IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NUMBER 81 OF 2007

FAROOK PATEL …….APPELLANT

-vs-

THE STATE …….. RESPONDENT

CORAM : SINGINI, J.

: Mr. Kambawuwa, Senior Legal Aid Advocate, of counsel for the Appellant

: Mr. Chimkango, Senior State advocate, of counsel for the Respondent

: Mr. Kaferaanthu, Court Interpreter

: Mrs Namagonya, Court Reporter

JUDGMENT

The appellant was convicted on his own plea of guilty on a charge of being found in possession of Indian hemp contrary to regulation 4(a) of the Dangerous Drugs Regulations as read with section 19(1) of the Dangerous Drugs Act (Cap. 35:02). He was found with the substance on 22nd, May, 2007, at Liwaladzi Trading Centre in Nkhotakota District. A sample of the substance was chemically analysed, and confirmed as Indian hemp *(Cannabis sativa)*, at the Government Agricultural Research Station at Chitedze. The quantity he was found with was 29 kilograms.

Briefly, the facts were that the police at Nkhunga Police Station in Nkhotakota District received information by a phone call at around 4:00 am from an unknown person that the appellant was travelling on a bus belonging to Likonde Bus Company which was south-bound and that he had with him on the bus some bags of Indian hemp. The police rushed to follow the bus. They stopped the bus at Liwaladzi Trading Centre. They searched the bus and found baggage of two bags packed with Indian hemp. The appellant revealed himself as the owner of the two bags, and he was arrested for the offence of being found in possession of Indian hemp.

The appellant, as accused, was brought for trial before the First Grade Magistrate Court sitting at Nkhunga in Nkhotakota District on 25th May when he pleaded guilty to the charge. After plea, the trial was adjourned for facts. It resumed on 1st June when the prosecution gave the outline of facts to which the appellant agreed, whereupon the court proceeded to convict and to sentence the appellant. He was sentenced to 30 months imprisonment with hard labour without the option of a fine.

The appellant appeals to this Court against sentence on two grounds that (a) the lower court did not fully consider the mitigating factors when arriving at the sentence it imposed on the appellant and (b) in all circumstances of the case the sentence imposed was excessive. The State opposes the appeal and prays to this Court to uphold the sentence as being appropriate to the offence. I heard the appeal on 26th September and adjourned for judgment.

I bear in mind that the offence the appellant has been convicted of carries a maximum sentence of a fine of K500, 000 and imprisonment for life. This maximum level of punishment was prescribed by an amendment enacted only recently in 1995 which raised the maximum general punishment for offences under the Dangerous Drugs Act from ten years imprisonment previously. There is no doubt therefore that the legislature intended to reflect that offences under the Dangerous Drugs Act had come to be regarded by the society as among the most serious, calling for the imposition of stiffer punishment as circumstances of the case may require in some instances. In view of this recent reform to the law, it would be wrong for the courts to not give the due effect of the law in imposing sentences for the offences under the Act.

On the other hand, I also recognise that circumstances of the offences that may be committed under the Act can vary considerably from, for example, involving large

quantities of dangerous substances meant for trafficking in illicit commercial trade within or across the borders of Malawi to involving small quantities for personal use by habitual or addicted users. The principles of sentencing require that the facts and circumstances of each case be individually considered both in relation to the gravity of the offence at hand as well as the factors of the offender. In my judgment, I hold that the sentence imposed must fit both the circumstances of the offence and the circumstances of the offender.

With regard to sentencing for the offence of being found in possession of Indian hemp, there had been for sometime in the past in our courts the practice to follow the guide that had been laid down in the dictum of Benson, Ag. C.J. in *Rep. v. Timoti* (1966-68ALR Mal 459) when he said at page 460:

> "If a person is found in possession of a large quantity of Indian hemp, and I would consider a large quantity to be anything, say, from one pound upwards, then a prison sentence without the option of a fine would be perfectly appropriate. If a person is found in possession of 20 to 30 pounds of Indian hemp, that would justify a sentence of about two year's imprisonment."

I am sure in today's metric system of weights and measures, the learned Justice would have been content to refer to one kilogram or 20 to 30 kilograms in laying down the guide he ventured to do.

Whether in pounds or in the larger measuring standard of kilograms, I would disapprove of that approach as it obscured or suppressed other important factors in arriving at a correct sentence, placing emphasis almost solely on the quantity of the dangerous substance a person is found in possession of. I do therefore cite with approval, as did Jere, Ag. C.J. in *Republic v. Mponya,* 9MLR 275, the different approach restated by Mead J. in *Rep. v. Longwe*, Confirmation Case No. 372 of 1977, unreported, that:

> "There cannot be a scale commensurate with the quantity of the

> drug found in the convicted person's possession. Factors in deciding whether the sentence should be by way of a fine or imprisonment, and if imprisonment its length, are whether the convicted person is a first offender, his age, the nature and quantity of the drug found in the convicted person's possession, and the intended use of the drug by the convicted person, if known."

I would add that sentencing remains principally the province of judicial discretion; and in exercising judicial discretion, there are many further factors open to consideration in arriving at an appropriate sentence to impose in any particular case.

In the instant case, I have considered two aggravating factors weighing against the appellant. One factor is the quantity of Indian hemp that was found in his possession. I consider a quantity of 29 kilograms to fall in the category of a large quantity. To get the picture in my own mind, I find that it is close to baggage weight of 30 kilograms commonly allowed for air travel to a business class passenger; and that is a sizable quantity. Another aggravating factor, in my judgment, is the appellant's intention or purpose in possessing the substance which, by his own revelation as recorded in the English translation of his caution statement that has not been disputed by the appellant or by his counsel, was to distribute the substance for use or consumption by himself and other members of his religious group, the so called Rastas, as part of their religious ritual. The taking of such dangerous drug with religious fervour or clamour must pose considerable danger to the concerned community and to the wider society, and it must be the duty of the courts to enforce the law so as to provide protection from risks of such grave danger to society.

On the other hand, there are also some mitigating factors in favour of the appellant. He is a first offender and he is of the young age of 23 years. Although in the circumstances he was found with the offending substance, it is hard to think he would have denied the offence, it is still to his credit that he pleaded guilty to the

offence. It is also a factor that punishment of young persons ought to be tempered with mercy, and I would consider that the appellant at his age may have unwittingly fallen victim of group behaviour in the pursuit of some religious beliefs with strange, even dangerous, rituals.

The lower court did consider some of those mitigating factors in arriving at the custodial sentence it imposed on appellant. However, weighing the scale of the set of factors I have outlined, there was in my judgment, room for further lenience in sentencing the appellant to give him a second chance to reform himself having learnt from his present offence.

I accordingly set aside the sentence of thirty months imprisonment and substitute it with a sentence of twelve months imprisonment with hard labour to run with effect from the date of his arrest.

PRONOUNCED in open court at the Lilongwe District Registry this 3rd day of October, 2007.

E.M. SINGINI, SC.

J U D G E