



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Rev. Case No. 142/13

In the matter between

**REX**

VS

**BONGINKHOSI MAGAGULA**

**Neutral citation:** *Rex v Bonginkhosi Magagula* (142/13) [2013] SZHC  
105 (03 June 2013)

**Coram:** Mamba J

**Heard:** **03 June 2013**

**Delivered:** **03 June 2013**

Criminal Law and Procedure – on a charge of being found in unlawful possession of dagga in contravention of s12 (1) (a) of the Pharmacy Act. Where the crown accepts a plea of guilty by the accused and an ordinary Magistrate convicts him per s238 (1) (b) of the Criminal Procedure and Evidence Act 67 of 1938, sentence may not exceed a fine of E2000.00 or term of imprisonment for 2 years.

- [1] The accused, a 36 year old man of Glen Village in Pigg's Peak, appeared before a Magistrate on 11<sup>th</sup> April, 2013 on a charge of contravening s12 (1) (a) of the Pharmacy Act 38 of 1929. The crown alleged that on 10<sup>th</sup> April 2013 he had been found at Glen Village in unlawful possession of 10kg of dagga which is a potentially harmful drug.
- [2] He was unrepresented and after his rights to legal representation were explained to him by the presiding officer, he indicated that he would conduct his own defence.
- [3] Upon being arraigned, he pleaded guilty and this plea was accepted by the crown. The said acceptance meant that the crown offered no evidence to prove its case.
- [4] On being questioned by the presiding judicial officer, the accused confirmed that he knowingly possessed the dagga in question. He explained further that the substance or drug had been left in his possession as security by a friend whom he had lent a sum of

E4000.00. The friend had promised to collect it on payment of the loan.

[5] The court, as one would expect under such circumstances, found him guilty as charged. He was declared a first offender by the crown. After mitigation the court sentenced him to pay a fine of E5000.00 failing which to undergo a term of imprisonment for five (5) years.

[6] The above sentence is clearly erroneous. In sentencing the accused, the learned Magistrate was acting in terms of s238 (1) (b) which provides that:

‘If a person arraigned before any court upon any charge has pleaded guilty to such charge or has pleaded guilty to having committed any offence (of which he might be found guilty on the indictment or summons) other than the offence with which he is, charged, and the prosecutor has accepted such plea, the court may, if it is- ...

(b) a Magistrate’s court other than a Principal Magistrate’s court, sentence him for such offence to which he has pleaded guilty upon proof (other than the unconfirmed evidence of the accused) that such offence was actually committed;

Provided that if the offence to which he has pleaded guilty is such that the court is of the opinion that such offence does not merit punishment of imprisonment without the option of a fine or of whipping or of a fine exceeding E2000.00, it may, if the prosecutor does not tender evidence of the commission of such offence, convict the accused of such an offence

upon his plea of guilty, without other proof of the commission of such offence, and thereupon impose any competent sentence other than imprisonment or any other form of detention without the option of a fine or whipping or a fine exceeding E2000.00...’.

Numerous decisions by this Court have interpreted the above provisions to mean that where the crown accepts a plea and the court, not being a Principal Magistrate’s Court or the High Court, convicts the accused on that plea, the accused may not be sentenced to a fine exceeding E2000.00 or imprisonment in excess of two years. See *Rex v Mfanukhona Nhlabatsi, Review 185/2007* (Judgment delivered on 12<sup>th</sup> December, 2007 (unreported) and cases therein cited.) In the instant case, the learned trial magistrate was in error in sentencing the accused as stated above. This sentence cannot be allowed to stand and is hereby set aside. It is simply contrary to the law.

[7] I have carefully considered this matter and I do not think that justice would be served by remitting it to the trial Magistrate to pass sentence anew. I have also taken into account the sentence that was imposed by the learned magistrate. It is above the maximum stipulated in the relevant law. Because of this fact, I am of the considered view that had the learned Magistrate correctly applied her mind to the relevant

law, she would have imposed the said maximum penalty therein stipulated. This is the sentence that I shall impose on the accused.

[8] I note that on the face of the court record, it appears that on 11<sup>th</sup> April, 2013 (date of conviction and sentence), a sum of E5000.00 was paid as and for bail. This appears very odd in view of the fact that there is no indication on the court record that the accused applied for and was granted bail on that day or any other day. There is further no information on the court record that the accused filed an appeal against the judgment of the court, which would then have necessitated an application for bail pending such appeal. I suspect that the sum of E5000.00 was paid by the accused as a fine and not bail. I note also that the judgment of the court was forwarded to the accused's employer by the Clerk of Court. This was presumably after a request by the employer. In the circumstances, I think, it is only fair that this review judgment should also be forwarded to the said employer; the Swaziland Development and Savings Bank – (Swazi Bank).

[9] For the foregoing reasons, I make the following order:  
(a) The conviction of the accused is hereby confirmed.

- (b) The sentence imposed by the court a quo is hereby set aside and is substituted with the following: the accused is sentenced to pay a sum of E2,000.00 failing which to serve a term of two (2) years of imprisonment.
- (c) If the accused has already paid the fine of E5,000.00, a sum of E3,000.00 is to be refunded to him immediately.
- (d) A copy of this judgment is to be forwarded to the accused's employer – Swazi Bank – by the Registrar of this Court.
- [10] The accused is to be caused to appear in Court – (Pigg's Peak) – to be apprised of this judgment.

**MAMBA J**