IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Crim. Case No. 206/2014

In the matter between

THEMBA NDZINISA

v

THE KING

Neutral Citation: ***Themba Ndzinisa*** v ***The King (206/2014) [2015] SZSC 49 (25th March 2015)***

Coram: **Dlamini J**

Heard: **12th November 2014**

Delivered: **25th March 2015**

- *it is not merely the quantity of poison or potentially harmful substance that the court has to consider in passing sentence. The court also has to look at the reasons advanced for possessing dagga*.

Summary: Before me is an application for bail pending appeal on a three year imprisonment term. The applicant pleaded guilty to two counts on charges of contravening the Pharmacy Act.

Record of proceedings in the *court a quo*

[1] On the 21st October 2014, the applicant appeared before Pigg's Peak Magistrate on two counts of contravening the Pharmacy Act No. 37 of 1929 as amended. The two charges read to him were as follows:

> *"COUNT 1*
> *The accused is charged with the offence of Contravening Section 12 (1) (a) as read with (i) of the Pharmacy Act 37/1929 as amended.*
>
> *In that upon or about the 03rd June 2014 and at or near Mbasheni Area in the Hhohho Region, the said accused not being a holder of a licence or permit to possess dagga, did wrongfully and unlawfully possess 95 kg of dagga a poison or potentially harmful drug and thus did contravene the said Act.*
>
> *COUNT 2*
> *The accused is charged with the offence of Contravening Section 7 as read with 8 (1) of the Opium and Habit Forming Drugs Act 37/1922 as amended.*
>
> *In that upon or about the 03rd June 2014 and at or near Mbasheni Area in the Hhohho Region, the said accused not being a holder of a licence or permit to possess dagga, did wrongfully and unlawfully possess 2 kg of dagga habit forming drug and thus did contravene the said Act."*

[2] When these charges were read to applicant, he pleaded guilty to both charges. Prosecution led one witness in proof of its evidence *alluendo*. When prosecution applied before the honourable Magistrate to call its witness, the honourable Magistrate commendably explained to applicant who was not legally represented, his rights to cross examine the Crown's witnesses. This was presumably to caution applicant to pay much attention

to the evidence that was about to be adduced in order to be able to cross examine the witness at the end of his evidence.

[3] PW1 identified himself as 3524 Detective Sergeant Mhlaba Hlatshwayo. On oath he informed the court that he was the investigating officer *in casu.* On 3rd June 2014 around 1800 hours upon information he, together with 4985 Detective Constable Mabasa, 6607 Detective Constable Ngcamphalala went to applicant's homestead at Mbasheni. He knocked at the door but applicant did not respond. They waited for about 20 minutes and applicant opened the door. He introduced themselves as Police officers from Pigg's Peak Police station. He then cautioned applicant as per the Judges Rules that they had information that he was in possession of dagga. That unless he produced a licence or permit to possess dagga, he would be arrested. He sought for permission to search the house. Applicant granted him the said permission.

[4] His evidence pointed out that in one of the two room house, they found fourteen bags of dagga. There was a fifteenth bag in which it contained dagga seeds. Upon this discovery, he requested for a permit to possess dagga and dagga seeds. Applicant failed to produce it. He then explained to applicant that he was then arrested and the reasons for his arrest. They seized the dagga and seeds and took them to Pigg's Peak together with applicant. They weighed the dagga which indicated 95 kg while the seeds 2 kg. Samples from each bag were removed and sealed in the presence of applicant and taken for examination.

[5] He then cautioned applicant that he had been found in possession of dagga and dagga seeds. He was not obliged to say anything pertaining to the charge. Anything he said would be written down and be used in evidence

before court against him. The applicant stated something and this was reduced into RSP 218. He then formally charged applicant.

[6] This witness stepped down from the witness box and showed the court the fourteen bags of dagga and dagga seed bag. He applied to hand them to court. The court marked the same as exhibit 1 and 2 respectively.

[7] PW1 testified further that the exhibits presented to court was dagga and its seeds by reason of its ever green colour and strong smell. At maturity it produces shiny seeds. He also submitted the analysis report from the laboratory. This was marked exhibit A after applicant indicated that he had no objection to it being handed as an exhibit. He further informed the court that he had been in such investigation for twenty two years. Applicant was invited to cross examine the witness. Applicant declined.

[8] The Crown closed its case. The learned Magistrate then explained to applicant his options at that stage. Applicant opted to give evidence under oath.

[9] Applicant identified himself as Themba Ndzinisa. On oath he stated that he admitted commission of the offence. He sated that he found himself engaged in such activity due to that he had to take care of members of his family.

[10] At this juncture the honourable Magistrate enquired whether applicant had any form of defence. Applicant replied that he did not dispute the offence. He indicated that he will make his statement in mitigation.

[11] The learned Magistrate wrote down his judgment and convicted the applicant. The applicant then mitigated as follows:

> *"I am a first offender. I am 36 years old. I am married and I have 2 children and only one attends school. My wife is not employed. I do not have parents.*
>
> *May the court exercise leniency when it pass sentence. My parents are deceased, I am unemployed. I have two siblings who are doing nursing at Nazarene University but did not obtain scholarship and I am paying their tuition. I will not commit similar offence again. I was trying to earn a living and also assist my siblings and my children. I am also sick I was treated for T.B. and ulcer. …"*

[12] The learned Magistrate in a well reasoned judgment, then sentenced the applicant to three years imprisonment without an option of a fine in respect of count 1 and E2000 fine in relation to count 2.

Adjudication

[13] The bone of contention by applicant's Counsel is that Section 12 (1) of Pharmacy Act No. 37 of 1929 does provide for an option of a fine in respect of first offenders. Applicant contends that he too, ought to have been slapped with a fine instead of a custodial sentence as a first offender.

Issue

[14] The question for determination in these proceedings is whether applicant has prospects of success in his appeal in order to warrant an order granting him bail.

The Act reads:

> *"12 (1) A person who –*
> *a) is found in unlawful possession of a poison or potentially harmful drug;*

b) unlawful conveys a poison or potentially harmful drug; or

c) without written permit issued by the Minister imports, exports or manufactures any 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 15,000 or imprisonment not exceeding 15 years;

ii) for a second or subsequent offence to a fine not exceeding E20,000 or imprisonment not exceeding 20 years."

[15] This section of the Act was promulgated in 1993. In 1995, **Sapire AJ** as he then was, in **Zembe Charles Maduna and the King, Criminal Appeal No. 69/1965** at page 6 stated:

"*The Magistrate's error lies in placing the appellant in this category. The accused in the case considered by Hannah J, the accused had admitted being a "wholesaler supplier" whereas in the present case the appellant has given an account of his possession of the large quantity of dagga which excludes the drawing of inference that the appellant possessed the dagga for wholesale distribution. The appellant's explanation was not challenged let alone shown to be untrue"*

[16] From the *ratio decidendi* as outlined above, one gathers that it is not merely the quantity of poison or potentially harmful substance that the court has to consider in passing sentence. The court also has to look at the reasons advanced for possessing dagga. This position of our law was succinctly so stated by their Lordships in **Mzikayifani Mncina and Another v Rex, Case No.1 of 2001**. At page 4 of the judgment it is pointed out:

"*Hannah CJ's (that is in **R. v Boy Phiri** – Review Case No. 223/1986) conclusion is that when a person is convicted of the possession of dagga the factors that are relevant to his appropriate sentence are the quantity of the dagga possessed and the reason why the dagga was in the possession of the accused.*" (words in brackets my own)

[17] It is common cause *in casu* that 95 kg of dagga weighs on the high side of the scale. However, that as it may, my duty is to interrogate the reasons advanced by applicant to be in possession of such high amount of dagga.

[18] *In casu* at the close of the Crown's case the learned Magistrate invited the applicant to advance its defence. The applicant informed the Magistrate that he intended to mitigate. No evidence was tendered at the close of the Crown's case on the circumstances for possessing such large quantity of dagga.

[19] In mitigation applicant submitted as the reason for possessing 95 kg of dagga and 2 kg of dagga seeds:

> *"I was trying to earn a living and also assist my siblings and children…"*

[20] These utterances coming from the mouth of the applicant indicate clearly to this court that the applicant was striving on the proceeds of dagga. He was engaged in the enterprise of selling dagga. What corroborates this finding is Court 2. One infers from Count 2 that applicant was intending to cultivate and have more dagga for his enterprise. In other words, this was not just a once off possession and the dagga was not for personal use.

[21] From this evidence, the honourable Magistrate was correct to conclude that the applicant fell under the second and third category of dagga possessors as per **R v Boy Phiri – Review Case No. 223/1986**. In this case the honourable Hannah CJ defined these categories as follows:

> "b) *Dagga for supply. Again this can normally be inferred from the amount involved though the circumstances of possession may also have an important bearing. For example, possession of a small bag of dagga on*

a homestead may indicate that it is merely for personal consumption whereas possession of a similar quantity in a number of containers may indicate otherwise. If the court is satisfied that the dagga in question was being cultivated or possessed for the purpose of supply, it should then decide which category of supplier the offender belongs to.

c)(i) *The wholesale supplier. This offender should be regarded as standing at the top of the sentencing scale. He is the person who is cultivating or in possession for the purpose of widespread distribution to a number of retail outlets. Where the court is satisfied that this is the purpose and the operation is being conducted on a large scale, the sentence should be at or near the maximum even in the case of a first offender."*

[22] In the circumstance, it is my considered view that there are no prospects of success on appeal in regards to applicant's case. For this reason, the following order is entered:

1. Applicant's application is hereby dismissed.

M. DLAMINI
JUDGE

For Applicant : S. C. Dlamini of M. N. K. Shongwe Attorneys

For the Crown : A. Makhanya from the Director of Public Prosecutions