

THE STATE
versus
VESCA MACHEKE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE: 24 July 2024

Criminal Review Judgement

MUREMBA J: The accused was charged with and convicted of unlawful possession of 700g of dagga as defined in s 157 (1) of the Criminal Law Code. She pleaded guilty to the charge and was duly convicted. I hereby confirm the conviction.

The accused was sentenced to 24 months' imprisonment of which 6 months' imprisonment was suspended for 5 years on condition she does not within that period commit an offence involving unlawful possession of dangerous drugs for which upon conviction she is sentenced to imprisonment without the option of a fine. The remaining 18 months' imprisonment was suspended on condition of performance of 630 hours of community service.

I have reservations about this sentence because, in sentencing the accused, the learned magistrate did not properly follow the sentencing guidelines. The facts of the case are that detectives from CID Drugs and Narcotics went to the accused's house after receiving a tip-off that the accused was in possession of dangerous drugs. A search was conducted, and a satchel containing loose dagga was found. The dagga was weighed and it amounted to 700g.

It is common knowledge that 700g of dagga is a substantial quantity. The statutory penalty for this offence is a level 10 fine/5 years' imprisonment. According to the sentencing guidelines - S.I. 146 of 2023, the presumptive penalty for possessing large quantities of dangerous drugs is 3 years' imprisonment. The learned magistrate misdirected herself when she stated in her sentencing judgment that the presumptive penalty is a level 5 fine or 3 years' imprisonment. This is not what the sentencing guidelines stipulate. A level 5 fine is for possession of a small quantity of drugs and for drugs intended for medicinal use.

In arriving at the sentence, she imposed, the learned magistrate considered that the accused is a 26-year-old female first offender who possessed the drug in a private place and that the drug was for "rituals for healing purposes." In aggravation, she took into account that

the quantity of the dagga was substantial and that the offence was serious. The learned magistrate then stated that due to these factors, a custodial sentence would be too harsh for a female first offender. She opined that community service would serve as a deterrent.

Clearly, aside from merely stating the statutory penalty and incorrectly stating the presumptive penalty, the learned magistrate failed to follow the sentencing guidelines entirely when sentencing the accused. She simply followed the old sentencing approach before the sentencing guidelines came into force. She started with a sentence of two years' imprisonment without explaining the rationale in her sentencing judgment. Her starting point should have been the presumptive penalty of 3 years' imprisonment. Section 5(2) of the Sentencing Guidelines provides that: -

“Where these guidelines have provided for a presumptive penalty, the guidelines shall apply to the exclusion of any other law in terms of which the sentencing of offenders may be prescribed”

This provision means that when the guidelines specify a presumptive penalty for an offence, these guidelines take precedence over any other laws that might prescribe different sentencing rules for that offence. In other words, the guidelines become the primary source for determining the sentence, and other laws that might suggest different penalties are not considered. The critical question is how do courts apply these guidelines in practice? Courts apply sentencing guidelines in practice by following a structured process to ensure consistency and fairness in sentencing. The court first identifies the specific offence committed by the accused. The court then consults the relevant sentencing guidelines, which provide a range of presumptive penalties based on the severity of the offence and other factors. The court considers any aggravating factors (which might increase the severity of the sentence) and mitigating factors (which might reduce the severity of the sentence). These factors can include the accused's criminal history, the circumstances of the offence, and the impact on the victims. Based on the guidelines and the specific circumstances of the case, the court determines the appropriate sentence. If the guidelines provide a presumptive penalty, this will generally be followed unless there are compelling reasons to deviate. Section 5 (1) provides that,

“Where a sentencing court departs from a prescribed presumptive penalty as provided for in these guidelines, it shall give reasons for that departure.”

The provision means that if the court decides to deviate from the presumptive penalty, it must provide a clear and justified reason for doing so. This ensures transparency and

accountability in the sentencing process, allowing for a clear understanding of why a different penalty was chosen. This process helps ensure that similar offences receive similar penalties, promoting fairness and consistency in the judicial system. In *casu* the learned magistrate must therefore have explained in her sentencing judgment why she was deviating from the presumptive penalty of 3 years' imprisonment.

I asked the learned magistrate to explain the ritual for which the dagga was intended. This issue is of interest due to the large quantity involved. I wondered what kind of ritual would require such a substantial amount of dagga. I also queried with the learned magistrate if the accused was not selling the dagga, considering its substantial quantity and the fact that the police had arrested her based on a tip-off that she was in possession of dagga at her residence. In response, the magistrate stated that the accused claimed the dagga was for her initiation ceremony to become a sangoma. However, this is not clearly reflected in the record of proceedings, which reads:

“Q What was the dagga for?

A. It was for rituals. I was told to bring the dagga to a sangoma. So, when I approached the person who sells the dagga, she gave me a small plastic with dagga saying he (sic) was going to give me the quantity I wanted when his back (sic). He left me with the bag and told me to lock it in a bag at my house. At 6 pm CID officers came, carried out a search and found the dagga. I was only going to get a handful of the dagga from the quantity that the police recovered.”

From the accused's answer, it is not indicated that she was going to be initiated to become a sangoma as the learned magistrate explained in her response to my query. The explanation is confusing because, elsewhere in the sentencing judgment, the magistrate wrote that the dagga was for “rituals, for healing purposes.” When I raised the query, I had thought that the magistrate would explain the type of sickness the dagga was meant to heal. Rituals for being initiated as a sangoma cannot be the same as rituals for healing. It is crucial for judicial officers to accurately capture what accused persons say to ensure readers understand the proceedings. However, regardless of the ritual's purpose, the question remains: what kind of ritual would require 700 grams of dagga? The substantial quantity raises the suspicion that the accused might have been dealing in dagga.

In response to my question about whether the accused was selling the dagga, given the quantity involved, the magistrate stated that the State had not rebutted the accused's explanation in mitigation. The magistrate said that the accused claimed that the plastic bag of dagga was brought by someone who was to sell her a handful needed for rituals. The magistrate

said she then assumed that the accused could possibly have been trapped. The problem I have with the magistrate's explanation is that it is not consistent with the accused's explanation as recorded in the proceedings. In the record, the accused did not say that the plastic bag of dagga was brought to her by the person selling it. Instead, the accused stated that she approached the seller, who then gave her the plastic bag of dagga. I do not understand why the magistrate's explanations are not consistent with the record. I also have issues with the magistrate's assumption that the accused could have been trapped, as she did not specify who might have trapped the accused and their reason for doing so.

In my considered view, the learned magistrate accepted the accused's explanation for possession of dagga without question, despite the explanation being unsatisfactory in the face of the substantial quantity involved. When an accused provides an unsatisfactory explanation in mitigation, the court should not merely record it without further probing or seeking clarification. The court must not accept explanations blindly. In this case, the explanation given by the accused that she approached the seller of drugs, who then gave her a whole plastic bag of dagga when she only needed a handful does not make any sense. Why would the accused accept the entire bag instead of just taking the handful she needed? Why would she even take the plastic bag of dagga to her house? The accused did not even explain where this transaction took place or what the ritual was about. Many questions remained unanswered, yet the learned magistrate believed the accused's explanation without question. The magistrate did not even consider what the prosecutor said, which was valid and pertinent in the circumstances of the case. The prosecutor stated, "*May the court take into account that this is a serious offence and people are abusing the drug. The quantity is substantial, which suggests that it was for dealing.*" The prosecutor clearly suggested that the large quantity of dagga implied the accused was likely involved in distributing or selling the drug, rather than just using it personally. The fact that the police received a tip-off about the accused possessing dagga at her residence further strengthens this suspicion. If the accused was not dealing in drugs, how did other people know she had dagga at her place of residence? This is the sort of question that should have exercised the learned magistrate's mind.

In *S v Dube Sixpence* HH 77 - 03 HUNGWE J said,

"I would add that what further justifies a custodial sentence in possession where there is no evidence that it was intended for supply to other persons is the quantity possessed. The larger the quantity the easier the inference that it was intended for supply, but since the accused is being charged for possession or has been convicted for possession it

follows that the courts recognise the temptation to supply as being inherent where dagga is possessed in large quantities.”

HUNGWE J was explaining why an accused might receive a custodial sentence for possessing a large quantity of dagga, even if there is no direct evidence that they intended to supply it to others. The larger the amount of dagga, the more likely it is that the court will assume the person intended to sell it, even if there is no direct evidence of this. He said that the court recognizes that having a large quantity of dagga might tempt someone to sell it, which justifies a harsher punishment. In essence, he was saying that possessing a large amount of dagga can lead to a prison sentence because it suggests the person might be tempted to supply it to others, even if they have not been caught doing so. I am in accord with HUNGWE J. In the absence of a good and clear explanation by the accused for their possession of a large quantity of dangerous drugs, that can only be the logical conclusion. The present case is one such instance. The accused offered no reasonable explanation for possessing a large quantity of dagga. Why would someone selling dagga ask her to keep it for them? And why would she agree to keep it? She was not even able to specify the ritual she claimed to need the dagga for. The only logical conclusion is that she possessed it with the intent to deal. It is no wonder the police were tipped off that she had dagga at her residence. The learned magistrate should have paid attention to all these issues during the hearing and clearly articulated them in her sentencing judgment. After addressing these issues, she should have then discussed whether there was a need to depart from the presumptive penalty of three years' imprisonment.

I note that in responding to my query, the magistrate mentioned that she took guidance from a Mutare High Court review case where an accused was fined for possession of 1,000 plants of dagga. The learned magistrate's manner of citing cases leaves much to be desired. I am at a loss to understand what exactly she expected me to do with this referenced case. She did not provide a proper citation of the case. A proper citation of a case means stating the names of the parties and the case number. I do not know if the learned magistrate expected me to phone the Mutare High Court to inquire about the case. To make matters worse, this is not a case she referenced in her sentencing judgment or anywhere in the record of proceedings. So, how did she take guidance from it without referring to it in her sentencing judgment? She did not explain the relevance of the case to the present case. It is not even known if that case was decided before or after the promulgation of the sentencing guidelines in August 2023. In *S v Wallace Kufandada & Anor* HH 233/24, it was held that cases decided before the sentencing

guidelines were promulgated should only be used if they are consistent with the sentencing guidelines. Sentencing guidelines were put in place to promote consistency and remove unwarranted disparities in the punishment of offenders. This means that judicial officers should only use past cases that are consistent with these guidelines.

Before concluding this judgment, I would like to address one additional issue. In suspending a portion of the accused's sentence on the condition of future good behaviour, the learned magistrate should have imposed a broader condition of suspension that bars the accused from possessing, cultivating, and dealing in drugs. A condition of suspension that only prohibits the accused from possessing dangerous drugs in the future is too restrictive and does not serve the interests of justice. If the accused is convicted of cultivating dagga, the suspended sentence will not be enforced. There is need for a broader condition of suspension to cover all aspects of drug-related offences. A broader condition of suspension is necessary to cover all aspects of drug-related offenses for several reasons: By including possession, cultivation, and dealing in drugs, the condition serves as a stronger deterrent against any form of drug-related activity. This helps prevent the accused from engaging in other drug offences that are not explicitly prohibited by a narrower condition. A broader condition ensures that the accused cannot exploit any loopholes. If only possession is prohibited, the accused might still engage in cultivation or dealing, which would not trigger the suspended sentence. Broader conditions help protect public safety by reducing the likelihood of the accused engaging in any drug-related activities. This contributes to a safer community by addressing all potential drug-related behaviours. A broader condition supports the rehabilitation of the accused by setting clear and comprehensive boundaries. This can help the accused understand the full scope of unacceptable behaviour and encourage her to avoid all forms of drug-related activities. Overall, a broader condition of suspension ensures a more effective and just approach to preventing drug-related offences and promoting public safety.

In conclusion, the trial magistrate having failed to properly follow the sentencing guidelines and explain her departure from the presumptive penalty of 3 years' imprisonment, I am unable to certify the sentence imposed as being in accordance with real and substantial justice. I thus withhold my certificate.

MUREMBA J :.....