STATE
versus
TSITSI MUURA

HIGH COURT OF ZIMBABWE
CHITAPI & MUSHORE JJ
HARARE, 10 March 2017

Criminal Review

CHITAPI J: The accused, a 51 year old female villager of Chikara Village, Chief Nyamukoho, Mudzi was arraigned before the magistrate at Mutoko Court on 17 November, 2015. The accused was charged for contravening s 156 (1) (b) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] which creates the offence of unlawful dealing in dangerous "Drugs". It was alleged against her that she unlawfully cultivated 9 plants of dagga with an average height of 2 metres for the purpose of dealing in the said dagga.

The accused pleaded guilty to the charge. The brief facts of the case were that, police acting on information that the accused cultivated dagga in her garden at her homestead went to the accused's homestead and identified themselves. They interviewed the accused on the unlawful cultivation of dagga in her garden. The accused co-operated and admitted to the transgression. She led the police to her garden where she was growing the 9 plants of dagga. The police recovered the plants which averaged 2 metres high. They arrested the accused.

In court, the accused was asked by the magistrate as to why she cultivated the dagga. In response she said that she wanted to sell the dagga and look after herself. The magistrate properly convicted the accused upon her plea of guilty. I do not have any issues with the conviction which is proper.

The magistrate sentenced the accused to pay a fine of US$150.00 or in default to serve a prison term of 2 months. In addition, the accused was sentenced to a wholly suspended imprisonment term of 3 months suspended for 5 years on condition that the accused did not commit a similar offence including that of possession of dangerous drugs for which upon conviction she is sentenced to imprisonment without the option of a fine. The 9 plants of dagga were forfeited to the State.

The sentence imposed by the magistrate is cause for concern and calls for comment. The sentence imposed by the *court a quo* is in all the circumstances disturbingly inadequate. It has the effect of sending the wrong signal to society that a person can cultivate a dangerous drug on an appreciable scale for purposes of dealing in such drug for sale to members of the public and get away with a fine, let alone a fine which is negligible. If the courts were to adopt this approach, dealing in drugs and paying a fine would be accepted as part of the hazards associated with the practice. The sale or supply of dangerous drugs is prohibited principally because of their harmful effect to the user and therefore to society. A proper sentence in cases of dealing in a substantial quantity of a dangerous drug is one which has a deterrent effect not only on the accused but on the members of society who are like minded.

In the case of *State* v *Paidamoyo Chitaka* HB 37/07, NDOU J refused to certify as being in accordance with real and substantial justice, a sentence of community service imposed upon an accused who was arrested for being in possession of 1.6kg of dagga which he was offering for sale. The dagga was being kept in the accused's bedroom concealed inside a radio box. The learned judge reasoned that the sentence was wholly inadequate. He had this to say which I also adopt herein and endorse-

> "….. The distribution of dangerous drugs to other persons is the more serious manifestation of drug offences. *R* v *Muchingani* 1984 RLR 264 (AD) at 265 C-D. Further in S v Thomson 1983 (1) ZLR 226 (H), Mc NALLY J, (as he then was) said at p 228 B-
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> > 'If an accused person satisfied the court that the dagga he possesses is for personal use he will be punished less severely than if he possess it for the purpose of sale or supply to others'
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> Severe penalties have been imposed for possession of drugs for the purpose of sale or supply. The task of the police to combat evil is a formidable one and the legislature has indicated the seriousness with which it regards the unlawful sale or supply of dagga by the creation of a more serious offence for such conduct in section 156 (1) *supra* which is now a separate and distinct offence from that of possession and cultivation under s 157 (1) *supra* – see also *S* v *Mngandi* 1965 (1) SA 129 (N) at 1300; *S* v *Mhuriro* 1985 (1) ZLR 197 (HC) at 200-201; *S* v *Katadzira* HH 250/82 and *S* v *Sixpence* HH 77/03. In the latter case, HUNGWE J, rightly held that dagga is a mind bending and habit forming drug which the court has to be seen to be discouraging its use with all its dangerous consequences to youth and the community at large. The punishment should not trivialise such as serious criminal."

Although NDOU J was reviewing a case where the accused was in possession of the dagga for sale, the remarks he made apply with equal force in *casu*. A *fortiori*, the accused in this case was actually possessing, under cultivation, 9 x 2 metre plants of dagga for purposes of selling the harvested dagga. The accused by cultivating and nursing the dagga to ripening and then selling it was no different from a manufacturer of the dangerous drug for purposes of sale.

In *casu*, the magistrate should have been guided by the penalty provision applicable to cases of a contravention of s 156 (1) of the Criminal Code where there are no aggravating circumstances meriting the imposition of a mandatory person term. Section 156 (1) (ii) provides for a sentence of "a fine up to or exceeding level 14 or imprisonment for a period not exceeding 15 years or both".

In *casu*, the magistrate in her reasons for sentence stated as follows:

> "Accused intended to sell the dagga. Actually, anything more than five plants attracts a custodial sentence. However this principle is applied depending on the circumstances. A fine in the present case will be proper."

The magistrate then imposed the sentence of a fine. It will be noted that the magistrate did not set out the circumstances which made her depart from her stated principle that cultivation of anything more than five plants should ordinarily be insisted by a prison term. I am not sure though as to the existence of such a principle as a rule of law. I only point out that assuming that the magistrate was correct in his or her understanding and application of the principle, the decision not to apply it should have been informed by factors which should have been set out in the reasons for sentence. It is meaningless for a sentencer to simply state that the application of a principle depends on the circumstances of a case but omit to then set out the circumstances which have justified the deviation from the stated principle. It was misdirection on the part of the court to omit to set out the factors which exercised its mind to exercise a discretion to deviate from the general trend of sentencing for a particular offence.

Sentencing is undoubtedly the prerogative or province of the convicting court. It is that court which acting within the limits of its jurisdiction exercises a discretion on a case by case basis to determine the type and severity of a sentence. It is however accepted that the general guiding principles required of a sentencer to consider are in the main, three in number. They are; the seriousness or gravity of the offence, the circumstances of the convicted person and the interests of society. The three are collectively considered in striking the right balance. With respect to offences which have been codified in the Criminal Law (Codification & Reform) Act and other enactments, the seriousness of the offence will be gauged by the penalty provision. Serious offences are visited by severe penalties in the enactments or provisions of the enactments creating the offences. A court should be guided to give effect to the intentions of the law giver as set out in the enactment concerned.

In this case, for the 9 dagga plants to grow to two metres on average clearly shows that they had been nursed over a long period of time which means that the accused had

resorted to cultivating and selling dagga as a way of life. The magistrate considered that the accused was a female first offender who pleaded guilty and that first offenders should be spared imprisonment whenever possible, especially female offenders. There is nothing wrong with the said principles. They should generally guide the assessment of sentence. However where a serious offence is committed, there is justification to depart from the principle. This was clearly the situation here.

I have already indicated that I am in agreement with the dicta of NDOU J in *S* v *Paida Moyo Chitaka (supra)*. Courts should not be seen to be defeating legislative intents. As a general rule, a person who cultivates dagga for sale is to be looked upon as a dangerous drug farmer. He or she chooses to farm the drug as a cash crop. Such person should be visited with an exemplary sentence especially where the number of plants cultivated is substantial as *in casu*.

In my view, an appropriate sentence should have been that accused be sentenced to imprisonment for between 3 and 4 years with part suspended. In the light of my finding that the sentence imposed in this case was disturbingly inadequate, I withhold my certificate of confirmation of the proceedings as being in accordance with real and substantial justice. In terms of the proviso (ii) to s 29 (2) (b) (ii) of the High Court Act, [*Chapter 7:06*] the proceedings are corrected as indicated herein for the guidance of the court *a quo*.

I have had my sister MUSHORE J consider the magistrates court record and my comments on review and she agrees with me.

MUSHORE J: agrees ……