THE STATE

VERSUS

OLY SIBANDA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 22 OCTOBER 2010 AND 11 NOVEMBER 2010

Review Judgment

CHEDA J: This matter has been forwarded to me for review.

The accused, a man of 37 years of age was charged with contravening section 157 (1) (C) of the Criminal Law Codification and Reform Act [Chapter 9:23]

The brief facts are that the accused a farmer in the Lalapansi area was found with 157 dagga plants measuring between 1.2 and 1.3metres.

He pleaded guilty, was convicted and sentenced as follows:

"24 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition accused does not within that period commit an offence of which Cultivation of dagga is an element and for which upon conviction is sentenced to imprisonment without the option of a fine. A further 18 months imprisonment is suspended on condition accused completes 630 hours of community service at Makute Primary School on the following conditions:

> The community service starts on 3 June 2010 and must be completed within 19 weeks. The community service shall be performed every Monday to Friday which is not a public holiday between 8am to 1pm and 2pm to 4pm, to the satisfaction of the person in charge of the said institution who may for good cause shown grant accused leave to be absent on certain days during certain hours. Such leave of absence shall not count as part of the Community service to be performed. The remaining..... months imprisonment is suspended on

> condition accused pays restitution to the complainant in the sum of $..... through the Clerk of Court, Gweru on or before....."

The sentence is incomplete and this shows the lack of seriousness of the learned trial magistrate. As it is, it is not capable of full compliance by the accused.

This sentence appeared too lenient to me and I solicited the learned trial magistrate's response to which he stated:

> "My reasoning at that time was that Community Service was appropriate and that accused had acted out of ignorance to the fact that such was unlawful.
> However, going through the proceedings I may have been excessively lenient, but my reasoning of Community Service was to do with accused being a breadwinner, the sentence also being effective in rehabilitation for 1st offenders and to correct accused's ignorance.
>
> I stand guided"
> "Signed"

Possession of dagga of this magnitude can only lead to one conclusion and one conclusion alone, that is, the accused intended to sell the dagga. It was therefore, for commercial purposes. In view, of such irresistible conclusion, the court should have viewed the case in the most serious light and therefore treat it as such, see *S v Inken Nyamaha* HB 121/10.

To sentence an accused who was found in possession of such a large quantity of dagga to community service defeats the spirit and purpose of community service. Infact this is a serious and brazen abuse of the court's jurisdiction. I must remark that this is the second case see *S v Inken Nyamaha* HB 121/10 to come before me from the same magistrate, *Mr I. T. Mhlanga* within a week. In that case I questioned the reasons given for an apparently lenient

sentence. I again re-iterate that judicial officers should take their work seriously as failure to do so will shake society's confidence in the judiciary.

There is a plethora of cases that show the court's views on drug related cases. The following are some of them:

(1) *S v Asereta* HH 2/90 where a 50 year old was found in possession of 6 plants of dagga. The trial court, after conviction sentenced him to 6 months imprisonment which was wholly suspended. On review it was held that the appropriate sentence would have been 6 months imprisonment of which 4 months imprisonment was suspended on the usual conditions:

(2) In *S v Kondo* HH 56/91, a 38 year old, first offender was convicted of a drug related offence and was sentenced to pay a fine of $100-00. Again, upon review it was held that the sentence was inadequate. The court went further and remarked that magistrates were lacking in terms of knowledge of the current legal position in sentencing.

There is a need for magistrates to familiarise themselves with precedents. The following cases will be of much help in the circumstances, *S v Sibanda* HH 45/88; *S v Marufu* HH 62/88 and *Attorney General v Sibanda and others* S 94/88.

There has been gross injustice in this matter, particularly if serious consideration is taken of the fact that the court would have either seen the exhibit or at least visualised what 157 plants of dagga look like to assist him, 157 plants is a substantial harvest for any dagga farmer and is indeed pricey. Had he applied his mind to the case before him, he would no doubt have properly considered that cultivation of such quantity of dagga was destined for sale

and nothing else. The appropriate sentence in my view should have been no less than 3 years effective.

In view of such injustice, the following order is made:

(1) my certificate is withheld.

Cheda J.....

Mathonsi J agrees .....