THE STATE
versus
BONIFACE MLAMBO MUGOBO

HIGH COURT OF ZIMBABWE
TAGU & CHAREWA JJ
HARARE, 3 February 2016

Criminal Review

CHAREWA J: The accused was properly charged and convicted of unlawful possession of dangerous drugs in contravention of s 157 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], in that he was found in possession of 300 grammes of dagga.

The accused is 18 years old, a first offender who pleaded guilty and did not benefit from his crime.

He was sentenced to 30 months' imprisonment of which 6 months were suspended for 5 years on condition that he, in that period, did not commit any offence involving contravention of s 157(1) of [*Chapter 9:23*] or involving possession, consumption, dealing and or supply of a dangerous drug for which he would be sentenced to imprisonment without the option of a fine.

The prosecution, relying on its outline which stated that the police had been tipped off that accused was selling dagga, had preferred a charge of contravening s 156 (1). However, the magistrate amended the charge to a contravention of s 157(1).

This is an important point to note as the sentencing regime under the two sections is significantly different. Under s 156, the maximum sentence is a level 14 fine and or imprisonment up to 15 years. Conversely, under s 157, the maximum sentence is a level 10 fine and or up to 10 years imprisonment.

It seems to me that the magistrate seriously misdirected himself on account of failing to note the difference in tenor of the two sections as he stated thus in his reasons for sentence:

> "The accused person had 300 grammes of dagga in his possession. The inference to be drawn from the sheer volume of the drug is that it was for purposes of sale. Any person who procures a dangerous drug for purposes of sale and distribution tends to promote the abuse and perpetuate the vice. This puts his moral blameworthiness on a high level and the court should be seen to have adequately punished the conduct."

The magistrate seemed to have forgotten that he tried the accused for possession rather than dealing with drugs. Perhaps this reason alone would not have been sufficient to warrant an interference with the sentence.

However, the magistrate went on to further misdirect himself as to the "sheer volume" of dagga involved, which really is not so sheer, being just 300 grammes. This amount of dagga which accused had in his possession did not to warrant such a heavy punishment which does induce a sense of shock. A comparative analysis with other decided cases certainly imputes that the sentence meted was unduly severe.

In *S* v *Washington Magama* HH 311-15, where a 29 year old man found in possession of 40 grammes of dagga a sentence of 24 months imprisonment with 6 suspended was held to be manifestly excessive. 12 months with 6 suspended for possession of 1.2 kilogrammes of dagga was held to be appropriate in *S* v *Mugugu* HH 386-13, while in *S* v *Mhuriro* 1985 (1) ZLR 197 (HC), it was held that 14 months imprisonment with 9 suspended would have been appropriate for a charge under s 156 for dealing in 501 grammes of dagga. 14 months imprisonment with half suspended was considered appropriate for possession of 592 grammes of dagga in *S* v *Gwenzi* HH 194-88, while in *S* v *Chingwaru* HB 106-93, 24 months' imprisonment with six suspended for possession of 1.4 kilogrammes was confirmed.

Certainly, 300 grammes of dagga cannot, by any stretch of the imagination be viewed as such a "sheer volume" as to warrant 30 months imprisonment , when a proper balance is made between the offence, social and public interest and the accused's personal circumstances.

Further, the magistrate in my view gave inadequate weight to the fact that the accused was an 18 year old first offender who pleaded guilty. The priority in such cases ought to be to keep him out of jail and try and guide him away from further criminal conduct, rather than incarcerate him with hardened criminals who may serve to cement his criminal tendencies. In view of the fact that in all the cases cited above, the accused persons were very mature adults, *in casu*, the sentence passed on the accused, who is barely beyond juvenile age is manifestly excessive in comparison.

Finally, the magistrate appears to have been unduly concerned with the prevalence of the offence in the area, overlooking the fact that while relevant, prevalence of an offence is not an overriding factor in sentencing. See *S* v *Sibanda* 2006(2) ZLR 221 (H).

For the above reasons, I would substitute the sentence as follows:

"12 months imprisonment of which 8 months are suspended for 5 years on condition the accused does not within that period commit any offence involving a contravention of s 157(1) of the Criminal Law (Codification and Reforms) Act, [*Chapter 9:23*] or involving possession, consumption, dealing or supply of a dangerous drug and for which on conviction accused is sentenced to imprisonment without the option of a fine. In addition the dagga is forfeited to the State."

TAGU J agrees…….