IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 103/99

IN THE MATTER BETWEEN:

SABELO DLAMINI

THEMBA MAMBA THEMBA DLAMINI

VS

REX

CORAM : MATSEBULA J

FOR THE DEFENCE : MR. S.M. KHOZA

FOR THE CROWN ; MR. M. NSIBANDZE

JUDGMENT

The three accused whose ages range between the ages of 17 and 19 respectively are charged under the provisions of Section 1 on count one, Section 12(l)(a) of the PHARMACY ACT NO.38/29 AS AMENDED. The unlawful possession of poison to wit 278kg of dagga and also alternatively charged under the provisions of Section 8(1) Act No37/22 as amended, unlawful possession of dagga to wit 278kg of dagga without the necessary documents. On both counts, one and the alternative, the date and place is the same and so too the quantity of the substance mentioned.

The accused pleaded not guilty to both the main and the alternative count and Mr. Khoza presented them throughout.

The Crown led the evidence of PW1 Themba Leonard Dlamini, a chemist whose evidence was not challenged and I do not propose to deal with it in details. In a nutshell, it is stated that he received 27 sealed envelopes marked "A1" to "A27" under

the seal "PIGGS PEAK CC1 790/99". These envelopes were brought by one 2412 Constable Dlamini He broke open the seal and examined the contents by virtue of his expertise to ascertain as a chemist whether they do not contain control substances. He found that the contents did infact contain control substances in the form of what we call dagga. He prepared a report which he read, confirmed and handed in as exhibit "A". It was his evidence that the control substance "dagga" is a substance for which one can only possess if he has a permit or licence.

The Crown also led the evidence of PW2 2412 Constable Dlamini. He confirmed that he had sealed the contents in envelopes taken from each bag of dagga which he found at a homestead where he found accused no. 1, 2, and 3. He had handed these samples to PW1 for the expertise analysis. His evidence was that on the 25th May 1999, he accompanied by other members of the Royal Swaziland Police from Pigg's Peak went to a homestead at Pondo in the Pigg's Peak area. They arrived there in the morning and found four men standing outside the yard. They introduced themselves to these men and requested permission to search the homestead. Permission was granted but before they began with the search, accused no. 1 asked permission to go and fetch keys from one of the huts to enable him to unlock a locked hut. However, the witness (PW2) told him that they would all go together to where the keys were and start searching from that hut. This was agreed to and a search was conducted but nothing of relevance to their mission was found. They proceeded doing the same exercise to all the huts but still nothing was found. When they reached the fourth hut they found it locked, and accused no.1 used a key to unlock it. They all entered the hut, that is the four men and police. Stacked in this hut were 27 bags which according to the witness contained dagga. PW2 said the four men were accused no.l, 2, 3, and a fourth man Ackel Mamba. Also found with the bags of dagga were machines and scales which according to the witness (he stated he had dealt with these

cases on numerous occasions) were machines used for compressing dagga into manageable quantities and a scales for weighing such quantities.

PW1 confronted all four men and asked them to produce a permit or licence for possession but they failed. He arrested them and took them to the police station and subsequently to the Correctional Services where the dagga in the bags were weighed in the presence of the accused. The dagga weighs 278kg. PW1 then took samples

from each of the 27 bags and put them in 27 envelopes and forwarded them to the police headquarters under seal number CC1790/99. These were handed to PW1 for chemical analysis. PW2 later received the report and put it in the docket and this was sent to the Director of Public Prosecutions office. He later received the envelopes with the samples, he gave them to PW1 who he handed them in as exhibit "A1-A27" when he gave evidence. The bags were also handed in as "B1-B27".

It was PW2's evidence that he warned all the accused in terms of the Judges Rule and stated further that he did not influence them to say anything. He said after the caution, each of the accused opted to say something. They stated that each of them had been employed at this homestead to work with the dagga. He then arrested all the accused and charged them with possession of dagga. He also arrested the man called Ackel but he was later released at the instruction of the DPP's office. He handed in the machines, scales and sellotapes collected there as exhibit "1". That was PW2's evidence.

PW2 was cross-examined by Mr. Khoza. He stated that they had arrived at the homestead at plus minus 6:15 to 6.30 in the morning. He said further that he had made recordings in Ms pocket book at 7:30 in the morning and read from the pocket book as he gave evidence. PW2 denied that accused no.3 was found in the street next to the homestead and ordered to join the other three men in the yard. The witness stated that he walked ahead of the other members of the RSP and warned all the men to stand still He denied that he knocked on the door o£the first hut and denied that they were conducting a raid. He said they had come to that homestead as a result of a tip-off He stated that he did not know who the owner of the house was. He said after accused no.l had unlocked the fourth hut, the accused entered and the police followed. That was the evidence of PW2.

Mr. Nsibandze who is appearing for the Crown ordered the name of Ackel Mamba to be called and when there was no response the Crown closed the case.

An application in terms of the provisions of Section 174(4) of the CRIMINAL PROCEDURE AND EVIDENCE ACT AS AMENDED was moved by the defence on behalf of all the accused. This was opposed by the Crown and the court turned

down the application and ruled that the Crown had made a prima facie case against all the accused.

Mr. Khoza then called first, to the stand, accused no.3 instead of accused no.l. I will refer to accused no.3 as DW1 for the purposes of this judgment. According to DW1 he was walking on the street minding Ms own business, walking near a homestead. He said he was about to cross a river when he saw a motor vehicle and raced towards it intending to hike a lift. The motor vehicle made a u-turn, he then saw police officers emerging and was called to move towards the homestead which was subsequently searched. He said the police knocked at the door of the hut and accused no. 1 opened and the police told him that they had come to search the hut. Accused no.1 opened and DW1 was also pushed into the hut to be searched. The police searched and found nothing of relevance. They search the other huts still they found nothing of relevance; they got to the fourth hut and found it locked. The police ordered him to unlock the hut but he told them that he had no keys, as this was not his homestead. The police then asked all the persons present whose homestead this was, they did not get any response. They ordered accused no.l to fetch a key for the locked hut. Accused no.1 went and came back with the keys. He opened the house and inside there were many bags containing dagga.

The police pushed DW1 and the other accused into the hut, he said. DW1 told the police he knew nothing about the dagga as he did not stay at that homestead. He was asked if he knew about the compressor and the other items found and he told them that he knew nothing about them.

Accused no.l was called as DW2. DW2 having heard what DW1 said in his evidence, his evidence was more or less along similar lines as that of DW1. I indicated to Mr. Khoza that even though there was no provision in the order of calling an accused person where there were more than one, it is usually not advisable to start from the bottom up. This is because the first accused would tend to repeat the version by the last accused depending upon circumstances of each case, the weight of such evidence could be less. In the present case, DW2 repeated what was said by DW1 who is in the order of position in the accused docket as accused no.3. Accused no.3 should have been called as DW3. However, it was during the cross-examination of

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DW2 by the Crown that it emerged that certain statements were made by the accused. Mr. Nsibandze for the Crown read the contents; certain portions of the contents of the statements were allegedly made by the accused that is DW2. It further emerged that DW3 had also made a written statement as DW1, Because of the contents of the alleged statements under cross-examination, the court was put in an invidious position. At the end of the day, I ought either to base my judgment or findings on the contents of documents whose authenticity I was not satisfied with. I then invoked the provisions of Section 199 of the CRIMINAL LAW AND PROCEDURE ACT 1938 as amended. In terms of which the court may at any stage subpoena any persons or witness or examine any person in attendance although not subpoenaed as a witness or may be called to re-examine any person if his evidence appears to be essential to the justice and handlings of the case. The witnesses were then called and statements were handed in as exhibits ("C" in respect of accused no.3, "D" in respect of accused no.l, "E" in respect of accused no.2). Before handing exhibits "C - D" and "E", Mr. Khoza on behalf of the accused objected to their handing in. He stated that this was on the basis firstly, the witnesses who handed the statements in, had never signed the said statements. Secondly, that the statements were regulated under the provisions of Section 226 and that the statements could only be handed in by the judicial officer before whom the statements were made. In short, Mr. Khoza contended that these statements were statements in a nature of confession.

I have looked at the statements and considered their contents against the definition of a confession laid down in cases suck as REX VS BECKER 1929AD where the learned Judge de Villiers ACJ as he then was, concluded that a confession could only mean "an unequivocal acknowledgement of guilt equivalent to a plea of guilt." Notwithstanding this definition of a confession the confessor must make an extracurial admission of all the elements of the offence. I do not find exhibit "C, D, E" to be confessions and I rule that these were not confessions. Because Mr. Khoza made the objection. My ruling still stands.

Turning to the facts of the case. PW2's evidence is straightforward. I find his evidence very credible. His evidence is corroborated by the contents of exhibit "C, D, E" in every material respects. (See in this respect STATE VS SAULS 1981(3) 17Z(A). This case dealt with a single credible witness. PW2 has not shown any bias

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in the matter and I accept his evidence as being true. The court is aware that the onus rests on the Crown to prove its case beyond reasonable doubt and that no onus rests on an accused person to prove Ms innocence. PW2 told the court that each of the accused said they have been asked to work with the dagga. Accused no.3 recorded a statement in which he stated that a Malaza man came to the homestead and asked him to assist in doing a certain job. Accused no.3 does not say what the job consisted of nor does he state in his statement if he accepted the request by this Malaza man. The police arrived before he had done anything.

It is true that accused no.3 lied by saying he had been in the street, away from the homestead when the police forced him to go into the homestead. He also lied that he wrote the statement under duress that he was threatened to sign it. However, the fact that he lied does not mean, that the Crown, has

proved its case against him. beyond reasonable doubt nor does the statement he made assist the Crown in any way in proving the case against him beyond reasonable doubt In suck circumstances, the rules or procedures are very clear and the case law is very clear that the court should give suck an accused person the benefit of the doubt.

However, the case against accused no. 1 stands upon a different footing. He also made a statement, exhibit "D" In exhibit "D" accused no.1 also makes mention of the man from the Republic of South Africa, a Malaza. He states that this dagga was brought by this man and left with him and accused no.2. Once accused no.1 accepted delivery of the dagga, he placed himself in the spotlight in-so-far-as the commission of this crime is concerned. The mere possession of dagga is not an offence per se, it was up to him to produce the necessary documents for possessing the dagga.

For the purpose of this judgment, the mention of accused no.2 by accused no.1 in his statement does not necessarily incriminate accused no.2. This will depend on how accused no.2 reacts at the mention of these names. He cannot, on account of his name having been mentioned by another accused be convicted. However, accused no.2 also made a statement exhibit "E" In exhibit "E" accused no.2 states that Malaza brought this dagga and he and others put the dagga into the hut and they were supposed to start compressing it on the day of their arrest. Here again, accused no.2 placed himself on the spotlight and it was up to him to ensure that the necessary documents

for possession of this stuff are available. When he was requested to fetch these documents, he failed.

In my judgment, he and accused no.l are guilty of being found in possession of dagga. In the result, I find accused no. 1 and no.2 guilty on the main count, that is count one and not guilty on the alternative count. I acquit and discharge them on the alternative count. I find accused no.3 not guilty on the main and alternative accounts therefore he is acquitted and discharged.
JUDGME1SIT ON MITIGATION

You have been convicted of a very serious crime. This Court and also in my capacity as a parent, I am concerned about young people who get themselves involved in such matters because the law is there and I am bound to pass a sentence. I have just mentioned to your counsel what the penal provision is and that I am very suspicious that you did not possess this dagga by yourselves but some adults are using you. The only way this Court can deal with this matter is to sentence the person/s who have been found in possession of dagga and convicted severely so that the people behind realise that children must not be used in the perpetration of their dirty work.

Mr. Khoza wants to have further consultation with you to enable him to mitigate, if need be, call further witnesses in mitigation or call you to the witness stand.

JUDGMENT ON MITIGATION/SENTENCE

Your counsel, Mr. Khoza, has addressed me and he has persuaded me not to send you to jail because of your youth. If that were to be allowed you would be contaminated by hardened criminals and instead of reforming you will come back and commit more crimes. I have indicated that I am not sure whether you are sorry for what you did. To me it is clear from the evidence led that some older people used you to achieve financial gain and you were doing the dirty work of these drug pushers.

Ml Nsibandze who is appearing for the Crown has also addressed me and said that I should take into account your youthfulness and that you are immature and it is easy for some people to manipulate people like you.

You must understand that the legislature takes a very serious view of this crime. It provides for a fine of El5, 000.00 or imprisonment for 15 years for a first offender to prove that this is a very serious crime which might cause you to remain in jail as long as a person who has committed murder.

You have been convicted of possessing 278kg of dagga and with the dagga certain apparatus clearly

indicates that this dagga was not meant for personal consumption. The inference that this was meant for a widespread distribution is inescapable. I have looked at the other decided cases dealing with similar offences like REX VS PHIRI 1982/86 at 509 where the learned Chief Justice, as he then was, said in the case similar to yours, that the court should bring the sentence very close to the maximum even in a case of a first offender. In the Phiri case supra which was decided in 1986, the court had to alter a sentence imposed by the trial Magistrate which was E300.00 or 300 days and the Magistrate had suspended two thirds of that sentence, the Court had to substitute that for a sentence of three years' imprisonment, suspending 18 months thereof.

Having listened to your counsel and taking all the factors into account, I am of the view that the following sentence will be an appropriate one.

"You will be fitted E5, 000.00 or 5 (five) years' imprisonment and be further sentenced to a further 3 years which last mentioned will be suspended for a period of three years on condition that during the period of suspension you are not again convicted of contravening the Pharmacy Amendment Order of 1993, that is either being in possession of dagga or some other similar substance ".

J. M. MATSEBULA

JUDGE