SWAZILAND HIGH COURT

REX

Vs

Ndwandwe Rose Lomasontfo

Cri. Review Case No. 13/2001

Coram **SAPIRE, CJ**

REVIEW JUDGMENT
(26/01/2001)

The accused was charged with the offence of "contravening Section 7 as read with Section 8(1) of 1922 (of the opium Habit Forming Drugs)"(*sic*). This description of the alleged offence is meaningless. There is no reference to the Act under which she is charged and the reference to the Habit Forming Drugs is obscure. For this reason alone the conviction should not be upheld.

There are other difficulties with this particular conviction. The evidence led by the crown was that of Constable Mavela Khumalo who stated that he was a Police Officer stationed at Mbabane Police Station under the drug squad. While on duty with other officers in the Lugaganeni area they got into a certain homestead. It was named "ka-Shiba". There the accused was found and she was the eldest person in the homestead. The witness and his party introduced themselves as Police Officers and informed her that she was not obliged to point out anything to them. They asked for permission to search her place. Whilst doing so in one of the huts the witness discovered some bags which contained herbal material which he suspected to be dagga. He then asked the accused for permission or licence to possess dagga. She did not produce any. The policeman then seized the bags and arrested the accused.

The accused was brought to the police station and detained in the cells. The accused and the bags were taken to the Post Office where they were weighed in her presence and they weighed 6.6 kgs.

Samples were taken from each of the bags and placed sealed in envelopes and marked "A" to "H". The envelopes were sent to the Police Headquarters for analysis and were sent under the RCCI No. 4095 of 1999. The bags were said to be before court. The envelopes containing the samples were before the court as exhibits. The witness went on to say that he saw that the herbal material in the bags was dagga and he then charged the accused with unlawful possession of dagga.

The witness was not questioned as to why he said he first suspected that the herbal material was dagga and thereafter was able with the required degree of certainty to state that it was dagga. The Policeman did not qualify his opinion and in this respect the evidence is defective.

After the witness had been cross examined an affidavit by a chemist of the Criminal Procedure and Evidence was tendered to which the defence counsel had no objection. The affidavit is not part of the record which has been sent at this court. Because of this I cannot be satisfied as to the testimony of the chemist and certainly cannot be satisfied that the samples which he presumably examined were the samples of the material found by the first crown witness. In this respect the evidence is again defective. The record which is to be sent to this court for review must be a complete record and it is impossible to deal with cases unless the records are complete. There is no explanation as to why this record which should be certified as being correct is not complete..

The conviction is also subject to criticism. The evidence of the policeman did not establish that the accused was the occupant of the hut in which the dagga was found, nor was it established that she was the only person who had access to that hut. The inference drawn by the Magistrate regarding her ownership or possession of the dagga could not properly be drawn on the evidence before her and the conviction cannot stand. Accordingly the conviction is set aside.

As far as the sentence is concerned, the sentence which was imposed was

> *"One (1) years imprisonment only suspended for three (3) years on condition the accused is not convicted of an offence under the act."*

In the first place if the accused had been properly found guilty for possessing 6.6kg of dagga the sentence would have been entirely inadequate. There is no reason why a person in possession of such a quantity of dagga should have her sentence suspended. The manner in which the suspension is provided for is also badly phrased. The sentence, if suspended should be suspended for the particular period of 3 years referred to and the condition for the suspension should be properly enunciated. In the first place reference to the act is inconclusive especially as the act is not even referred to on the cover sheet. It is also improper to make the suspension subject to non-conviction under all the sections of the act and the particular offence the commission of which during the period of the suspension and the conviction thereafter which would bring the suspended sentence into force should be properly described.

In the circumstances, the conviction is quashed and the sentence is set aside.

SAPIRE, CJ