THE STATE

VERSUS

DARIUS MUNSAKA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 28 JUNE 2012

Criminal Review

MAKONESE J: This matter has been placed before me for review from the Provincial Magistrate, Binga.

The accused person is a male adult aged 56 years old. He was charged with contravening section 156(1)(a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23], that is to say accused unlawfully possessed 6 grammes of dagga. On this count he was sentenced to 3 months imprisonment wholly suspended for 5 years on the usual conditions.

The accused was further charged and convicted on a second count of contravening section 156(1)(b) of the Criminal Law (Codification and Reform) Act, in that he unlawfully cultivated 440 plants of dagga measuring 1.3 metres for which he was sentenced to 24 months imprisonment of which 6 months was suspended for 5 years on condition of good behaviour. The remaining 18 months was suspended on condition he performed 630 hours of community service at a primary school.

On both counts, nothing turns on the conviction. It is the sentence in the second count that is shocking and disturbingly inappropriate.

The facts as contained in the outline of the state case are that on the 20th March 2012, police proceeded to the accused's homestead after getting a tip-off to the effect that accused was selling and cultivating dagga. Upon arrival the police recovered 440 plants of dagga measuring 1.3 metres from accused's field. The plants were ready for harvest. The accused pleaded guilty and was properly convicted.

In his reasons for sentence the learned magistrate reasoned as follows:

"In arriving at an appropriate sentence this court took the following factors into consideration;

Mitigatory
That the accused is a 56 year old male adult. That he is a widower and has (7) seven children three of which are minors. That he pleaded guilty to the offence and was very contrite and that he is a first offender.

Aggravatory
That the offences pleaded to are prevalent and of a serious nature. There is therefore need for deterrent sentences that will deter accused persons and other would be offenders.
After weighing both factors this court is of the opinion that a prison term although called for, would be too harsh a sentence. Accused is a widower and has three children to look after. If sent to prison these minor children will suffer. Again there is a clash between the law and culture. Culture allows them to smoke dagga, but the law prohibits him from doing so. In his eyes dagga is not a dangerous substance and given his age he does not appreciate the seriousness of the offence. Thus to send him to prison is grossly unfair. Community service is just in this case."

It is clear that the learned magistrate did not properly apply his mind with regards to sentence in count 2. He applied some form of twisted logic which led him to the conclusion that there is a "clash" between "culture" and the "law". The magistrate should have been aware of the numerous decisions of this court which have established a clear pattern of sentencing which has called for prison sentences where it is clear that the dagga was for sale and distribution. The magistrate misdirected himself by reasoning that in the eyes of the accused person cultivating dagga and smoking the dagga was not a "serious" offence.

I have also perused the argument advanced by the accused in mitigation and this is the exchange between the court and the accused person;

"Q - why did you cultivate the dagga?
A - I wanted to smoke so as to get energy to till my fields so as to feed my children. I thought the dagga would not germinate in the manner it did as I had just thrown the seeds randomly. I have 6 hectares of land so I need a lot of energy to till that is why I smoke."

It is clear from the accused's explanation for cultivating the dagga that he was lying to the court. The number of plants cultivated could only be for commercial purposes. This explanation was clearly false and should have been rejected by any reasonable person.

Severe penalties have been imposed for possession of dangerous drugs for commercial activities. See the cases of *The State v Paidamoyo Chitaka* HB 37/07, and *The State v Abraham Tshuma* HB 40/10, *The State v Katsidzira* HH250/82 and *The State v Sixpence* HH 77/03.

There can be no doubt that the remarks of the learned magistrate to the effect that the smoking of dagga is accepted by culture can only encourage rather than discourage like-minded persons to commit this offence. The legislature has outlawed the possession and cultivation of dagga in terms of section 156 of the Criminal Law (Codification and Reform) Act. There is no ambiguity in the law. There are several decided cases on the subject. The learned magistrate, in my view, for reasons best known to him chose to turn a blind eye not only to the law but to the decided cases.

The effects of dangerous drugs are well known to all persons and our courts will be failing in their duty to curb the cultivation, possession and distribution of dagga. In this case justice was clearly not done. The accused person was lucky to escape a prison sentence which should have been not less than three (3) years imprisonment without the option of a fine. See the case of *The State vs Oly Sibanda* HB 128/10.

I must emphasize that judicial officers must be seen to dispense justice by imposing appropriate sentences. The public will loose the confidence of the judiciary where ridiculous sentences are imposed for serious cases.

In my view, to impose a non-custodial sentence where 440 plants of dagga which are ready for the supply and distribution to the public is a serious misdirection.

The sentence imposed is disturbingly lenient and I accordingly am not able to certify these proceedings as being in accordance with real and substantial justice. I therefore withhold my certificate.