

THE STATE
versus
NANCY MADZIKANGAVA

HIGH COURT OF ZIMBABWE
MANGOTA & MUSHORE JJ
HARARE, 3 January 2018

Review Judgment

MUSHORE J: The accused was convicted on her own plea of guilty of having contravened s of 157 (1) (b) Criminal (Codification and Reform Act) Act [*Chapter 9:23*]. The accused, a female aged 40 years who resides in Mount Darwin, was found in possession of 1885grams of loose cannabis. From the facts the State established that on the 7th May 2017 a certain Constable Goko reacted upon certain information he had received which led to the arrest of the accused on the 8th of May 2017. When she was searched, she was found to be in possession of 4 separate plastic bags which contained the cannabis. The 4 plastic bags were concealed in a pink carry bag which she had wrapped in a navy blue track suit. She was immediately arrested and the cannabis was seized.

When she was asked to plead, she pleaded guilty and waived the right to be legally represented. The essential elements were put to her and a plea of guilty entered. In mitigation before sentence she informed the court that she was a single mother of two children, and that she looks after her mother and her sister's children. She said she relied upon income from piece jobs for her and her dependent's subsistence earning US\$5-00 a week. She said she had US\$2-00 with her and no assets of value. She admitted that she intended to sell the dagga and make an income from its distribution.

The court sentenced her to 4 years imprisonment and ordered that the dagga be forfeited to the State, after noting in mitigation that that the accused is a first offender with family responsibilities and that she had not wasted the court's time by having pleaded guilty. In aggravation he found that the sentence should not trivialise the offence and that it was the duty of the courts to discourage the distribution and sale of mind bending drugs. He cited *S v Sixpence* HH 77/03 as the guiding authority for his determination of sentence.

In my considered view, the sentence imposed is unduly harsh. Whilst I accept that a custodial sentence is an appropriate penalty, the duration of the sentence imposed is severe even against the backdrop of similar cases particularly when account to is had to the accused's guilty plea and is a single mother without a spouse or a support system in place to cater for the needs of all her dependents. The fact that she alluded to the fact that she was intent on distributing the dagga to other purposes, should have been an indicator to the court *a quo* ought to suspend a portion of the sentence, to discourage her from further offending in this manner, in the light of her paltry income from piece jobs. The magistrate fell into error in imposing such a harsh sentence when seen in the light of one of the cases he cited in his reasons for sentence; that being *State v Paidamoyo Chitaka* HB 37/07 wherein the accused in that case was found with 1,6kg of loose cannabis concealed in a radio and sentenced to 15 months imprisonment, 3 months of which were suspended on future good conduct for five years and the remaining portion being suspended on condition that the accused performed community sentence. On appeal in that case, the appeal court recommended that 3 to 4 years would be appropriate "*albeit with a portion suspended*"

For a bread winner such as the accused, it is my view that the term of imprisonment should fall in line with other cases which call for a less harsh term of imprisonment as follows.

S v Chingwaru, HB 106/93 the accused was found in possession of 1,4kg of dagga and the appeal court confirmed a sentence of 24 months imprisonment with 6 months suspended for 5 years for future better conduct.

S v Chizairira HB 2/87, the accused was found to be in possession of 1,7kg of dagga and the appeal court confirmed a sentence of 2 years imprisonment with 6 months suspended.

In *S v Sharawakanda*, where accused was convicted of having been found in possession of 1,3kg of :prepared dagga" for his own use, the appeal court reduced a sentence of 18 months imprisonment with 9 months imprisonment to a sentence of 8 months imprisonment with 6 months suspended on good behaviour terms.

My sentiment with respect to the case in hand is that the court *a quo* did not adequately acquit himself in his approach to applying the mitigation proffered by the accused. The reasons and sentence were hurried. It appears to me that the Magistrate's focus was more on the quantity of the drug, as opposed to the remorse shown by the accused. See *S v Nompumelo Mpofo* HB 21/11.

In the circumstances I order as follows:

1. The conviction of the accused be and is hereby is confirmed.

2. The sentence of 4 years imprisonment is set aside and in its place is substituted with a sentence of 12 months imprisonment of which 6 months is suspended for 5 years on condition that the accused does not in that period commit an offence involving the possession, smoking, distribution for sale and cultivation of dagga for which upon conviction she is sentenced without the option of a fine. The dagga is forfeited to the State for destruction.
3. Any prison time served is to be commuted to the sentence.

MANGOTA J agrees