

THE STATE  
versus  
BATSIRAI MUTYAMBIZI

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 16 August 2022

### **Criminal Review**

**MUNANGATI-MANONGWA J:** A plea of guilty should be genuine, unequivocal and freely made. It should not be accompanied by any explanation which impacts upon the admission of guilty. Once such an explanation props up the plea should be altered to “not guilty”. Despite numerous judgments by this court emphasizing this point the lower courts continue making the same mistake of proceeding with a plea of guilty when evidence points otherwise. This case is yet another example of such a misdirection.

The accused was charged with unlawful possession or use of dangerous drugs as defined in s 157(1)(a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] as read with s 14(2) of the Dangerous Drugs Act, [*Chapter 15:02*]. The accused pleaded guilty and she was duly convicted. She was sentenced to 18 months imprisonment of which 12 months imprisonment was suspended for 5 years on condition accused does not during that period commit any offence involving possession of dangerous drugs for which upon conviction she is sentenced to a term of imprisonment without the option of a fine.

It is the conviction and ultimately the sentence which shows gross misdirection.

After pleading guilty, the magistrate elicited evidence to prove the elements of the offence and the following is the exchange between the magistrate and the accused person:

Court: “Admit that on 11 December 2021 and at House No 1249

Huxton Road Waterfalls, Harare you were in possession of dangerous drugs namely  
14, 7850 grammes of methamphetamine

Acc : Yes

Court: Why did you possess the drugs.

Acc: Actually my sister-in-law Dephine Adams was the one who had the drugs stashed in a dish which contained baby clothes. She is the one who was selling the drugs.

Court: So why are you saying you are the one who had the drugs.

Acc: I am admitting because on the day in question I had visited the house with a buyer and I knew she was selling drugs so I had brought an interested client from Chinhoyi. I had earlier discussed with her and she had promised to give me USD 120 which I desperately needed to pay medical bills from my son.

Court: So you participated in selling the drugs.

Acc: Yes, I knew that the drugs were there and I facilitated in selling the drugs.

Court: did you have any lawful right to possess the drugs?

Acc: No the reason the police did not arrest my sister-in-law is that she was heavily pregnant.

Court: Any valid defence to offer

Acc: No”

It is clear that the accused denies being in possession of the drugs and stated that the sister in law was in possession of the drugs. The accused brought a customer or a client to the sister-in-law. As soon as the accused denied being in possession of the drugs the court should have altered the plea to a NOT Guilty and converted the proceedings into trial proceedings.

As the record stands there is no evidence rebutting her averment that she was not in possession of the dangerous drug. There is thus nothing to support the conviction. Her initial admission cannot be relied on as she then indicated that she did not possess the drug.

The section that she was charged under reads:

**157 Unlawful possession or use of dangerous drugs**

- 1) Any person who lawfully-
  - a) Acquires or possesses a dangerous; or
  - b) Ingests, smokes or otherwise consumes a dangerous drug; or
  - c) Cultivates, produces or manufactures a dangerous drug for his or her own consumption;

shall be guilty of unlawfully possessing or using a dangerous drug and subject to subsection (2), liable to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both.

A reading of the section shows that what the accused admitted to is not covered by the section. She brought a client to the person who was selling the drugs. She was neither mentally in control of the drugs nor physically in possession thereof. She could not therefore be convicted of the offence as presented. Equally the state outline does not speak to accused's circumstances in as much as the bedroom nor the house was not hers, she was a visitor. It states that the drugs were found in accused person's bedroom in a dish. The accused person stated that the drugs in the dish belonged to Dephine Adamis who she admits is her sister-in-law. In the absence of a trial and proof otherwise, the conviction cannot stand as the plea tendered is not sustainable.

Accordingly, the conviction cannot stand due to the misdirection. Suffice that justice delivery demands that the lower courts positively embrace the guidance from the superior courts particularly the plethora of precedents available on the issue of plea recording. Equally the prosecutors must be diligent enough when vetting matters for prosecution to ensure that proper charges are brought against accused persons so as to avert such scenarios where a perpetrator of an offence drops off the hook due to a technicality. The process of justice delivery requires the participation of the state, the court and the defence, it is somewhat tripartite. In that regard, it is also the duty of the state to assist the court, when during plea recording an anomaly arises and it becomes apparent that the plea is not unequivocal. A prosecutor should not hesitate to point to the court that given the accused's answers the proceedings ought to be converted to trial proceedings. This is important as the ultimate goal in proceedings is to achieve justice at the end of the day. Thus all parties must remain diligent and conscious of the precepts of fairness and the ultimate achievement of justice.

In the result, the conviction is quashed and the sentence is set aside. The accused is entitled to immediate release.

MUNANGATI-MANONGWA J:.....

ZHOU J: agrees.....