



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CRIMINAL REVIEW CASE NO.14/2017(H404/16)

In the matter between:

THE KING

AND

NGWENYA ESTHER SICHUSHA

Neutral Citation: *The King vs. Ngwenya Esther Sichusha Case No. [14/2017] 2017 SZHC (179)*

Coram: MLANGENI J.

Summary: Criminal review – accused charged with illegal possession of dagga in contravening of s7 as read with s8 (1) of the Opium and Habit Forming Drugs Acts No.37/1922 (As amended) – weighing 1.135 kilogrammes.

Accused’s statement in mitigation suggested dagga was for sale in order to make a living. Accused pleaded guilty and was sentenced to E1, 000.00 fine or one (1) year’s imprisonment, half of which was suspended for a period of six months.

Section 238 of the Criminal Procedure and Evidence Act 1938 considered.

Held: The sentence was overly sympathetic to the accused and overlooked the escalating prevalence of the offence in this country.

Held, further: Suspension of half of the sentence set aside.

JUDGMENT ON REVIEW

[1] The accused was charged with illegal possession of dagga weighing 1.135 kilogrammes. She pleaded guilty and the crown accepted her plea. Evidence was not led in proof of the offence.

[2] Accused was sentenced to one (1) year imprisonment, or E1, 000.00 fine. Half of the sentence was suspended for a period of six (6) months. Effectively, the accused would pay E500.00, in default serve custodial sentence of six (6) months, or possibly less.

- [3] In mitigation the accused stated that she is a widow and responsible for orphaned children. She does not state that she intended to sell the prohibited substance for a living, but perhaps this can be inferred from her statement in mitigation.
- [4] The sentence clearly reflects sympathy towards the accused, and it completely overlooks the menace that dagga has become in this country, with dagga wars¹ that are reminiscent of the experiences of some Latin American countries and elsewhere. The Judiciary has the enormous task of assisting the country to curb the scourge, and lenient sentences are not assisting in this important cause.
- [5] In the case of **MDUDUZI MOHALE AND OTHERS v THE KING**², the Full Bench of the High Court was at pains to demonstrate the damaging extent of current abuse, that the maximum fine in terms of the Statute is 33 years old and in today's value it could well be worthless, and that our courts need to send a stern message to would be offenders.
- [6] In cases such as the present one subordinate courts seem to perceive that where the crown accepts a plea of guilt and leads no evidence, then the trial court is tied to a maximum of E2,000.00 in terms of s238 of the Criminal Procedure and Evidence Act 1938. But in terms of the first proviso, the court must be of opinion that **“such offence does not merit punishment of imprisonment without the**

¹ See The King v Mbukwa Foreman Dlamini, Criminal Review Case No. 02/2017 [SZHC] 134 June 2017, para 14.

² [2016] SZHC 139.

option of a fineor a fine exceeding two thousand Emalangenani”. The effect of the proviso, in my view, is that the trial magistrate who is not a principal magistrate must be alive to the gravity or prevalence of the offence, so as to determine whether a penalty in excess of E2,000.00 or imprisonment without the option of a fine would be appropriate or not. Where the trial court is of the view that a term of imprisonment or fine in excess of E2, 000.00 might be appropriate, it may require the crown to present evidence in respect of the charge or charges.

[7] There is no doubt that the sentence that was meted out in *casu* was lenient. A fortiori, it is more difficult to justify the suspension of half of the sentence for a mere six months. What this means is that after only six months the accused can be at it again, and most likely will be at it again, because for dagga dealers money is usually not a problem.

[8] While sentencing should not be influenced by anger³, it must be dispassionate, devoid of sympathy, so as to give due consideration to each of the components of the triad. In the present case the interest of society were most probably overlooked.

[9] It clearly follows that in the offences relating to possession of dagga the inclination should be towards the maximum allowed by the law, to *wit* 15 years imprisonment/15,000.00 fine, and in cases involving large amounts there should be no option of a fine. Only then would progress be made to curb the escalating scourge of abuse.

³ Per MCB Maphalala J. in R v Goodman Mngometulu, Criminal Trial No. 60/2006(Judgment on Sentence para 4.

[10] On the basis of the above, while I reluctantly confirm the sentence, I order that the suspension of half the sentence be set aside. Hopefully the accused will, in future, be deterred by the knowledge that crime can be costly.



T.M. Mlangeni

T.M. MLANGENI

JUDGE OF THE HIGH COURT