Judgment No. 37/07
Case No. HC 327/07
CRB 5416/06

THE STATE

Versus

PAIDAMOYO CHITAKA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 29 MARCH 2007

Criminal Review

NDOU J: The accused was convicted by a Bulawayo Magistrate of having in possession 1,6kilogrammes of dagga without the requisite permit or licence in contraventions of section 157(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The brief facts are that three policemen attached to Crime Prevention Unit (West) received a report to the effect that the accused was in the business of selling dagga. Acting on this report they carried out a search at the accused's place of abode and found 1,6 kilogrammes of loose dagga concealed inside a radio box in the accused's bedroom.

First, as the accused was actually selling the dagga, the correct charge should have been framed under section 156(1)(a) of Criminal Law (Codification and Reform) Act, *supra* i.e. unlawful dealing in dangerous drugs. The legislature, in its wisdom, has created different penalty regimes for possession and dealing in dangerous drugs. What is evident is that for the dealing, the penalties are materially harsher than possession. More importantly, for dealing "in any of aggravating circumstances" there is a mandatory sentence of imprisonment of between 15 and 20 years in the absence of special circumstances being found by the trial court. Looking at the facts of this case, there are no such aggravating circumstances as defined in section 156(2) *supra*. It is important that magistrates and public prosecutors appreciate this

fundamental distinction in the offences of possession of dangerous drugs or of dealing is in dangerous drugs. From the facts admitted the accused, *in casu*, was selling dagga, he should have been charged under section 156(1) and not 157(1) of the Act.

Second, the sentence imposed here is disturbingly inappropriate. The accused was sentenced to a wholly suspended sentence of 15 months (i.e. 3 months on conditions of future good behaviour and 12 months on condition the accused performs 420 hours of community service). The distribution of dangerous drugs to other persons is the more serious manifestations of drug offences – *R* v *Muchingani* 1964 RLR 264 (AD) at 265C-D. Further, in *S* v *Thomsen* 1983(1) ZLR 226 (H), MCNALLY J, (as he then was) said at p228B-

"If an accused person satisfied the court that the dagga he possesses is for personal use he will be punished less severely than if he possesses it for the purpose of sale or supply to others."

Severe penalties have been imposed for possession of dangerous drugs for the purpose of sale or supply. The task of the police to combat the evil is a formidable one and the legislature has indicated the seriousness with which it regards the unlawful sale or supply of dagga by the creation of a more serious offence for such conduct in section 156(1) *supra* which is now a separate and distinct offence from one of possession or cultivation under section 157(1) *supra* – see also *S* v *Mngandi* 1965(1) SA 129(N) at 130D; *S* v *Mhuriro* 1985(1) ZLR 197(HC) at 200-1; *S* v *Katsidzira* HH-250-82 and *S* v *Sixpence* HH-77-03. In the latter case, HUNGWE J rightly held that dagga is a mind-bending and habit forming drug which the court has to be seen to be discouraging its use with all its dangerous consequences to youth and community at large. The punishment should not trivialise such a serious criminal

conduct. *In casu*, the accused was selling the dagga in the high density suburb of Mzilikazi, Bulawayo. Drug related offences are prevalent. In my view, a sentence in the region of three to four years with part suspended was called for.

Accordingly, I am unable to certify these proceedings as being in accordance with true and substantial justice and I therefore withhold my certificate.