

STATE
versus
FREDRECK NGORIMA

HIGH COURT OF ZIMBABWE
MWAYERA & TSANGA JJ
HARARE, 16 January 2015

Criminal Review

TSANGA J: The accused, a sixty five year old offender was charged and convicted of contravening s 157 (1) (c) of the Criminal Law Codification and Reform Act [*Cap 9:23*] relating to unlawful possession or use of dangerous drugs. Section 157 (1) (c) in particular under which he was convicted, criminalises the cultivation production or manufacturing of dangerous drug for one's own consumption. He was convicted of having planted 135 plants of "dagga" which he said he wanted to smoke.

The relevant section permits a fine up to level 10 (i.e. US\$700.00) or imprisonment not exceeding five years or both. The accused was sentenced to 36 months imprisonment of which 12 months was suspended on the usual conditions. In sentencing him the magistrate alluded to the harmful effects of the drug and the large quantity that he had grown. He was also mindful of the need not to trivialise the offence by granting a fine or community service in lieu of incarceration.

Whilst the conviction is proper the sentence in my view is unduly harsh for reasons hereby elaborated. The criminal justice system as a general principle is non-discriminatory in holding criminal violators to account for their actions regardless of factors such as age, sex, social class or race to mention a few. However, in meting out punishment it is a fact that positive biases often emerge towards certain groups such as the elderly because of their increased physical vulnerability that often comes with age which may make a lengthy prison term unduly harsh in the case of relatively less serious crimes. Another group sometimes treated differently are women offenders given the often less dangerous nature of the criminality or the consequences of their gendered roles as care takers. Yet another group very youthful criminal offenders given their perceived lack of maturity to make proper judgment at the time of commission of offences.

Thus while elderly offenders who commit crimes can expect to be held accountable for their actions and to be punished in accordance with the gravity of their crime, the severity of the sentence especially where incarceration is deemed necessary, should in my view take into account whether such elderly person is being convicted of a violent or non-violent crime. Prison is harsh. It is a known fact that our prisons are overcrowded and that the relevant authorities who run prisons do so on a shoe string budget. Media reports of prisoners going hungry are not unknown. Magistrates should therefore be alive to the real consequences of taking an overly punitive approach that subjects non-violent offenders to lengthy prison terms especially those who are already vulnerable.

This is not to unwittingly foster a soft approach to crime but to encourage the adoption of a critical approach to sentencing that is equally alive to the seriousness of the offence committed as it is to the environmental circumstances leading to the commission of the crime as well as other personal factors that pertain to the accused.

A three year imprisonment term with one year suspended, and even taking into account reduction in sentence that may result from good behaviour, still takes away a considerable portion of his life which he will have to spend in extremely harsh prison conditions for a non-violent crime. An approach to sentencing for such crimes which combines the legal position with lived realities is more likely to result in a balanced sentence than one which seeks to mechanically apply precedence on dagga sentencing in such matters. Happily case law suggests that in such matters involving cultivation of dagga by an elderly offender, age is a factor to be taken into account in meting out an appropriate sentence. For example, in *S v Sithole* HH 436/86, a 63 year old offender was convicted of and sentenced to 2 years. He appealed his sentence. On appeal the sentence was reduced to 1 year effective with the other year suspended for five years on the usual conditions.

In my view a similar sentence in this matter would more than meet the justice of the case. Magistrates should not unwittingly contribute to a human rights catastrophe of overcrowded prisons by granting overly punitive sentences for non-violent crimes. This puts tremendous strain on a system already struggling to cope with meeting basic humane standards for prisoners.

Accordingly the accused's sentence is altered as follows:

“24 months imprisonment of which 12 months is suspended for 5 years on condition accused does not during that period commit any offence involving the unlawful cultivation, possession, sale and supply of dagga and for which

upon conviction he is sentenced to imprisonment without the option of fine.
The dagga in question is hereby forfeited to the State”.

MWAYERA J agrees