

THE STATE

Versus

JOHANNES TSHUMA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 27 SEPTEMBER 2012

Criminal Review

MAKONESE J: This matter was referred for review from the Provincial Magistrate, Binga. In this matter nothing turns on the conviction but it is the sentence which I find to be manifestly lenient.

The accused was arraigned before the court charged with contravening section 156 of the Criminal Law Codification and Reform Act [Chapter 9:23], in that on the 15th July 2012 at Lusulu, Binga, he was found in possession of 1.2 kilograms of dagga for the purpose of dealing in such dagga. The accused was convicted and sentenced to 24 months imprisonment of which 8 months were suspended for 5 years on the usual conditions. The remainder of 16 months was further suspended on condition he performed community service.

The brief facts of the matter are that the accused, a 41 year old male adult was found in possession of 1.2 kilograms of dagga. Upon his arrest he confessed that he intended to sell the dagga in order to raise school fees for his children. In his mitigation the accused reiterated that his intention was to sell the dagga as he needed money for school fees. The accused is a married man with family responsibilities and pleaded guilty. He is a first offender.

The trial magistrate highlighted the prevalence of the offence and the fact that accused admitted to selling the drug which meant accused was exposing too many other people to the effects of consumption of the dangerous drug. The trial magistrate came to the conclusion that accused deserved a second chance because he was of ill health and looked after the children of his late brother. The magistrate went on to reason that community service was appropriate.

In *S v Chingwena and another* HH 251/89, the appellant a female first offender had been found, with a male accomplice, in possession of 1.275 kilograms of dagga, which she submitted was intended for sale. She had been sentenced to 2 years imprisonment with 9 months suspended on the usual conditions of good behaviour. On appeal it was held that the sentence was not excessive.

In *Clara Maseko v The State* HB 65/08, in considering an application for bail pending appeal in a matter where a 41 year old woman was found in possession of 0.705 kilograms of dagga, the court, in refusing bail pending appeal pointed out that a sentence of 20 months imprisonment was appropriate.

In *State v Paidamoyo* HB 37/07, the accused was convicted for possession of 1.6 kilograms of dagga. He was sentenced to a wholly suspended sentence of 15 months (i.e. 3 months on condition the accused performs 420 hours of community service). The court held, in a review judgment that the distribution of dangerous drugs is the more serious manifestation of drug offences. The learned Judge held that a sentence in the region of three to four years with part suspended was called for. He refused to certify the proceedings as being in accordance with true and substantial justice.

It is now an established principle that the sale of dangerous drugs attracts more severe penalties, than mere possession. The reason is simply that an individual who sells dangerous drugs causes long term and sometimes permanent damage to the consumer. The quantity of dagga involved in this case is substantial. The learned magistrate should have acquainted himself with the case law and he would have noted that a non-custodial sentence was inappropriate. The learned magistrate's sentence trivialises the offence and to some degree encourages like-minded persons to continue the supply and distribution of dagga in the knowledge that they can escape without prison sentences.

In *casu*, the accused himself admitted to selling the dagga. He was making a profit from the proceeds of the sale of the dagga. The offence is prevalent. In my view a sentence in the region of 3 years with a portion suspended would have met the justice of the case.

Accordingly, I am unable to certify the proceedings as being in accordance with real and substantial justice and I therefore withhold my certificate.

Makonese J.....