IN THE HIGH COURT OF SWAZILAND

Cr. Appeal No. 69/95

In the matter between:

ZEMBE CHARLES MADUNA — Appellant

and

THE KING — Respondent

CORAM: S.W. Sapire A.J.
FOR THE CROWN Mr. Kilukumi
FOR APPELLANT Mr. Nhleko/Adv. Kades

Judgment
(20/10/95)

The appellant, Zembe Charles Maduna according to the record a man of fifty years, married to four wives and his father of twenty children, was arrested at his home in the Kuhlahla area by Superintendent J.D. Dlamini and other police officers on 24/5/95, who were on a "dagga raid". About 100 metres from the appellant's home an unspecified quantity of dagga was seen by the police to be laid out for drying purposes. A foot path lead from appellant's homestead to the dagga. Suspecting that there may be more dagga in the accused's homestead, they approached the homestead where the appellant was. The Sergeant introduced his team to the appellant, who after being cautioned allowed the police party to his house.

In one hut, apparently part of the complex of dwellings occupied by the appellant and his family a quantity of dagga was found. The appellant informed the police party that this dagga belonged to his daughter.

The police apparently accepted this explanation for they turned their attention to another hut, where they found a further quantity of dagga, which subsequently became an exhibit at the trial. This dagga, the appellant claimed to be his. The appellant explained that he was a herbalist, that the hut in which the dagga was found was used for the purpose of consultations, and that the dagga was used by him in his practice as a herbalist for healing such people.

Some confirmation for this explanation is to be found is the presence of other herbs in the hut, which was noted by the police. The police did not then question the explanation given by the appellant, but asked him to produce a permit allowing him to heal people using dagga and authorizing his possession of the dagga. This the appellant could not do. Thereupon the appellant was arrested and the dagga in the hut of which the appellant claimed ownership and possession was seized. Both the appellant and the dagga which had been seized were taken to the police station at Piggs Peak. The dagga was weighed in appellant's presence, and weighed some 19.2kg. Samples were taken from each of the three bags in which the dagga had been carried which was sent for analysis. An affidavit reporting on the analysis and the three bags of dagga was apparently handed in as exhibits. These exhibits were not before this court but little turns thereon as the appeal is diverted to sentence only.

The appellant was charged before the Magistrate at Piggs Peak, with having contravened Section 7 read with Section 8(1) of the Opium and Habit Forming Drugs Act No. 37/1922, in that on or about 22nd May 1955 (I observed that the day does not agree with the date of the raid testified to by Sergeant Dlamini) and or near Kuhlahla area in the said district, the appellant not being holder of a valid permit or licence to possess dagga, did wrongfully and unlawfully and intentionally have or his possession 19.2kg of dagga, a habit forming drug.

To this charge the appellant pleaded guilty.

It is to be noted that the plea of guilty related only the 19.2kg of dagga which was found in appellant's consulting hut, and that the

other dagga seen by the police in the appellant's property did not form part of the charge.

The Crown led the evidence of Sergeant J. Dlamini to which I have already referred to establish aliunde apart from the plea of guilty that the offence had been committed. Reference should not have been made to the presence of dagga drying near the appellant's home and other dagga in the appellant's daughter's hut as the charge related only to the 19.2kg found in the appellant's consulting but. It seems that this evidence may have influenced the magistrate in regard to sentence.

The appellant was found guilty as charged. No previous convictions of any nature were proved and the prosecutor indicated that the appellant was a first offender.

In mitigation it was said from the bar; no evidence being led, that -

(a) the appellant's plea of guilty was sign of remorse
(b) he was a first offender
(c) the appellant had cooperated with the police
(d) he was a married man, with four wives and twenty children dependent on him
(e) appellant had given an explanation as to his possession of a large quantity of dagga which excluded him being a wholesale or ever retail dealer in drugs.

The appellant's attorney concluded with a plea for a sentence with an option of a fine.

The magistrate in imposing a sentence of three years imprisonment, of which one year was suspended for two years on condition that the appellant is not convicted of any offence in contravention of Section 7 of the Opium and Habit Forming Drugs Act 37/1922 or Section 12 of the Pharmacy Act 38/29 committed during the period of suspension, observed -

(a) from the evidence before the court it is clear that the accused (appellant) is the wholesale supplier and;

(b) "he cultivates dagga for the purpose of widespread distribution."

The magistrate made it clear that these inferences were deduced from the quantity of dagga found in his possession.

The magistrate misdirected himself in overlooking or neglecting the explanation given by the appellant for his possession of a large quantity of dagga. It seems that the magistrate must have had regard to the evidence of dagga drying close to the appellant's home. There is no other suggestion in the evidence that he cultivates dagga. In the absence of an explanation, possession of so large a quantity of dagga may in appropriate circumstances lead to a permissible inference that the possessor was a dealer in the substance. In the present case however unlikely one may consider appellant's explanation to be, like his explanation of the presence of other dagga in the complex, it was not challenged.

This misdirection makes it proper for this court to consider the question of sentence afresh. Little purpose would be served by remitting the matter to the magistrate.

The magistrate referred in his judgment on sentence to the case of R. v. Phiri 1982 -1986 SLR 508. In that case the facts were indeed similar to the present in that the accused was found in possession of some 14.88kg of dagga. The Reviewing Judge Hannah C.J. found the sentence initially imposed by the magistrate, E300 or 300 days to be grossly inadequate and substituted a sentence of 3 years imprisonment, of which eighteen months was suspended for three years on the conditions which were repeated in the present case.

In coming to the conclusion which he did, Hannah C.J. referred to factors which were to be considered when sentencing in cases of possession of dagga. Observing the circumstances in which an offender may be found to be in possession of dagga will vary enormously from case to case and the proper sentence will vary accordingly, he listed

on different sets of circumstances which might be applicable from case to case. Clearly where a small quantity of dagga for personal consumption is found, it is a far cry from the case where the accused is found to be a wholesaler supplier. An offender in this latter category is to be regarded as standing at the top end of the sentencing scale. He is the person who is cultivating or in possession for the purpose of widespread distribution to a number of retail outlets. When the court is satisfied that this is the purpose and the operation is being conducted on a large scale, the sentence should be at or near the maximum even in the case of a first offender.

The magistrate's error lies in placing the appellant in this category. The accused in the case considered by Hannah J. the accused had admitted being a "wholesaler supplier" whereas in the present case the appellant has given an account of his possession of the large quantity of dagga which excludes the drawing of the inference that the appellant possessed the dagga for wholesale distribution. The appellant's explanation was not challenged let alone shown to be untrue.

Because of the magistrate's misdirection and failure to distinguish facts in the case before him from those which pertained in R. v. Phiri he placed appellant nearly on the top of the sentencing scale notwithstanding that he was a first offender.

It is open to me to set the appellant's sentence aside and impose a sentence which I consider more appropriate.

The appeal therefore succeeds and the sentence imposed by the magistraie is set aside, the following being substituted therefore:

(a) The appellant is sentenced to a fine of E1500 in default of payment of which imprisonment for a period of one year.

(b) In addition thereto, imprisonment for two years wholly suspended for three years on condition that the appellant is not convicted of any offence in contravention of Section 7 of the Opium and Habit Forming Drugs Act 1922 (Act 37 of 1922) or of a contravention of

Section 12 of the Pharmacy Act, 1929 (Act 3 of 1929), committed during the period of suspension.

S.W. SAPIRE
ACTING JUDGE