PATRICIA MUNYENGERI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 3 & 24 August 2022

Criminal Appeal

T S T Dzvetero with L Hlon'o, for the appellant
F Kachidza, for the respondent

CHIKOWERO J:

INTRODUCTION

1. This is an appeal against both conviction and sentence.

THE BACKGROUND

2. The appellant was convicted by the Magistrates Court on a charge of unlawful dealing in dangerous drugs as defined in s 156(1)(c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).
3. She was sentenced to 4 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual conditions of good behaviour.
4. The Court *a quo* found that the appellant, who resided in Msasa Park in Harare, had unlawfully dealt in two hundred and seventy-one kilogrammes of dagga. It accepted the evidence of the state witnesses that the appellant rented a room at 634 Makomo Extension, Epworth in Harare. It accepted too the evidence of those witnesses that when the police searched that room, pursuant to a tip off, the thirteen bags of dagga were recovered therefrom.
5. Since the appellant rented the room in question, the court *a quo* concluded that she was in possession of the dagga. The large quantity of the drugs is what satisfied the learned Magistrate that the appellant was unlawfully dealing in the same. It could not be for personal consumption.
6. Further, the court *a quo* also found that the two police officers were credible witnesses. These testified that they had placed 634 Makomo Extension Epworth under surveillance

on receipt of information that the appellant was dealing in drugs thereat. They had observed the appellant entering and leaving the house.

7. The learned Magistrate was satisfied that the two police officers (who also searched and recovered the dagga) had no reason to lie that they had seen the appellant entering and leaving the house. They also had no reason to inflate the quantity of dagga recovered by bringing in more of that contraband from elsewhere.
8. The appellant's defence that she never rented the room in question was found to be false. So too was her assertion that the landlady had orchestrated the appellant's arrest by planting dagga into the room and then claiming, together with her husband, that the appellant rented that room-all because of an adulterous relationship between the appellant and the landlord. The learned magistrate rejected the appellant's evidence of such an illicit love affair.
9. In fact, the court *a quo* found that there was no connivance between the landlady and her husband (both testified) and the two police officers. It found that the couplet corroborated each other relating to the two broad issues before it, namely, whether the appellant rented the room and if so, whether the dagga was recovered therein.

THE GROUNDS OF APPEAL AGAINST THE CONVICTION

10. Aggrieved by the conviction, the appellant has attacked it on the following bases:

> "1. The Court *a quo* erred and grossly misdirected itself at law and in fact in finding and its failure to give reasons for such finding that the appellant rented a room at Number 634 Makomo Extension, Epworth, Harare and in disbelieving appellant's evidence that she never rented a room at number 634 Makomo Extension, Epworth, Harare, when the state failed to prove beyond reasonable doubt that the appellant was a tenant at the said property.
> 2. A fortiori, the Court *a quo* erred and grossly misdirected itself at law and in fact in convicting the appellant on the mere basis of its finding that the appellant was a tenant at Number 634 Makomo Extension, Epworth, Harare; it erroneously disregarded and failed to give reasons for such disregard of overwhelming evidence to the effect that the substance must have been planted or possessed by someone else as it was recovered in the absence of the appellant, and that there were other people with access to the room which evidence raised a reasonable doubt on who really possessed the substance in question.
> 3. The Court *a quo* erred and grossly misdirected itself at law in convicting the appellant in the absence of forensic investigations to prove that the substance in dispute was indeed dagga.
> 4. The Court *a quo* erred and grossly misdirected itself at law and in fact in imposing a quantity of the substance and in its reliance on the weighing certificate, notwithstanding the substance having been weighed after approximately 20 or more days from the date of her arrest, which raises reasonable doubt as to the quantity of substance recovered at the scene.

5. A fortiori, the Court *a quo* erred and grossly misdirected itself at law and in fact in drawing an inference that due to its substantial quantity, the substance was for sale when no evidence at all was led to that effect and when there were other reasonable inferences that could have been drawn from the circumstances.
6. The Court *a quo* erred and grossly misdirected itself at law and in fact in convicting the appellant of dealing in dangerous drugs without satisfying itself on whether or not the appellant's defence and evidence was false beyond a reasonable doubt in particular when the state failed to prove the requirement that it was the appellant who possessed the substances, for the purposes of dealing in same.
7. The Court *a quo* erred and grossly misdirected itself at law and in fact in its failure to put the test of circumstantial evidence when it convicted the appellant based on circumstantial evidence, in its finding that the accused was in possession of the dagga, without ruling out other reasonable explanations.
8. The Court *a quo* erred and grossly misdirected itself at law and in fact in its failure to treat the evidence of the first and third witnesses as that of accomplices, which evidence was supposed to be treated with caution."

11. As for the appeal against the sentence, the grounds of appeal are:

"1. The Court *a quo* grossly misdirected and erred at law in imposing a sentence of four years imprisonment, without an option of a fine or community service, which sentence was too excessive and imposes a sense of shock. It failed to consider that the appellant was a good candidate for a non-custodial sentence or at very most community service, by its failure to give weights as required to mitigatory factors such as that the appellant's age; that the appellant is a breadwinner, who takes care of four minor children, her mother in law, her sister who suffers from cancer and her own, mother who has high Blood Pressure. It also failed to consider that she owns a cosmetic shop and a mining venture, sending her to prison would result in her losing customers.
2. The Court *a quo* grossly misdirected and erred at law by failing to consider the sentencing principles in our law, particularly, to female first time offenders whose moral blameworthiness was low.
3. The Court *a quo* grossly misdirected and erred at law in overstressing on the effect of drugs to society, seriousness of the offence and the substantial quantity of the substance in issue while overlooking appellant's averments that she was not found selling the substance, and that it was a fineable offence."

12. In praying that the appeal against sentence be upheld, the appellant sought the setting aside of the sentence and substitution thereof with thirty-six months imprisonment of which twelve months is suspended for a period of five years on the usual conditions of good behaviour with the remainder being suspended on condition she pays a fine of ZWL$ 280 000.

THE ISSUES

13. Despite the multiplicity of the grounds of appeal against the conviction the issues requiring determination are narrow. They are whether the magistrates court was correct in finding that:

- the appellant rented the room in which the dagga was recovered

- if so, whether the appellant possessed that dagga
- if so, whether the appellant unlawfully dealt in that dagga

14. In so far as the appeal relates to sentence, the crisp issue is whether the sentence is manifestly harsh and excessive as to induce a sense of shock.

THE APPEAL AGAINST THE CONVICTION

15. The appellant attacks the correctness of the factual finding that the appellant rented the room in which the drugs were recovered.
16. That finding was premised on a conclusion that the four state witnesses were credible.
17. For us to disturb the factual finding, since it is based on credibility, we must be satisfied that the record demonstrates that the finding is clearly wrong. Alternatively, the appellant has to persuade us that the trial court's assessment of the credibility of the witnesses defies reason and common sense. See *State* v *Soko SC* 118/19. *State* v *Mlambo* 1994(2) ZLR 410(S), *State* v *Chingurume* 2014(2) ZLR 260(H).
18. The appellant did not succeed in this regard.
19. We accept that the trial court carefully analysed the evidence and gave sound reasons for finding, as a fact, that the appellant rented the room in which the dagga was recovered. The landlady and her husband corroborated each other. Both testified that the appellant had begun renting the room in question some six months before the dagga was recovered at a rental of US$ 50 per month. The lease agreement was verbal. The learned magistrate, who saw the couple testifying, recorded that they were simple lay persons who stood to benefit nothing from appearing before a criminal court to lie that the appellant was their tenant if in fact she was not.
20. They had no reason to connive with police officers to bring false allegations against the appellant. The two police officers testified, and were believed, that they acted on a tip off which led them to conduct a surveillance of the appellant and the house in Epworth. They observed the appellant getting into and out of the house.
21. They conducted a search when the time was ripe, leading to the recovery of the thirteen bags of dagga. Both the recovery and the surveillance were not by accident. They were pursuant to information received linking not anybody else but the appellant (who otherwise resided in Msasa Park, Harare) with the particular room in Epworth and the activities reflected by the charge.

22. Without placing any onus on the appellant to prove her defence, we are amply satisfied that her assertion that somebody must have planted as many as thirteen bags of dagga in that room with the goal of having her arrested for being in an adulterous relationship with the landlord was correctly rejected. She did not lay the factual basis for that defence. She did not indicate when the illicit love affair commenced, how and by whom it was discovered, if at all. Indeed, she did not go beyond a bare assertion that she, a married person, was in an adulterous relationship with the landlord. The latter disputed the existence of such an affair, and was believed. His wife disputed that she caused the planting of as many as thirteen bags of dagga in the room in question, and was also believed. Sitting as an appellate court, without having experienced the benefit of the atmosphere at the trial, we see no reason to fault the learned magistrate's assessment of the credibility of the four state witnesses and the finding of fact made consequent thereto.
23. Mr Dzvetero referred us to *Mpa* v *The State* HH 469/14 in arguing that it was an error to find that the appellant possessed and hence unlawfully dealt in the dagga.
24. On the facts, *Mpa* v *The State* (*supra*) is distinguishable. The appellant, having been found to have been renting the room where the drugs were recovered, was correctly found to have been in possession of the contraband. She was in control of the room, and its offending contents. Four state witnesses testified to that effect. As already noted, the Court found all of them to be credible witnesses. The appellant's endeavor to distance herself from a finding that she was in possession of the drugs was to deny that she rented the room in question. The learned magistrate found against her. That the appellant was absent when the dagga was recovered and that the landlady also had a key to the room were inconsequential in our view. There is other evidence linking the appellant to that room and hence to the contents thereof.
25. Unlawful dealing in a dangerous drug has a very wide ambit in terms of the Criminal Law Code. Section 155 puts it this way:

> "deal in', in relation to a dangerous drug, includes to sell or to perform any act, whether as a principal, agent, carrier, messenger or otherwise, in connection with the delivery, collection, importation, exportation, trans-shipment, supply, administration, manufacture, cultivation, procurement or transmission of such drug."

26. Considering the huge quantity of the dagga, and that it was packaged, the inference that the appellant was engaged in some commercial activity in relation to the drugs was properly drawn. In short, she was dealing in the dagga.

27. In all the circumstances, there is no merit in the appeal against the conviction.

THE APPEAL AGAINST THE SENTENCE

28. The trial court followed the correct approach in assessing an appropriate sentence.
29. It considered both the mitigating and aggravating factors.
30. It was alive to the legal principles laid down in case law relating to sentencing for drug offences in particular unlawful dealing in dangerous drugs. See *State* v *Sixpence* HH 77/03, *State* v *Sibanda* 2006(2) ZLR 221(H); *State* v *Magobo* HH 105/16.
31. The learned magistrate also noted that the penal provision for unlawful dealing in dangerous drugs was a fine up to level 14 or imprisonment for a period up to 15 years or both.
32. At the end of it all she settled for a sentence of 4 years imprisonment a quarter of which was suspended on the usual conditions of good behaviour.
33. This punishment is not only well below the maximum provided by the lawmaker but is, needless to say, within the range provided by statute.
34. We do not think that the sentence is manifestly harsh and excessive. Certainly, it is not one that induces a sense of shock.

ORDER

35. The appeal be and is dismissed in its entirety.

CHIKOWERO J:……..

KWENDA J: Agrees……..

Antonio and Dzvetero, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners