

THE STATE
vs
SIZALA NYAMOWA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 10 March 2004

Criminal Review

UCHENA J: The accused person was convicted on a charge of contravening section 3(1) as read with section 3(b) of the Harmful Liquids Act [*Chapter 9:10*]. She unlawfully manufactured and supplied 200 litres of *sikokiana*. She pleaded guilty to the charge. She was sentenced to 12 months imprisonment with 9 months suspended for 5 years on conditions of good behaviour.

The Regional Magistrate to whom the record of proceedings was forwarded for scrutiny is of the view that the sentence imposed is unduly harsh. He pointed out that other sentencing options should have been considered.

I agree with the Regional Magistrate.

The convicted person is a fairly old woman. She pleaded guilty to the offence.

The sentence imposed by the magistrate is not supported by section 3(6) of the Harmful Liquids Act.

Section 3(6) as amended by section 4 of the Criminal Penalties Amendment Act No. 27 of 2001 provides as follows:

“3(6) Any person who contravenes any provision of this section shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”

The magistrate's first mistake was to sentence the convicted person to imprisonment when the statute provides for a fine.

In the case of *William Rutsvara v State* SC 2/90 McNALLY JA said:

“It is trite that where the statute lays down a monetary penalty as well as a period of imprisonment the court must give consideration first to the imposition of a fine, it will normally reserve imprisonment for bad cases.”

The question to be considered is whether this case is so bad as to warrant imprisonment in spite of the statute providing for a fine.

I agree with the Regional Magistrate that the sentence imposed on the convicted person a first offender, a widow with 6 children who is a fairly old woman is not appropriate. I also agree with the Regional Magistrate that other options should have been considered.

The level of fine stipulated by statute is level 7. Statutory Instrument 192 of 2003 pegs the fine under level 7 at \$400 000-00.

Section 3(6) states that the fine to be imposed shall not exceed level 7. That means \$400 000-00 is the maximum fine that can be imposed. Level 6 sets the fine at \$200 000-00. This means the range of fines for contravening section 3 of the Harmful Liquids Act is \$200 000-00 to \$400 000-00.

In his reasons for sentence the magistrate pointed out that the convicted person had 200 litres of *sikokiana* after she had sold some. The fine to be imposed should be such as can deter the convicted person.

I am aware that the convicted person was sentenced on the 21 December 2003. She has obviously completed serving the effective sentence of 3 months. As I have already indicated the sentence imposed is too severe and has to be set aside.

The sentence imposed by the magistrate is therefore set aside and is substituted by the following:

“\$300 000-00 in default of payment 3 months imprisonment. In addition 3 months imprisonment wholly suspended for 5 years on condition the convicted person does not within that period commit any offence involving the manufacturing, storage and or supply of harmful liquids as defined in the Harmful Liquids Act [*Chapter 9:10*] for which she will be sentenced to imprisonment without the option of a fine.

The 200 litres of *sikokiana* and the three blue containers are forfeited to the State.”

In view of the fact that the convicted person has already served three months imprisonment she should not be required to pay the fine of \$300 000.

Bhunu J, I agrees.