

TRACY NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE AND TAKUVA JJ

BULAWAYO 31 JANUARY 2022

Criminal Appeal

P. Butshe for the appellant

Ms N. Ngwenya for the respondent

MAKONESE J: The appellant appeared before a Magistrate sitting at Esigodini on the 28th June 2019. She was charged and convicted with the offence of unlawful possession of dangerous drugs as defined in section 157 (1) (a) of the Criminal Law (Codification & Reform) Act (Chapter 9:23). Appellant was sentenced to 36 months imprisonment of which 12 months was suspended on condition of future good conduct.

Factual Background

On the 29th of May 2019 at around 0900 hours three police officers were on patrol at Esigodini business centre. They met two male adults Kilous Mpofo and Mpumelelo Zimba carrying satchels. The officers requested to search them. A search revealed that each of them

possessed twists of dagga. Upon further enquiries and on being quizzed the suspects disclosed that they had bought the dagga from the appellant. The police officers proceeded to appellant's residence. Upon arrival they requested to conduct a search. The officers found nothing inside the house. They searched the yard and found a *tshangani* bag with dagga wrapped in a newspaper. Appellant was arrested but professed ignorance about the dagga. The dagga weighed 4.260 kg. In her defence the appellant did not deny that at some point she sold dagga to the informants but stated that the dagga that was recovered outside her house did not belong to her. She indicated that that since she stayed in a compound, chances were that anyone could have placed the dagga outside her house. She denied possession of the dagga.

Submissions by the appellant

The appellant contends that the court *a quo* erred in convicting the appellant on the basis of circumstantial evidence and that other inferences could be drawn from the circumstances of the matter. Further, and in any event the appellant argued that the court *a quo* erred in failing to appreciate that the appellant never possessed the dagga in question since the dagga was found outside her house in a place where people had access to.

As regards sentence, the appellant submits that the court *a quo* erred in failing to consider community service for a female first offender when the effective sentence fell within the threshold for community service.

Submissions by the respondent

The state contends that the court did not rely on circumstantial evidence in convicting the appellant. The state argues that the court *a quo* relied on direct evidence and that the record shows that appellant sold dagga to Kilius Mpofo and Mpumelelo Zimba. This led to

the police arresting the appellant after a search at her residential premises led to the recovery of 4.260 kg of dagga. The bag containing the dagga was found inside appellant's yard.

As regards sentence the state contends that there was no misdirection on the part of the sentencing court. By her own admission the appellant confirmed that she sold dagga to the informants. The appellant was therefore in the business of selling dagga.

Whether the appellant was correctly convicted and sentenced

A perusal of the record indicates that the dagga was found in appellant's yard. The bag containing the dagga was found next to the wall of her house. The court *a quo* made a specific factual finding that for the appellant to suggest that the bag could have been placed there by someone else in her yard was far-fetched. The area where the bag was found was inside the appellant's yard. This court observes that the quantity of dagga is quite substantial. It could not be mere coincidence that the appellant was selling dagga to the informants and that very same day dagga is recovered from a bag inside her yard. The dagga was wrapped in a newspaper which meant that it was concealed deliberately. It is trite that *mens rea* is an essential ingredient of the offence of unlawful possession of dangerous drugs. The state managed to prove possession in the juridical sense. Possession consists of two essential elements, namely, physical or corporeal element (*corpus* or detention) and the mental element (*animus*- that is the intention of the possessor). See ; *S v Bains* 1961 SA 104 AT 107 and *Attorney General v Mbewe* HB 91/04

In cross examination by the state the appellant responded at page 18 of the record as follows:-

“Q - On the day you were arrested you sold to 2 boys.

A - Yes

Q - A search was conducted and dagga was found in a bag near your house?

A - Yes but it was not mine.

Q - Was it coincidence that you sold dagga to 2 people and dagga was found in a bag next to your house?

A - It was by coincidence

Q - Is the wall part of where you reside?

A - Yes, it is the wall to my house.

Q - So, I put it to you that the dagga is yours?

A- No it is not mine.

Q - I say so because you sold the dagga to the boys?

A - Yes, the one I sold to the boy was left by my friend at my house.

Q - I put it to you that the dagga found is part of the dagga you sold to the boys?

A - No.

The evidence placed before the court *a quo* satisfied the requirement of proof beyond reasonable doubt. The conviction by the learned Magistrate cannot be assailed. The dagga in question was found in appellant's premises. The assertion that someone hid it in appellant cannot be believed and does not accord with common sense. The dagga in question has substantial value and no reasonable person would hide such a consignment in someone else's yard.

In so far as sentence, is concerned, there is a long line of case law that provides a guide on the range of sentences to be imposed where persons are convicted for the possession of dagga. For possessing 4.260 kg of dagga the appellant though a female, first offender aged 42 years and with 7 children was bound to face a custodial sentence. It must be observed that the fact that an effective prison sentence falls within the threshold for consideration of Community Service does not always mean that the imposition of a custodial sentence may not be considered. In serious offences a term of imprisonment is unavoidable. The appellant was in the business of trafficking dagga. Her conduct is viewed in serious light by the courts.

In *S v Sixpence* HH 77-03, it was held that dagga is a mind-bending and habit forming drug which the courts has to be seen to be discouraging its use with all its dangerous consequences to the youth at large. In *S v Paidamoyo Chitaka* HB 37-07 the accused was sentenced to perform community service for being found in possession of 1.6 kg of dagga. On review, this court held that the sentence was disturbingly inappropriate.

In *S v Mashonga* 1998 (2) ZLR 377 (HC) for the possession of 2 kg of dagga by a female first offender a sentence of 24 months with 10 suspended was held to be appropriate.

In *S v Nyambo* 1997 (2) ZLR 333 (H) a 22 year old first offender was sentenced to 7 years imprisonment of which 2 years were suspended for possession of 12.49 kg of dagga.

In view of the foregoing cited cases the sentence imposed by the learned trial magistrate in this matter, taking into account the substantial quantity of dagga involved is appropriate. We find however, that the sentence is harsh and excessive and induces sense of shock. The sentence does not properly take into account all the mitigating circumstances. There is need to interfere with the with the sentence.

In the result and accordingly, it is ordered as follows;

1. The appeal succeeds in part.

2. The sentence of the court *a quo* is set aside and substituted with;

“Accused is sentenced to 24 months imprisonment of which 12 months is suspended for 5 years on condition accused is not within that period convicted of possession of dangerous drugs for which upon conviction she is sentenced to imprisonment without option of a fine.”

TAKUVA J.....agrees

Mathonsi Ncube Law Chambers, appellant’s legal practitioners

National Prosecuting Authority, respondent’s legal practitioners