IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL NO. 76/06

In the matter between

JOHANNES KHOZA **APPELLANT**

VS

REX

CORAM: BANDA CJ

MAMBA J

FOR APPELLANT: IN PERSON

FOR THE CROWN: MR M. SIMELANE

JUDGEMENT

13th MARCH 2008

MAMBA J

[1] The Appellant, an adult male of Ngodini area, together with two other persons appeared before the Magistrate's court in Pigg's Peak on the 6th July 2005 facing two charges.

[2] The first count alleged a contravention of Section 12(l)(a) of the Pharmacy Act number 38 of 1929 (as amended) (hereinafter referred to as the Act). It was alleged that they were found in possession of 5.8kg of dagga which is a potentially harmful drug. On the second count they were charged under Section 14(2)(c) of the Immigration Act 17 of 1982 (as amended).

[3] Both in this court and in the court below the Appellant and his co-accused were unrepresented. At the commencement of the trial the Magistrate explained their rights to them that they were at liberty to engage the services of an attorney to represent them during the trial and all three elected not to be represented.

[4] On being arraigned, they all pleaded guilty on both counts. The Crown only led the evidence of Constable 4207 S. Ginindza in support of its case and at the conclusion of the trial, the Accused were, correctly in our view, found guilty as

charged.

[5] The appellant, who was the third Accused in the court a quo was sentenced to pay a fine of E12, 000-00 failing which to undergo a term of imprisonment for a period of 12 years. Four (4) years or E4000-00 of this sentence was conditionally suspended for a period of 3 years. A similar sentence was imposed on the first Accused who was a 31 year old female who has, however, not appealed against either her conviction or sentence. (We were informed by the Crown during the hearing of this appeal that she paid the fine and was released.)

[6] The second Accused, a fifteen year old girl was sentenced to pay a fine of E6000-00 or term of imprisonment for a period of 6 years. The whole sentence was suspended. Neither the period of such suspension nor the condition upon which the suspension was made were stated by the trial court. Like the first Accused, she has not appealed to this court on either the conviction or the sentence.

[7] The Appellant has appealed against the sentence imposed on him on the first count only. He complains that the sentence meted out to him is too harsh. He points out that he pleaded guilty to the charge and was a first offender and is unable to pay the fine of E8000-00.

[8] In argument before us he also referred to a case from the same court by the same trial Magistrate wherein an

Accused who was convicted of being found in possession of 184.5kg of dagga, which is substantially more than what the Appellant was convicted of, was sentenced to pay a fine of E8000-00. By implication, he submits that his sentence should have been much lighter than the Accused who had a larger quantity than him.

[9] Mr Simelane for the Crown, very properly in our view, conceded from the outset that he could not support the sentence imposed on the Appellant and his co-accused on count one. This concession is also contained in the heads of argument by respondent's counsel which were drawn up by Mr A. Makhanya and filed with the Registrar of this court on the 10th instant.

[10] Sentencing is predominantly a matter for the discretion of the trial court. It is, however, not the exclusive preserve of such court. For example, the legislature may, in certain cases legitimately have a say in this, as in cases where minimum or maximum sentences are set by Parliament. And, an appeal court will not interfere in the exercise of the trial court's discretion just because that trial court has arrived at a decision different from that which the appeal court or judge would have arrived at. If, however, the court on a

consideration of all the material or evidence relevant for purposes of sentence, such as the nature of the offence, the circumstances under which it was committed, the personal circumstances of both the Accused and the victim of the offence, comes to the conclusion that the sentence imposed by the trial court, is vastly different from that which the appeal court would have imposed such that an inference can be drawn that the trial court acted improperly or unreasonably, the court on appeal would be obliged to set aside the sentence imposed by the lower court and be at large to impose an appropriate sentence. **(see S v Anderson 1964 (3) SA 494(A) and S v Human 1979 (3) SA 331(E).**

[11] DU TOIT et al in their work **Commentary on The Criminal Procedure Act (1995)** @ 30-31 states as follows:

> "In general a court of appeal would be slow to reduce a sentence which was properly imposed - save in exceptional circumstances when the interest of justice require it (R v Ramanka 1949 (1) SA 417 (A) 419-20). But a court of appeal is certainly not limited in the exercise of its powers to impose such a sentence as the magistrate's court ought to have imposed (S v Peter 1987 (1) SA 348 (Ck) 351D). The considerations which have over the years been taken into account are summarized in S v Anderson 1964 (3) SA 494 (A) at

495D-E as follows: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was [not] in the interests of justice. In other circumstances the fact that the sentence was disturbingly inappropriate or sufficiently disparate has also been accepted by the courts as sufficient cause to interfere (S v Mothibe 1977 (3) SA 823 (A) 830D; S v Narker & Another 1975 (1) SA 583 (A) 585DI 590A; S v F 1983 (1) SA 747 (O) 754E)."

[12] Section 12(l)(a) of the Act provides that:

"12(i) A person who -

(a) is found in unlawful possession of a poison or potentially harmful drug; ...shall be guilty of an offence and liable on conviction -(i) For a first offence, to a fine not exceeding E15000-00 or imprisonment not exceeding 15 years;"

[13] In the case of **Philile Dlamini and another vs the Senior Magistrate N.O. (Nhlangano), Civil Case 4345/07** (a judgement of this court handed down on the 25th January 2008,) to which we were referred in argument by

counsel for the crown, the accused had been found guilty of the unlawful possession of dagga weighing 163.5 kg and was sentenced to a term of imprisonment for four years, half of which was conditionally suspended for a period of 3 years. This court, after reviewing the leading cases in this area of the law in this jurisdiction, including the case of **R v Phiri, 1982-1986 SLR 508,** relied upon by the court a quo, came to the conclusion that the sentence imposed by the trial court was too harsh. The court substituted it with a sentence that the appellant should pay a fine of E3000-00 or undergo a prison term for 3 years. An additional term of imprisonment for one year without the option of a fine was imposed, but was wholly suspended on condition that the Appellants are not found guilty of a contravention of section 12 of the Act or section 8(1) of the Opium and Habit Forming Drugs Act 37 of 1922.

[14] In the present appeal, whilst the sentence imposed by the trial court is within the range provided in the above quoted sub section, it is in our judgement too harsh regard being had to the quantity of dagga for which he was convicted; it was 5.8kg. A sentence to pay a fine of E12000-00 or undergo imprisonment for a period of 12 years is clearly at the top end of the scale for first offenders. The Appellant has stated that the sentence induces a sense shock. We agree. It is that kind of sentence.

[15] The quantity of dagga involved in this appeal is significantly or substantially less than that involved in Philile's case (supra). The sentence imposed by the learned trial magistrate herein is grossly inappropriate and is set aside.

[16] The appellant was arrested and taken into custody on the 5th July 2005 and has been in custody since that day. He has todate been in custody for about 32 months.

[17] Having considered all the evidence herein we order that the sentence imposed by the court a quo is hereby set aside on count one and there is substituted for it the following:

(a) Accused 1 and Accused 3 are sentenced to pay a fine of E3000-00 or to undergo a term of imprisonment for a period of three (3) years. This sentence isback-dated to the 5 July, 2005 being the date on which they were arrested and detained.

(b) Accused 2 is sentenced to pay a fine of E3000-00 failing which to undergo a term of imprisonment for 3 years. This sentence is wholly suspended for a period of 3 years on condition that the Accused is not found guilty of a Contravention of section 12(1) of the Act or section 8(1) of the Opium and Habit Forming Drugs Act 37 of 1922,

committed during the period of suspension.

MAMBA, J