said she is a widow with six children and had intended to use the money for the traditional ceremony for the commemoration of her late husband.

The conviction is proper. However, the reasons for sentence are no more than a tiresome rehash that invariably stands as an opening paragraph in most magistrate court judgements when it comes to reasons for sentence. Although noting that she was a first offender and had also saved the courts time by pleading guilty, it is not clear from the record how this was taken into account in arriving at the actual sentence imposed. If the magistrate would have imposed a higher sentence but for the mitigatory factors, then it is not immediately clear what that sentence would have been. In aggravation was said to be the fact that the offence is prevalent. The quantity was also taken as an aggravating factor since the dagga was clearly for commercial purposes. The five year sentence imposed had no part of it suspended.

In S v Mahove & Ors HH 83-09 it was re-emphasised by CHITAKUNYE J following a line of cases, that the sentence must be individualised to the particular offender. (See *S v Dube* 1995 (2) ZLR 321; *S v Mayberry* 1985 (1) ZLR 192; *S v Mugwene & Anor* 1991 (2) ZLR 66) As he observed in that case, although it is not a rule that first offenders who are

being imprisoned are entitled to have portion of their sentence suspended , failure to consider or to give reasons for not suspending portions of the sentence on suitable conditions is a misdirection especially where sentences are not long. He also stated that first offender should be accorded a chance at reformation by having a portion of their sentence suspended so that they serve only that which is absolutely necessary.

Granted a prison term in accused's case was inevitable given the large quantity of dagga in her possession. (See *S v Kangande* HH 399-13 which captures a range of cases on possession of dagga). Her personal circumstances were that she is a widow with six children. The record does not show that the magistrate sought any further detail relating to the accused and her children, a necessary process to arrive at a properly individualised sentence. Their ages are not articulated nor are any details provided that show the likely social costs to the children of having their mother, an only parent, sent to jail for five years.

In my view there was a misdirection in not thoroughly engaging her lived reality when it came to mitigation and in not suspending a portion of the sentence.

Accordingly the sentence is altered as follows:

“Five years imprisonment of which 2 years is suspended for five years on condition that the accused does not during that time commit any offence involving possession , smoking, dealing in or cultivation of dagga for which upon conviction she is sentenced to imprisonment without the option of a fine. The dagga is forfeited to the stat for destruction”.

The magistrate should bring the altered sentence to the attention of the relevant authorities.

MWAYERA J agrees: _____