

IN THE SUBORDINATE COURT OF THE FIRST
CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

SSPB/057/2017

THE PEOPLE
V.
TRYRONE NKHOMA

Before Mrs Mwaaka Chigali Mikalile –PRM

For the People: Mrs S. Mwamba Besa _National prosecution Authority

For the Juvenile offender : Mr G. Phiri and Ms N. Chilufya – Messrs PNP Advocates

JUDGMENT

The juvenile offender was initially jointly charged with two others with one count of Trafficking in Psychotropic substances contrary to section 6 of the Narcotic Drugs and Psychotropic Substances Act CAP 96 of the Laws of Zambia. Particulars of offence alleged that on 18th July, 2017, the Juveniles at Lusaka in the Lusaka District did traffic in psychotropic substances namely 1.9 grams of marijuana, a herbal product of cannabis sativa without lawful authority.

All three juveniles pleaded not guilty. The other two however were acquitted at no case to answer stage.

I warn myself at the outset that the onus is upon the prosecution to prove its case beyond all reasonable doubt and there is no onus on the J.O to prove his innocence. If, after considering all of the evidence in this case there is any doubt in my mind as to the guilt of the Juvenile offender, then that doubt must be resolved in his favour.

Section 6 of CAP 96 states as follows:

Any person who traffics in a narcotic drug or psychotropic substance shall be guilty of an offence and shall be liable upon conviction to imprisonment for a term not exceeding 25 years.

Section 2 of the Act defines trafficking as:

- (a) being involved directly or indirectly in the unlawful buying or selling of narcotic drugs...
- (b) being found in possession of narcotic drugs or psychotropic substances in such amounts or quantities as the president may by statutory instrument declare to be trafficking...

Therefore, to succeed on this charge, the prosecution ought to show beyond reasonable doubt the following elements:

1. That the Juvenile was either buying/selling drugs or was in possession of the drugs
2. That he had no authority to be in possession of the said drugs.

The prosecution called two witnesses and the Juvenile elected to give evidence on oath and called four other witnesses.

PW1 was Daniel Mumba , an Assistant Investigations officer of the DEC. It was his evidence that on 18th July, 2017, information was received pertaining to three male person believed to be dealing in cannabis. A team of officers was formed including PW1 led by Jones Siasamba. A cover agent directed them to the place where the suspects were said to be. They had moved from Chilenje and were advancing towards the ring road and the team was able to detect the three male persons, one of whom was carrying a bag. The three were approached and Mr Siansamba introduced the team. The three were contained and body searches were conducted. On the now juvenile offender was found a white paper in which was concealed cannabis. The same was identified in court and marked ID1. According to PW1, the team leader asked he juvenile offender about ID1 but he denied possession. He said it was not his. The team leader then showed the other two but they also denied ownership. He then made up his mind to apprehend all three persons.

When cross examined, PW1 stated that the team confronted the suspects around 18h00. He said it was not dark. PW1 also stated that their agent saw the juveniles buying drugs within Chilenje from an unknown person. He however does not know who amongst the three did the purchasing. He further stated that all three were taken to Maxwell Sibongo Police Post. Still under cross examination, PW1 stated that he had no photographic evidence that the three boys were found with drugs and neither did he had finger print evidence. He denied the assertion that only one was detained and the other two were released. He however said he did not go to police post with the suspects. He also stated that ID1 was found in the trousers pocket but he could not state

which one. He further stated that he had not been to any of the boy's houses to search for drugs.

PW2 was Nelson Phiri, also an investigations officer of the DEC. His testimony was similar to that of PW1. He added that the first two suspects he searched had nothing on them but the last, the now juvenile offender had a folded white paper in his pocket. PW2 unwrapped it and found loose vegetable matter suspected to be cannabis. It was shown to the juvenile offender but he denied ownership. He was picked and detained at Maxwell Sibongo Police Post. He recorded a warn and caution statement the following day but he denied ownership and mentioned his two colleagues. He then arrested the three persons as they did not give him satisfactory responses pertaining to ownership of the cannabis. The suspected cannabis was sent to UTH Food and Drug Control Laboratory where the Public Analyst confirmed them to be marijuana with a total weight of 1.9 grams. As custodian of the cannabis (ID1), the affidavit of the Analyst (ID2) and seizure notice (ID3), PW2 tendered them in evidence and they were admitted marked P1, P2 and P3 respectively.

When cross examined, PW2 stated that information regarding the trafficking reached their office around 14h00. He said the boys were not described to him but denied the assertion that it could have been any other boys. He also denied the assertion that the boys were 4. He insisted they were 3. He further denied the assertion that he told the parents to one of the boys to admit the charge. PW2 stated that only the juvenile was picked up and the other two boys were told to go home

because they had nothing on their bodies. He also stated that the drugs were found in the front pocket and not the back pocket. When shown the Jeans short that the juvenile wore on the material day, PW2 stated that the back pockets are ripped and he insisted that the cannabis was in the front pocket together with the phone. He further stated that the juvenile admitted ownership of the cannabis at the scene and his colleagues were there. He brought in the other two suspects because the now juvenile later denied ownership and implicated them.

In his defence, the juvenile offender (DW1) testified that on 18th July, 2017, his cousin Erick from Mazabuka, that he had been expecting arrived at his grandmother's place in Kabwata around 16h00. He said his mother had sent him to deliver a copy of an NRC to the juvenile offender's mother in Chilenje. According to the juvenile offender, he called his brother Terrence and asked him to meet them at Katungu but he could not as he was babysitting. The juvenile offender and Erick the proceeded to Chilenje and found Terrence home. They gave him the NRC. Terrence later escorted them and along the way, the juvenile decided to wash his feet which had become dirty due to the fact that he had on slippers. They went to his friend's house where he washed his feet and a few minutes after leaving that house, people they came to know as DEC officers surrounded them and took Terrence and Erick to the ground. The juvenile said he and his friend Twazwane were searched and were told to sit down. The officers then explained that they had been following them since 14h00 but they told them it was impossible as that it is the time Erick left Mazabuka. They were then told to stand and they were searched for the second time. Erick's bag

was searched and nothing was found. One of the officers got hold of him again, touched his back pocket and told fellow officers that he had found drugs in the juvenile's back pocket. The juvenile offender tendered in evidence the Jeans short with ripped back pockets that he was wearing on the material day and it was admitted in evidence marked D1. He said he told the officer that his pocket could not have contained the drugs as it was ripped. His brother Terrence then called their mother to inform her about the apprehension but the officer grabbed the phone from him and cut the call. The juvenile was then taken to Maxwell Sibongo police post while his brother, cousin and friend were left by the roadside. In his statement the following day, he explained to the officer that Erick came to his place and they proceeded to Chilenje where Terrence was. It was at that point that the officer called Erick and Terrence and asked them if they were admitting the charge. They all denied and the officer locked all of them up amidst protests from his mother. It was the juvenile's evidence that at no point did he admit to having drugs on him.

When cross examined, the juvenile offender stated that he did not know where the drugs came from. He said they were not his.

DW2 was Terrence Nkhoma, the brother to the juvenile offender and DW3 was Erick Mwape. The two were the co-offenders acquitted at no case to answer. Their evidence in the main was similar to that of DW1 and will not be repeated. DW2 however added that the three of them were initially searched and nothing was found after which they were moved to another point where they were made to sit and were searched

one by one. He was searched first and nothing was found. They moved to Erick and then to Twazwane and nothing was found on them. The now juvenile was searched and the arresting officer, PW2 touched his back pocket and held out something in his hand. He then asked what that was but the juvenile said he did not know. The juvenile was picked up and they were told to go.

When cross examined, DW2 stated that they were moved two metres away from initial search point. He also stated that after their apprehension, all he saw was a brown paper in PW2's hands. He said he does not know where the drugs came from.

DW3 in his testimony added that whilst they were at the police station visiting the juvenile offender, they were called by the officer to give their statements and the officer said they were lying hence locking them up.

Under cross examination, DW3 stated that PW2 did advise them to admit the charge. He also stated that while PW2 told court that the drugs were in the front pocket, he (DW3) saw him tap the back pocket at the scene which pocket was ripped.

DW4 was Lisa Kamau, the juvenile's mother. She confirmed having received the phone call informing her of the apprehension and she also confirmed attending the recording of the juvenile's warn and caution statement. She said the juvenile denied ownership of the cannabis and the officer not being satisfied called in Terrence and Erick. The two gave exact statements but the officers were still not satisfied and decided to

arrest them as well. The officers said they were being arrested because they were witnesses. Later, PW2 advised her to tell the boys to admit the charge but she refused because she did not believe they were guilty.

DW5 was Christine Mhango, Erick Mwape's mother whose evidence basically was that she travelled from Mazabuka as soon as she heard of her son's incarceration.

This is all the evidence. The undisputed facts are that the juvenile offender was in the company of his former co-offenders when he was apprehended. All three were rounded up and searched and the juvenile was said to have been found with cannabis in his pocket hence was picked up. The others were let go.

The evidence of the prosecution witnesses and particularly PW2 is that the juvenile was found with cannabis in the front pocket of the short he had on, D1. The juvenile and the former suspects on the other hand told court that the officer touched the back pocket and said he found P1 there.

I have carefully examined the evidence in its entirety to determine its veracity. I must point out that the evidence of the two witnesses was contradictory on important aspects. Firstly, PW1 made it clear that the second search is what revealed the cannabis in the juvenile's pocket. This is in tandem with what the juvenile offender and his co-offenders said. This is not what PW2 said however. His evidence is to the effect that the initial search is what revealed the cannabis. Secondly, PW1 told

court that the juveniles were earlier seen purchasing the cannabis but PW2 had no knowledge of that purchase. Thirdly, PW1 said all three suspects were picked while PW2 said only the juvenile offender was picked. Fourthly, PW1 said the juvenile denied ownership when asked by the team leader while PW2 said he admitted at the scene.

Clearly, this discredits the evidence of the prosecution. In the case of **Dickson Sembauke Changwe and another v. The People**(1998) ZR144, the Supreme Court stated that *"for discrepancies and inconsistencies to reduce or obliterate the weight to be attached to the evidence of a witness, they must be such as to lead the court to entertain doubts on his reliability or veracity either generally or on particular points."*

In my considered view, these are disparities on important aspects that cannot be ignored as they cast doubt on the reliability of the two witnesses' evidence.

From the evidence of PW1 and the defence witnesses that the second search is what revealed the drugs, I was left wondering what happened the first time around. Pockets are obvious places to search for drugs and I wonder how PW2 missed the drugs in the initial search.

This has raised doubts in my mind as to whether truly the juvenile did have the cannabis in his pocket. This is exacerbated by the evidence from the defence suggesting that the officer allegedly found the cannabis in the back pocket which pocket was ripped. I have not dismissed this evidence because PW2's verbal representation that the

cannabis was in the front pocket was not in any way substantiated by any evidence. Not even fellow officer, PW1, could tell court which pocket the cannabis was found.

Furthermore, the evidence of the prosecution is that the information regarding the people that were trafficking in drugs reached DEC at 14h00. But defence evidence has revealed the juvenile and the others only met much later and this evidence has not been challenged in any way. Thus the possibility that the juvenile and his colleagues were not the targeted group cannot be ruled out.

I am satisfied that juvenile offender denied ownership of the drugs contrary to what PW2 told court. There was need for independent evidence to connect the juvenile to the cannabis such as evidence that the juvenile does use marijuana. As was revealed by cross examination, no search was conducted of the juvenile's residence. Clearly, there was need for the state to call a witness to testify on the purchasing of the drugs by the juvenile as alleged.

The evidence is visibly not satisfactory as it does not meet the burden of proof placed on the state.

In the case of **Shawaza Fawaz and Prosper Chelelwa v. The People** (1995) Z.R the Supreme Court quashed the convictions of the appellants despite acknowledging that a great deal of suspicion attached to the appellants. The appellants received this favour because there was a doubt arising from the evidence.

Similarly in this case, because of the doubt that has been cast by the evidence on record, I enter a finding of NOT GUILTY against the juvenile offender.

DATED THE 8TH DAY OF AUGUST, 2017.



PRINCIPAL RESIDENT MAGISTRATE