HB 09/19
HCA 51/17

MILTON CHIGIYA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 21 & 31 JANUARY 2019

Criminal Appeal

K. Ngwenya for the appellant
Ms N. Ngwenya for the respondent

MAKONESE J: The appellant appeared before a magistrate sitting at Kwekwe facing one count of contravening section 15 (1) (c) of the Criminal Law (Codification and Reform) Act (Chapter 9:23), cultivating dagga. He was arrested for cultivating 10 plants of dagga which were 30 cm long. Appellant was convicted on his own plea of guilty and sentenced to 12 months imprisonment of which 6 months were suspended for 5 years on the usual conditions of future good conduct. The appellant had an effective term of 6 months imprisonment.

The appellant noted an appeal against sentence and in his grounds of appeal raised the following issues:

(a) the sentence imposed by the court *a quo* is manifestly excessive so as to induce a sense of shock.
(b) the appellant submitted in mitigation that the dagga was cultivated for medicinal purposes for his child who suffered from asthma.
(c) the appellant is a 44 year old first offender who pleaded guilty.
(d) the offence was not committed in aggravating circumstances and as such the sentencing provision provides for the option of a fine.
(e) the court imposed a sentence which is disproportionate to the offence committed.

(f) the learned magistrate misdirected himself by imposing a sentence of 6 months imprisonment notwithstanding the fact that the sentence fell within the grid of community service sentence.

It is a well settled position of our law that issues of sentence are the domain of the trial court, the court having a discretion in assessing an appropriate sentence in each case before it. It is because of that sentencing discretion that an appeal court will not readily interfere with the sentence imposed by the lower court unless the sentence is manifestly excessive as to induce a sense of shock or is otherwise vitiated by irregularity or misdirection. See *S* v *Ramushu* SC-25-93 and *S* v *Nhuwa* SC-40-88.

The appeal court will not interfere with the discretion of the sentencing court merely because it might have passed a sentence somewhat different from that imposed by the court *a quo.* If the sentence complies with the relevant principles, even if it is less severe than the one which the appeal court would have imposed, sitting as a court of first instance, the appeal court will not interfere with the sentencing discretion of the trial court. Offences involving the cultivation, possession and unlawful dealing in dagga are generally viewed as serious by the courts in this jurisdiction. Under section 156 of the Criminal Code the legislature criminalises the unlawful dealing in drugs and section 157 deals with the unlawful possession of the drugs. In this matter applicant was charged with contravention of section 157(1) (c) of the Code for cultivation of 10 plants of dagga. The plants were 30 cm long and appellant argued that there were not ready for harvesting and they had not reached maturity stage. In mitigation the appellant mentioned that he had cultivated the plants for medicinal purposes and specifically to treat his child who suffered from asthma. I must mention that there was no evidence rebutting the appellant's assertions that he had no intention to cultivate the dagga for resale or distribution for commercial benefit.

In *S* v *Thomsen* 1983 (1) ZLR 226 where an accused had been convicted of cultivating 36 plants of dagga it was held that an accused who manages to satisfy the court that the dagga he possesses is for personal use will be punished less severely than one who possesses the dagga for

sale to others. The court indicated that the most convincing evidence in determining an accused's mind is the quantitity of dagga involved. In this matter, the cultivation of 10 plants would have to be viewed in the light of the veracity of the explanation given by the appellant. In the absence of any controverting evidence, this court is left with no option but to believe the appellant's explanation. Contrary to the learned magistrate's assertion, the appellant never alleged that the dagga was for his own consumption. Instead the appellant mentioned that he intended to use the dagga for the treatment of his child's asthma. Although the court *a quo* in its reasons for sentence, remarked that there was no evidence that the dagga was intended for supply to many others, it however, appears to have been swayed into imposing a custodial sentence on the strength of that unproved fact. That in our view, was a misdirection. Where the court relies on the existence of unproved fact, it falls into error, and misdirects its self.

For these reasons, we are satisfied that the appellant's appeal against sentence does have merit. This court is at large and is entitled to exercise its discretion and imposed an appropriate sentence.

Accordingly and in the result, the court makes the following order:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following:

> "The accused is sentenced to 12 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving the cultivation or possession of dangerous drugs for which he is sentenced to a term of imprisonment without the option of a fine. The remaining 6 months is suspended on condition accused performs 210 hours community service on conditions to be determined by the probation officer".

Moyo J agrees ……..

Magodora & Partners, c/o T. J. Mabhikwa & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners