

THE HIGH COURT OF SWAZILAND

REX

V

Daryl Wayne Smith

Of. Trial No. 58/99

Coram

Sapire, C J

For Crown

For

Defence Mr. P. M. Shilubane

JUDGMENT

(13/08/99)

The accused Daryl Wayne Smith has during the course of a trial changed his plea to GUILTY of a contravention of Section 12(2) of the Pharmacy Act No. 38 1929. The act itself has been amended and the sentence is prescribed is imprisonment or a sentence of a fine. The statutory provisions do not contemplate that both may be imposed. I therefore have to consider whether a custodial sentence as it is called is proper and appropriate in this case or whether the imposition of a fine could meet the circumstances.

The accused is a man of 39 years of age and although he has no previous convictions in Swaziland and certainly no conviction in Swaziland relating to the

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contravention of this particular Act it has been proved that he has convictions in South Africa some of which may be relevant although the convictions took place a long time ago.

In essence the accused has pleaded guilty to taking part in the transportation of dagga and to playing a part in exportation of a large consignment of dagga from Swaziland to countries beyond the borders. This sort of offence is very serious and is regarded as such in most countries of the world. International trafficking in drugs of various nature has become a world wide problem and the difficulties and social effects of that sort of trade are well known. The sentences imposed in other countries or even in South Africa are considerably more severe than is provided for in Swaziland In some countries mere possession of drugs may be visited with capital punishment.

All this underlines the seriousness with which this offence is regarded.

A question to be considered in contemplating a fine, is whether the amount provided for in the act as a maximum, having regard to the depreciation of money has the same relationship to the equivalent period of imprisonment as it did at the time the Act was passed. A fine as a deterrent has to be considered in the light of the amount becoming almost insignificant in relation to the enormous profits which are reaped by those who engage in the commission of this offence.

The accused in this matter was not, what one may term, a ringleader or the entrepreneur. The evidence has disclosed an well-organized and extensive ring of people who have gathered dagga from the growers principally in the northern reaches of the Hhohho province. The supplies were assembled at various premises, principally at the home of one Mnisi who was taken as an accused in this matter but who is since deceased. About that I will say more lately.

The evidence has been that this dagga was processed and packed into blocks and was intended to be exported in mat way or in cans. Some dagga was smuggled out of Swaziland and in this the

accused admits having taken part. His role was to bring a speedboat into Swaziland, have the speedboat loaded with a large amount of dagga, hidden under a tarpaulin. The boat would then, be driven by him, on a trailer through the border at Oshoek. Further distribution and was made by other persons involved in the ring.

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The other consignment of dagga with which we are principally concerned, involved a plan for the dagga to be packed in boxes, placed in a container and consigned together with similarly packed furniture to the United Kingdom. The quantity of dagga in these cases was such to make planning worthwhile, The profit anticipated from these transactions went far beyond any benefit that the accused himself derived from his participation. The big profits were clearly intended for those other persons mentioned who were the entrepreneurs.

The accused had a limited function. He smuggled the dagga through the Oshoek border. He manufactured the crates for the transportation of the dagga and quite clearly assisted in the preparation for the exportation of the dagga to the United Kingdom.

There is this to be said for Mm. After arrest he did apparently cooperate to this extent with Interpol in that he informed the authorities of the container being on the waters and this crate never reached its intended destination. I understand has been impounded either in the United Kingdom itself or on the way. In any event in this way he did contribute to the frustration of the plan. For this he does deserve a certain amount of credit. But the question still remains what is an appropriate sentence?

I have seriously considered imposing a fine but there are a number of factors, which have convinced me that if I did so I would be failing in my duty in this matter. First of all the question of the appropriate sentence for trafficking in particularly dagga has been dealt with frequently in this court and the case of Rex vs Phiri decided as a matter of review by previous Chief Justice, Mr. Justice Hanna in November 1986 has long been the guideline for the imposition of sentences in cases such as this, in this case the learned judge discussed the various functions of persons involved in the possession and distribution of dagga. His Lordship considered the case of a person who possessed dagga for personal consumption only and where a small amount was involved and observed that a fine would normally be an appropriate sentence. Possession for the purpose of supply was placed in a different category and different considerations applied. If the court was satisfied that the dagga in question was being cultivated or possessed for the purpose of supply it should then decide what category of supplier the offender belong to. The Learned Judge then looked at the position of a

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wholesale supplier and into this category would fall those persons who I have referred to as entrepreneurs and in regard to those persons the judge says this offender should be regarded as standing at the top end of the sentencing scale. He is the person who is cultivating or possession for the purpose of widespread distribution to a number of retail outlets.

The judge then considered another category, the wholesale distribution network and he observed that inevitably the wholesaler requires a number of couriers to play a vital role in the distribution work. These persons are motivated purely by financial gain and not infrequently would include persons whose background it is thought would lead to leniency on the part of the court.

Those who engage in dagga trafficking should not expect to be dealt with leniently. Normally they should be dealt with by way of a substantial custodial sentence. This is the category into which the accused in this matter falls. He is not a retail supplier involved in an isolated consumption nor is he what is referred to as a social supplier The accused was a vital link in the distribution network of this organised dagga export enterprise. For this reason I have come to the conclusion that a substantial custodial sentence has to be imposed.

I do not lose sight of the fact that the accused in previous case had committed an offence under the Opium and Habit Forming Drugs Act number 37/1922. The present act is most stringent in its provisions for penalty. The counsel for the accused

advanced a number of reasons which in his submission should influence me in

treating the accused with leniency and his pleading before the court was in earnest and certainly as occasioned a considerable thought on my part to the sentences to be imposed.

I take a look at the circumstances of the offender. Indeed he is a mature man and he is educated. He does seem to have a certain moral weakness. However as is witnessed by his previous convictions and he is certainly aware of the seriousness of the exploit to which he committed himself. He certainly did it for reward and he expected to be paid for what he did. He, like many persons who come before the court, has children. They do not appear to be dependent on him. Nevertheless he said

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that it would be terrible for these children to have a father in jail. I am afraid this is a consideration which he should have thought of before he engaged in this enterprise and it is a consideration which would apply to everybody who has to be sentenced. Most people who appear before this court have children, parents, or dependants. Most have families who may consider them to be disgraced by the criminal actions of the accused. That cannot affect the sentence.

The accused has had physical difficulties and Ms health seems to be suspect That too is not something, which can affect the sentence, which has to be imposed.

His change of heart in the course of the trial, which induced him to change his plea, indicated remorse. He says that although he was remorseful even from the time of his first arrest he was inhibited from making a clean breast of all because he feared what may happen to him at the hands of the entrepreneurs if their names were mentioned in the statement which he made to the Police. He says that he was impressed by the example of the witness who gave evidence who was one of the co-conspirators and when he saw that that witness was prepared to name names and names had already been mentioned he could then come clean. I am not very impressed with that sort of reasoning and it does not stand a test of logic. When I say logic I also appreciate that whatever the accused's education, he does not appear to me to be a person of acute insight and a person who appreciates the moral values of society.

All in all and taking everything into consideration and bearing in mind the sentencing patterns which are consistently followed in this country, when you see cases constantly coming before us on appeal wherein the court found in possession of dagga in far smaller quantities than involved in this case. I say far smaller but it is incomparable yet these, as Judge Hannah observed, were in most cases the cat's paws for the real operator. They go to jail and they are sent to jail because they are in fact the cat's paws because as in this case the principle perpetrators went free but that does

not mean that the cat's paws should be treated any more lightly for if it was not for these people who were willing participants in this circle at all the distribution of dagga would be a lot more difficult and the entrepreneurs themselves would have to take the distribution.

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Taking all the circumstances into consideration I have come to the conclusion that a sentence of seven years imprisonment is the appropriate sentence but I do take into consideration that the accused did, as I have said, frustrate the distribution of dagga by disclosing to the authorities the existence of the crates loaded with dagga and I do take into consideration that he presents a somewhat pathetic picture notwithstanding his greed and notwithstanding Ms, as I say, participation and it seems to me that part of the sentence should be suspended.

I accordingly sentence the accused to seven (7) years imprisonment of which three (3) years will be suspended for a period of three (3) years on condition that the accused is not hereafter found guilty of any offence mentioned in Section 7 of the Opium and Habit Forming Drugs Act 37/1922 or Section 12 of the Pharmacy Act 38/1922 as amended committed during the period of suspension. The sentence will be deemed to have commenced on the date of arrest, that is the 20th October, 1998.

S. W. SAPIRE, CJ