SWAZILAND HIGH COURT

Rex

v

MNCINA Mzikayifani
NHLENGETHWA Vusie

Cri. Case No. 1/2001

Coram	Sapire, C.J.
For Crown	Mr. M. Sibandze
For Defence	Mr. C. Ntiwane

JUDGMENT

(19/04/2001)

The accused in this matter were charged with and have pleaded guilty to contravention of Section 12(1)(A) of the Pharmacy Act as amended by the Pharmacy amendment order number 11 of 1993. The charge was that on or about 20th October 2000 and at or near Nkomanzi area, Hhohho region, the said accused persons each or all of them, acting jointly in common purpose, did unlawfully and intentionally possess 63 bags of dagga weighing 614.7 kg, a poison or potentially harmful drug without a permit or licence and did thereby contravene the said Act. The two accused having been found guilty gave evidence in court in mitigation of sentence and described his personal circumstances which will of course be taken into consideration.

The important point is that this is the first conviction in respect of both of them. The family circumstances of their dependants are not so extraordinary that they can materially affect the sentence.

The accused who was accused no. 9, Vusie Nhlengethwa appeared in court with an inhaler and suggested that he was of ill-health and that this should be taken into consideration in whether or not he should be sent to jail. This is not the sort of evidence which can influence the court. If there is to be evidence of this nature one would expect a doctor to describe the condition from which the accused is said to be suffering and to indicate why in prison there are no facilities to care for his ailment during the period of incarceration.

The quantity of prohibited substance, dagga, in possession of which the accused were found and to which they have pleaded guilty is a substantial one. That they gave evidence to the effect that they were charged with less than they actually possessed cannot in any way affect the outcome of my judgment. I cannot accept that their statement that the dagga which they possessed exceeded 2 metric tons was given merely to indicate that they regretted what they had done and that they wanted to make a complete clean breast. They must have been aware when givng this evidence that they could only be punished in respect of the considerable amount which they were in fact found in possession as alleged. The prosecution has suggested a different motive for their willingness to assume responsibility for the possession of a far greater quantity than that in respect of which they were charged. This too is presently irrelevant.

The question of sentence in a matter such as this is always of great concern. In the first place I must bear in mind that the legislation under which the accused were charged makes possession alone a very serious offence and prescribes a maximum penalty which in terms of prison sentence is equivalent to a sentence which may expect in an aggravated form of culpable homicide. I only say this to indicate the gravity with which the law treats this sort of offence.
On the other hand provision is made for a fine to be imposed and I have to consider whether it is a fine or imprisonment which is appropriate in this case. I must be guided by previous decisions in this court but I must also bear in mind that each case has different features which can affect the imposition of sentence.

In this case it is clear that the accused persons on their own evidence assisted and participated in the distribution of dagga in a wholesale manner. Even the amount alleged, which is just more than half a metric ton, could by no stretch of imagination be considered for private use or for social distribution.

The fact that they were to be paid the amount of E10 000.00 for handling the quantity of drugs is an indication that this was a commercial transaction and once again I must refer, as often been done, to the case of R vs Phiri decided as a matter of review by the previous Chief Justice Hannah in November 1986. The judge considered different categories of persons who are guilty of possession. He observed that the wholesale distribution network inevitably requires a number of couriers to play a vital role in the distribution work. These persons, as are the accused, are motivated by financial gain and infrequently include persons whose backgrounds it is thought would lead to leniency in the part of the court.

In this case we have two persons with clean records who have been induced to participate in the wholesale distribution network The value of the services must be gauged by the amount which they were offered. Those who engage in dagga trafficking cannot expect to be dealt with leniently. The learned Chief Justice said that normally they should be dealt with by way of substantial custodial sentence. This is the category of persons into which the accused persons in this matter fall. They are not retail suppliers involved in an isolated transaction nor are they what can be referred to as social suppliers. The accused who formed a vital link in the distribution network of what must have been an organised dagga enterprise. For this reason I come to the conclusion that a substantial custodial sentence has to be imposed.

I have not lost sight of other judgments which I have given as late as the 18th August last year, I dealt with the matter of Thomas Manyisa . The accused in that matter was a person who was induced to take possession and to store dagga on behalf of a third person or persons who were engaged in dealing with dagga. In that case he told the court how he was approached by two people who were his customers at a garage where he operated at Sidwashini. They asked him to take custody for a short period of a bag of dagga which they had and they were tempted by only E2 000.00 in seemed to be a very easy way. The accused in this case took possession of the dagga which he kept at his house. The police however found the dagga at his home, even before the short period had elapsed. The dagga in that case weighed 74.4 kg. Here we have a case of over 500 kg. When one tries to imagine the picture, 500 kg of dagga, one must know that it is a voluminous amount. The accused in this case who had taken this and kept it into the property of the father of one of them and put it in a room in his homestead suggests that the circumstances are not entirely fortuitous.

I must also bear in mind that people who are entrepreneurs in dagga dealing are not going to take enormous quantity of dagga and place it in the hands of strangers. This is an unlikely situation and

I do not feel that the accused persons notwithstanding that their evidence is uncontradicted have told me the entire truth of what took place.

The contrition displayed by the accused in the case of Thomas Manyisa was such and his readiness to disassociate himself from the crime by disclosing the person on whose behalf he was holding the dagga operated as a consideration which induced me in his case to consider a custodial sentence inappropriate. These considerations do not apply in this case. It is my view that the facts in this case are more akin to a situation which I dealt with in **Rex vs Daryl Wayne Smith** in a judgment I gave on the 13 August 1999 and it seems to me that the sentence imposed in that case would be appropriate in this case as well.

I accordingly sentence the accused to 7 years imprisonment of which 3 years will be suspended for a period of 3 years on condition that the accused is not hereof found guilty of any offence mentioned on section 7 of the Opium and Habit Forming Drugs Act 37 of 1922 or Section 12 of the Pharmacy Act no. 38 of 1922 as amended committed during the period of suspension. The sentence will be deemed to have commenced on the date of the arrest which was 20th October 2000.

SAPIRE, CJ