

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

REVIEW CASE NO. 88 OF 2009
District Record No. ML 20 of
2009

In the matter between:

THE KING

VERSUS

MDUDUZI STANLEY BUTHELEZI
LUCKY DLADLA

Date of consideration: 24 March, 2009

Date of order: 26 March, 2009

JUDGMENT ON REVIEW

MASUKU J.

[1] The accused persons mentioned above, were convicted by the Manzini Magistrates' Court of possession of 9kg of dagga on 5 February, 2009 at or near Mliba. This was alleged to have been done in furtherance of a common

purpose and in contravention of section 7 as read with 8 (1) of the Opium and Habit-Forming Drugs Act, 37 of 1922.

[2] Accused 1 pleaded guilty to the offence whereas Accused 2 pleaded not guilty thereto. Notwithstanding Accused 1's aforesaid plea, the prosecution intimated that they wished to proceed against both accused persons as if they had both pleaded guilty. The Court appears to have sanctioned this procedure.

[3] The prosecution proceeded to lead the evidence of 5345 Detective Constable M. Dlamini who testified about how in the company of his colleagues, on the date in question, consequent upon a tip-off, he found the accused persons driving a motor vehicle in which the consignment of dagga referred to above was found and how the accused persons failed to produce a permit when each was required by him to do so.

[4] After the police officer adduced his evidence, the prosecution closed its case. An explanation of the accused persons' rights at this stage was conducted by the learned Magistrate, whereupon Accused 1 elected not to lead any evidence or to call witnesses. Accused 2 chose to remain silent. The defence case was thus closed on that note.

[5] The Court, after noting that neither of the accused persons cross-examined the police officer nor led any evidence "to show their innocence," as the Magistrate put it, found them guilty as charged. I interpolate to state and observe that the principle that an accused person bears no onus to prove his innocence has, like the majestic Baobab tree, taken root in the soils of this country's criminal justice system. The accused persons therefore, had no duty, as the trial Magistrate, found to prove their innocence. The onus was, throughout the case, on the prosecution to prove their guilt beyond reasonable doubt. After mitigation both were sentenced to a fine of E2000.00. and in default of payment, to 2 years' imprisonment.

[6] There is a curious feature indeed to the conviction returned and which leads me to doubt the correctness of thereof. Inexplicably, there was no scientific or other evidence led by the Crown to show indubitably that the substance found in the accused persons' possession was indeed the substance alleged by the only witness who testified. Considering that the accused persons were unrepresented, no questions were asked of the officer by either the Crown or the Court to satisfy the Court's conscience that the said

officer was, through experience and dealing with dagga (not in the innocuous sense but as a police officer) qualified to state that the substance found was indeed dagga as he alleged.

[7] There is no cogent or compelling reason as to why the consignment was not sent for forensic analysis and report which procedure would have left the Court in no doubt as to the nature and properties of the consignment found in the accused persons' motor vehicle. In the circumstances, I am of the considered view, notwithstanding Accused I's guilty plea, that it was not proved beyond reasonable doubt that the substance in question was indeed dagga as alleged. A doubt in that regard precariously hangs in my mind. I should also mention that there was no evidence adduced, as should have been the case, of the weight of the substance in question. The weight of the substance becomes of momentous significance in deciding on the class of a possessor the accused person is and consequently, what the condign sentence would, in the circumstances be.

[8] I say so quite mindful of the fact that the trial proceeded as if both accused persons had pleaded not guilty. In that

instance, the accused persons joined issue with the Crown, and that placed the onerous burden of proving all the constituent elements of the offence, including whether the substance was indeed dagga, on the broad shoulders of the Crown.

[9] In the premises, I cannot, on the evidence before Court come to a conclusion that the accused persons were properly found guilty on the evidence without a fair measure of diffidence. The fact that there was no expert or other admissible evidence, or in the absence thereof, an admission by the accused persons that the substance exhibited in Court was dagga leads to what I consider the inexorable conclusion that the State did not prove the guilt of the accused persons beyond reasonable doubt. As indicated above, there was no evidence adduced to prove the weight alleged in the charge sheet. In the circumstances, there can only be one verdict, which I propose to pronounce once I have dealt with another issue of note.

[10] That issue relates to the trial Court not ordering, in view of the accused persons' aforesaid divergent pleas, a separation of trials, which was, on the facts imperatively-

called for. The normal procedure, in such instances, is governed by section 170 of the Criminal Procedure and Evidence Act, 67 of 1938, in terms of which Accused 1 ought to have been dealt with alone in appreciation of his plea. As a result of the erroneous procedure followed, he was forced to run the entire gauntlet of trial, his aforesaid plea notwithstanding,

[11] The greatest travesty he was forced to endure was at the stage of sentencing. I say so for the reason that the fact of his plea is normally regarded as a sign of contrition and which further serves to redeem the Court's time. Furthermore, this plea ordinarily obviates the need to call the witnesses, thereby avoiding them reliving the trauma of the events in question and testifying at the trial. In this regard, the Court did not take into account his plea and sentenced him as his co-accused who had pleaded guilty.

[12] The net result of not acknowledging Accused I's guilty-plea as such, and proceeding with his case as if he had pleaded not guilty, which was clearly not the case, was that he was compelled by the prosecution and the Court to run the entire gauntlet of a trial when he had pleaded not guilty. Furthermore, he did not benefit, as he ought to, from his guilty plea, which should ordinarily result in the Court

considering his plea in a favourable light. The first accused was thus dealt with in similar vein as his counter part who had pleaded not guilty. This erroneous procedure should be avoided at all costs.

[13] In the premises, the Order that I issue is the following:-

13.1 The conviction of the accused persons of the offence of contravening section 7 as read with section 8(1) of the Act be and is hereby quashed.

13.2 The sentence imposed upon the said accused person by the trial Court be and is hereby set aside.

If the said accused persons have paid the fine, it shall be refunded to each one of them without further delay.

**DONE AND DATED IN CHAMBERS IN MBABANE ON THIS
THE 26th DAY OF MARCH, 2009.**