

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRI. APPEAL No. 54/97

IN THE MATTER BETWEEN

MATHEW SEMELANE

APPELLANT

V

THE KING

RESPONDENT

CORAM :

DUNN J.

MAPHALALA A J.

FOR THE APPELLANT :

MR HLOPHE.

FOR THE RESPONDENT :

MR MASEKO

JUDGMENT

16TH SEPTEMBER 1997.

The appellant, to whom I shall continue to refer to as the accused, was convicted by the Magistrate sitting at Pigg's peak on charges of possession and cultivation of Dagga in contravention of the Opium and Habit Forming Drugs Act No. 37/1922 .The two counts were taken as one for purposes of sentence and the accused was sentenced to two years imprisonment. The present appeal is against both the conviction and sentence.

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The accused pleaded guilty to both counts in the court a quo. In terms of section 238(l)(b) of the Criminal Procedure and Evidence Act No. 67/1938 all that the crown was required to do in order to secure a conviction was to prove by evidence aliunde, the commission of the two offences.

Specifically, the crown had to prove the possession and cultivation of Dagga by the accused. The investigating officer ,2211 constable Mahlalela gave unchallenged evidence clearly establishing the possession and cultivation by the accused of a substance the officer stated was Dagga. The officer was not called upon to identify the substance exhibited in court as Dagga. The investigating officer stated that samples of the substance found in the accused's possession were forwarded for expert analysis at the Royal Swaziland Police Headquarters.

For proof of the nature of the substance, the crown relied upon a document purporting to be an affidavit under section 220 (4) of Act No. 67/1938 by Leonard Dlamini, a Chemist attached to the Royal Swaziland Police, to the effect that the substance was Dagga. The document was handed in by the crown as part of the evidence. There is no indication in the record as to the authority under which the court acted in allowing the document to be handed in by the prosecutor. There are two sections in the Criminal Procedure and Evidence Act No. 67/1938, dealing with the acceptance of affidavits and reports by certain categories of witnesses, in criminal trials. The two sections are sections 220 and 221 . The former provides in part as follows –

4. If any fact ascertained by any examination or process requiring any skill in bacteriology, biology, chemistry, physics, astronomy, or geography is or may become relevant to the issue in any criminal proceedings, a document purporting to be an affidavit made by a person who alleges in such affidavit that he is in the service of the Republic of South Africa, or in the service of, or attached to, the South African Institute for Medical Research or any university in the Republic or any other institutions designated by the Deputy Prime Minister for the purposes of this section by notice in the Gazette, and that he has ascertained any such fact by means of any such examination or process, shall subject to sub-section 5, on its mere production in such proceedings by any person, be admissible to prove such fact:

Section 221 deals with the proof of certain facts, ascertained by medical and veterinary practitioners, by way of written reports.

Two obstacles lie in the way of the admission of the document from the " Drugs Expert". Firstly, the document is not an affidavit for the reason that it was not deposed to before a commissioner of oaths.

The space provided for completion by the commissioner of oaths is blank. Secondly and more importantly, it does not appear ex facie the document that Leonard Dlamini,

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despite his qualifications which are set out in the document, is in the service of or is attached to any of the institutions referred to under section 220(4). It was incumbent upon the magistrate to satisfy himself that the document satisfied all the requirements for admissibility as evidence, proving the commission of the offence. The prosecutor should either have called Leonard Dlamini to testify or canvassed the ability of the investigating officer to distinguish between Dagga and other species of plants. There are officers of longstanding within the Royal Swaziland Police whose experience in the investigation of Dagga cases has placed them in a position to be able to positively identify the drug.

The investigating officer in this case may have been such an officer but no attempt was made to solicit his opinion.

The apparent consent by the unrepresented accused to the handing in of the document by the prosecutor does not detract from the provisions of section 220(4).

The appeal is in the circumstances allowed. The conviction and sentence are set aside.

A copy of this judgment is to be forwarded to the office of the Attorney General, for purposes of considering the desirability or otherwise of an amendment to section 220(4) to include appropriately qualified personnel within the forensic departments of the Royal Swaziland Police and the Central Medical Laboratory in Manzini.

B.DUNN

JUDGE.

I agree.

S.B. MAPHALALA

ACTING JUDGE.