

TAPIWANASHE CHRISWELL MUKANDI
versus
MINISTER OF HEALTH AND CHILD CARE N.O.
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS N.O.
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE N.O.

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 12 July & 31 October 2023

Opposed Application

Advocate *T R Mafukidze*, for the applicant
M C Chibidi, for the 1st respondent
No appearance for 2nd & 3rd respondents

MHURI J: This is an application for declaratory relief wherein applicant is seeking that:

1. Section 156(1)(a)(b)(c) and (e) as read with section 155 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (THE CODE);
2. Section 157(1) (a) and (b) of the CODE and
3. Section 3 as read with section 6 of the Dangerous Drugs Act [Chapter 15:02] (THE DDA) and section 4(a) and 6(1) of the Dangerous Drugs Regulations 1975 (Rhodesia Government Notice No. 1111 of 1975) as amended by Statutory Instrument 409 of 1999 Regulations No. 4 (THE REGULATIONS).

be declared inconsistent with sections 57, 56(1) and 52 of the Constitution and therefore constitutionally invalid only to the extent that they make the cultivation of cannabis in a private place or use or possession of cannabis in private by an adult person for his or her own consumption a criminal offence.

Applicant's challenge of these provisions is that the said provisions infringe on his constitutional rights of privacy, equal protection and benefit of the law as well as bodily and psychological integrity enshrined in sections 57, 56(1) and 52 of the Constitution to the extent

that they criminalize the cultivation, possession and or use of cannabis in private by an adult for his personal consumption.

As regards his right to privacy under section 57, his challenge is that the provisions prohibit and preclude the enjoyment of cannabis by him, an adult in the privacy of his own home or in place which he deems private. He is unable to consume, possess cultivate or use cannabis in a private place despite his desire to do so as there is the threat of criminal prosecution and imprisonment. These laws thus encroach into his personal sphere.

As regards the right to equal protection and benefit of the law under section 56(1) applicant's challenge is that cannabis users are not extended the same benefit and protection that users of more harmful and dependence – producing substances such as alcohol and tobacco enjoy. Legislation permits the use of alcohol and tobacco which have more harmful effects and yet the use of cannabis is entirely prohibited and is subject to criminal prosecution. To penalize cannabis users for engaging in a practice that is no worse than tobacco smoking and alcohol is disrespectful of human personality and violates the equal protection and benefit clause.

As regards the right to bodily and psychological integrity (s 52) applicant's challenge is that he is at liberty to choose what he can consume into his body. He should be allowed to consume anything that does not exceed the prescribed threshold i.e. cannabis.

To bolster his challenge, applicant attached and relied on reports and expert supplementary affidavits of Professors Nutt and Abrams. Their conclusions reached after research in respect of the use and effects of cannabis were:

“I do not consider the prohibition of cannabis use in Zimbabwe as being rationally connected to the objective of public health protection since, as has been shown above, the public is permitted to use and possess more harmful substance, such as tobacco and alcohol;

The harms of cannabis use (which are relatively minor) are far outweighed by the detrimental effect of criminal prohibition (including the stress of getting caught, facing prosecution, and going to prison, where one is exposed to harder drugs and possible life – threatening disease);

Moreover, since cannabis is a medicinally – beneficial substance that can be used for the treatment of a variety of medical conditions and ailments; one can even conclude that it appears the criminal prohibition deprives the poor (or anyone of that matter) of access to what seems to be a cheap and effective alternative to many unaffordable pharmaceutical equivalents; and

It appears unreasonable and irrational to deprive people access at worst, a relatively low – harm vice and, at least, a substance that constitutes preventative and curative medicine.

Therefore, it is my considered opinion that the criminalization of the use and possession of cannabis constitutes an ineffective means to manage a substance that has been scientifically shown to not present the (at a minimum, full extent of the) harms espoused by prohibitionists and which may have significant therapeutic potential. Any concerns arising may be alleviated by adequate regulations by Parliament.”

per Professor *David John Nutt* on 16 June 2022, United Kingdom.

I have observed with wonder that the same conclusions word for word were reached by Professor *Donald Abrams* who is in the USA, a totally different jurisdiction from the UK where Professor *Nutt* is based.

In this jurisdiction, criminalization of cannabis with regards to cultivation, possession or even dealing with the drugs as regulated by the Criminal Law Codification and Reform Act [*Chapter 9:23*], (The Code) and the Dangerous Drugs Act as read with the Regulations.

Section 155 of the Code defines what cannabis is. It states:

“Cannabis” means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated;

“Cannabis plant” means the whole or any portion, whether green or dry of any plant of the genus *cannabis* also known as “Indian hemp” as *bhanga*, *camba*, *dagga*, *mbanje* or *intsangu* by excluding –

- (a) any fibre extracted from the plant for use as or in the manufacture of cordage, canvas or similar products, or
- (b) any seed which has been crushed comminuted or otherwise processed in such a manner as to prevent germination, or
- (c) the fixed oil obtained from the seed;

“cannabis resin” means the separated resin, whether crude or purified, obtained from the cannabis plant.”

“Dangerous drug” is defined as,

- “(a) any coca bush, coca leaf, raw opium or cannabis plant
- (b) prepared opium prepared cannabis or cannabis resin
- (c) a scheduled drug.”

“Prepared cannabis” is defined as:

“cannabis which has been prepared for smoking and any dross or other residue remaining after cannabis has been smoked.”

Clear from the above, is the fact that cannabis is a dangerous drug.

Section 155 of the Code goes further to define what “deal in” means. It states:

“In relation to a dangerous drug, includes to sell, or perform any act, whether as a principal, agent, carrier, messenger or otherwise, in connection with the delivery, collection, importation, exportation, trans-shipment, supply, administration, manufacture, cultivation, procurement or transmission of such drug.”

Also clear from the above definition is the fact that cultivation is taken as dealing.

Section 156 of the Code prohibits unlawful dealing in dangerous drugs. It provides as follows:

- “(1) A person who unlawfully –
- (a) imports, exports, sells, offers or advertise for sale, distributes, delivers, transports or otherwise deals in a dangerous drugs; or
 - (b) cultivation, produces or manufactures a dangerous drug for the purpose of dealing in it;
 - (c) possesses a dangerous drug, or any article or substance, used in connection with the production or manufacture of a dangerous drug for purpose of dealing in such a drug; or
 - (d) incites another person to consume a dangerous drug; or
 - (e) supplies or administers to or procures for any person, or offers to supply or administer to or procure for any person, a dangerous drug;

shall be guilty of unlawful dealing in a dangerous drug and liable –

- (i) if the crime was committed in any of the aggravating circumstances described in subsection (2) and there are no special circumstances peculiar to the case as provided in subsection (3), to imprisonment for a period of not less than fifteen years or more than twenty years and a fine not below level fourteen or, in default of payment, imprisonment for an additional period of not less than five years or more than ten years; or
- (ii) in any other case to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding fifteen years or both.”

Section 157 of The Code which applicant also takes issue with equally criminalizes unlawful possession or use of dangerous drugs. It provides as follows:

- “(1) Any person who unlawfully -
- (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.
- (2) where a court convicts any person of the crime of unlawfully possessing or using a dangerous drug and it is established that the person is an abuser of and addicted to a dangerous drug the court may, additionally or alternatively to any sentence impossible under section (1), impose a sentence requiring the person to undergo treatment for such addition.”

Following applicant’s argument, it is this particular section which he is mainly aggrieved by as it narrows down to private cultivation in homes and private spheres and consumption by adult individuals in private.

Section 3 of the Dangerous Drug Act [*Chapter 15:02*] THE DDA refers to the definition of dangerous drug as provided in section 155 of the Code.

Section 6 of the DDA gives the Minister power to make Regulations prohibiting, controlling or restricting the production, possession, sale, use or distribution of drugs and the cultivation of plants from which such drugs are derived.

This section needs no further elaboration as it is clear that the Minister has the authority to make the regulations.

Section 4(a) and (b) of the Dangerous Drugs Regulations 1975 as amended have the same prohibitory effect on cannabis as section 156 and 157 of the Code. The Regulations permit/authorize a licensed person to acquire, possess, supply Part II Drug.

Applicant's case is that the sections alluded to earlier in (THE CODE, THE DDA and Regulations) infringe upon his constitutional rights, in particular the right to privacy (Section 57) the right to equal protection and non-discrimination (Section 56), the right to personal security (s 52).

Chapter 4 of the Constitution of Zimbabwe amendment No. 20) (The Constitution) provides for the Declaration of Rights. Section 44 thereof provides:

“The State and every juristic persons and every institution and agency of the government at every level must respect, protect, promote and fulfill the right and freedoms set out in this Chapter.”

Section 52 – the right to human dignity provides:

“Every person has the right to bodily and psychological integrity which includes the right –
(a) to freedom from all forms of violence from public or private sources;
(b) subject to any other provision of this Constitution, to make decisions concerning reproduction;
(c) not to be subjected to medical or scientific experiments or to the extractions or use of their bodily issue without their informed consent.”

As regards the above section, applicant's submission in a nutshell was that an adult person who choses to consume cannabis should be free to make a choice in the same way other adults who consume alcohol are free to do so.

As regards section 56(1) – equality and non-discrimination, it was his submission that the distinction in treatment between a person who consumes alcohol and that one who consumes cannabis is irrational and affects those that consume cannabis by taking away their liberty.

The section reads:

“(1) All persons are equal before the law and have the right to equal protection and benefit by the law.”

As regards section 57 Right to privacy, it was applicant's submission in summary that the impugned section infringes on his right to privacy as he is prohibited and precluded from the use, possession, cultivation or consumption of cannabis in the privacy of his own home or in a place he deems private as there is an extant threat of criminal prosecution and punishment which may include imprisonment. He is unable to live his life as the law interferes with his privacy by regulating or barring his intention to consume, use, cultivate and or possess cannabis in his personal sphere.

The Constitution of Zimbabwe is the supreme law in this jurisdiction and any law which is in conflict with the provisions of the Constitution is subject to being declared invalid. Chapter 4 of the Constitution provides the Bill of Rights and the State and all executive, legislature and judicial institutions are bound by this particular Chapter. This is trite.

It is an accepted legal position that, save for the rights stipulated in section 86(3) the rights as provided in Chapter 4 are not absolute. Section 86 is the limitation of rights and freedoms clause. It reads:

- “(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
- (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity and freedom, taking into account all relevant factors, including –
- (a) the nature of the right or freedom concerned;
 - (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
 - (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
 - (f) whether there are any less restrictive means of achieving the purpose of the limitation.”

It follows therefore that the rights which applicant is complaining that they are infringed by the said provisions of the Code and Dangerous Drug Act and Regulations are subject to this limitation clause. An act of Parliament can limit the exercise and enjoyment of these rights. The exception as pointed out earlier is in subsection (3) which reads as follows:

- “(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them –
- (a) the right to life, except to the extent specified in section 48;
 - (b) the right to human dignity;

- (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
- (d) the right not to be placed in slavery or servitude;
- (e) the right to a fair trial;
- (f) the right not to obtain an order of *habeas corpus* as provided in section 50(7) (a).”

Can it be said that the limitation *in casu* does not comply with subsection (2) of section 86 for the impugned provisions to be held unconstitutional, to wit that the limitation is not fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom? The answer in the negative.

Zimbabwe is a democratic society. It is part of the global village. It subscribes to various international conventions and treaties. As submitted by respondent, cannabis is an internationally controlled substance by the International Narcotics Control Board (INCB). The Convention of Narcotic Drugs 1961 establishes strict controls on the cultivation of cannabis plant and their products. Zimbabwe subscribes to this Board and to the Convention thereby undertaking to limit the production, manufacture, export, import distributiontrade in, use and possession of cannabis, with the exception of use for medicinal purposes as provided for in the Dangerous Drugs (Production of Cannabis for Scientific Use) Regulations, 2018 S.I. 62 of 2018.

The submission therefore by applicant that other jurisdictions have decriminalized the use, possession, cultivation etc, of cannabis, in my view does not assist *in casu*. Further, I am not persuaded by the submission that a consumer of cannabis is not treated equally with a consumer of alcohol. These two are different and are not comparable. If the argument was that one consumer of cannabis is not treated equally with another consumer of cannabis, the argument will hold water.

The case of *Samuel Nkomo v Minister of Local Government, Rural & Urban Development & 2 Ors CCZ 6/2016* articulated the legal position by stating:

“The right guaranteed under section 56(1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position.

It envisages a law which provides equal protection and benefit for the persons affected by it.

It includes the right not to be subjected to treatment to which others in a similar position are not subjected.” (Emphasis is my own)

Applicant therefore cannot compare himself to a consumer of alcohol. They are not in a similar position.

The effects of cannabis were found to be hazardous by HUNGWE J (as he then was) in the case of *S v Sixpence* HH 77/03 wherein he stated that dagga (another name for cannabis) 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 the youth and community at large. I agree with these sentiments, and add that cannabis remains a dangerous drug with the potential of magnifying or increasing crime if not properly handled or controlled.

The limitation as provided in section 86 of the Constitution is therefore justified, fair, necessary and reasonable in a democratic society like Zimbabwe. To that end, I find no infringement an applicant's rights

In the result, the application is hereby dismissed with costs.

Scanlen & Holderness, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners