

THE STATE

VERSUS

ANTONY NCUBE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 22 JULY 2010

Criminal Review

CHEDA J: This is a review judgment.

The accused was charged with illegal possession of dagga. He was arrested at his homestead in the Mayobodo area in Plumtree on the 4th August 2008. Police received information about his possession of the illicit drug and this led to his arrest.

Unfortunately, the quantity was not recorded by the police which resulted in the record proceedings also lacking that information. He admitted the charge and was sentenced to 9 months imprisonment which was wholly suspended for 5 years on condition that he performs 315 hours of community service.

Upon scrutiny the learned Regional Magistrate noticed that the quantity of the dagga was not stated. He raised this issue with the trial magistrate who responded that he had noticed that the quantity was not stated in the state outline although the prosecutor had advised him that there were 2 twists. It was on that basis that he imposed the sentence referred to above.

Two problems arise in this matter. Firstly, it is improper for the trial court to send an incomplete record either for scrutiny or review for there will be no basis for the said Regional Magistrate or Judge to scrutinise or review it, as they will be saddled with an incomplete record. An incomplete record does not help in the furtherance of the attainment of justice.

The second problem relates to the quantity of dagga. The chances are that the learned trial Magistrate noticed the absence of the quantity of dagga after sentencing the accused. He then thought of the quantity afterwards. My conclusion is based on the disparity of the sentence passed in light of the quantity of the dagga. Possession of two twists of dagga can not attract a sentence of 9 months imprisonment, even if it is wholly suspended. Two twists of dagga are so small that if anything a fine would have met the justice of this case.

This type of offence would have attracted a fine of between \$10-\$20 with an alternative of 2 months imprisonment. These proceedings are not in accordance with real and substantial justice.

The possibility is that the trial court did not either see the dagga or did not properly apply its mind to the case, hence his inability to assess what 2 twists look like.

What the trial magistrate did is certainly improper and cries out for the learned magistrate's diligent attention when trying cases in future. What is more disturbing is the pretence of having forgotten to insert the quantity of dagga. This type of conduct on the part of the court is improper and unacceptable in the justice delivery system.

Judicial officers are advised to constantly refer to their oath of office which has fairness as one of its ingredients.

In my mind there has been a misdirection by the court *a quo*. These proceedings are so out of step with the normal procedure and decided cases to an extent that I can not confirm then.

The following order is made:-

- (1) These proceedings be and are hereby set aside and substituted with a fine of \$20 or 2 months imprisonment. Since accused has already served he should be released with immediate effect.

Cheda J.....

Mathonsi J agrees.....