SWAZILAND HIGH COURT

Dlamini , Madunguzele

V

The King

Case No. 29/2002 (Criminal Appeal)

Coram: Sapire C.J., Masuku J.

For the Crown: Mr N M Maseko

For the Appellant: Mr B Sigwane

Judgment

The Appellant and another were charged in the Subordinate Court for the District of Hhohho held at Piggs Peak with the offence of contravening section 7 read with section 8 (1) of the Opium and Habit Forming Drugs Act 37/1922 as amended. The charge related to the possession of 191.7kg of Dagga.

Relevant portions of the legislation read

> *Taking of drugs.*
>
> 7. No person shall use any pipe, receptacle, or material for smoking opium, Indian hemp or dagga, or, save and except in the circumstances contemplated in sections 4 and 5, consume, be in possession of, or use any habit-forming drug or plant from which such drug can be derived, extracted, produced or manufactured and no person shall keep or assist in the keeping of or frequent any premises or place for the smoking of opium, Indian hemp or dagga, or for the surreptitious consumption, injection or administration in any manner whatsoever of any habit-forming drug.

Penalties.

8. (1) Any person who contravenes any provision of section 2, 3, 5 or 7, or any condition of any permit or licence issued under the provisions of section 3 or 5 shall be guilty of an offence and liable on conviction to a fine not exceeding two thousand emalangeni, or, in default of payment thereof, imprisonment not exceeding five years or such imprisonment without the option of a fine, or both such fine and imprisonment, and any such plant as is referred to in any of the said sections suspected of having been unlawfully imported or cultivated, and any habit-forming drug suspected of having been unlawfully imported, produced, extracted, derived or manufactured may be seized, and if any person is convicted of contravening any provision of any of the said sections, or any condition of any such permit or licence, the plant or drug in respect of which such contravention has taken place shall be forfeited

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(2) Notwithstanding anything in the Magistrate's Courts Act, No. 66 of 1938 or in any other law, a magistrate's court of the First Class may impose a punishment not in excess of the maximum punishment set out in subsection (1) hereof.

The Appellant pleaded Guilty while his co accused pleaded not guilty. The judgment of the court accorded with such pleas. Appellant was sentenced on conviction to two years imprisonment without the option of a fine. Against the imposition of this sentence the Appellant has appealed to this court.

There are well known principles to be applied in dealing with appeals of this nature. A court of appeal will not interfere with the proper exercise of its discretion in the matter of sentencing, by the court a quo. Where, however, in coming to its decision, the court a quo has misdirected itself, in the sense that the court has taken into account facts or circumstances which it should not have, or failed to take into account facts or circumstances which it properly should have, the court of appeal will set aside the sentence imposed and, correcting the misdirection impose a sentence other than that imposed in the court of first instance.
More rarely where the court of appeal finds the sentence of the court a quo to be so inappropriately severe as to induce a sense of shock, the sentence will be reduced to conform to what the court of appeal considers to be a proper sentence.

In the present case a most significant feature is the large quantity of dagga found in possession of the appellant. The only inference, which can be drawn there from is that, the appellant had engaged in the wholesale sale and distribution of the prohibited substance. In such circumstances a former Chief Justice, Hannah J. in his judgment in **Rex v Phiri 1982/86 SLR 509** recommended that even in the case of a first offender it would not be out of place to impose a maximum sentence.

It must however be borne in mind that the Act contemplates the imposition of what was at the time the Act was passed, a very heavy fine. Even the maximum fine in terms of today's values is not trivial. It has often been said that where possible first offenders, should be given the opportunity of paying a fine in preference to spending time in prison.

In the present case if there is any misdirection to be found, it is in the Magistrate's failure to consider the financial implications of imposing a fine and the ability of the Appellant to pay a fine. The magistrate seems to have given undue consideration to the message, which the imposition of a fine would be to other potential offenders. In doing so the personal circumstances of the appellant, the fact that he is a first offender and what we will hope is genuine remorse evidenced by his plea of guilty, have not been given sufficient weight.

Our attention has been directed to the case of ***Dlamini and others v R (Criminal Case No 103/99).*** The accused in that case was only 19 years old. On the other hand the amount of Dagga was 278kg. The accused was found guilty of contravening section 12(1)(a) of the Pharmacy Act No.37/22 as amended which provides for a maximum penalty of E15 000 or 15 years for even a first offender. The sentence in that case was E5 000 fine or 5 (five) years imprisonment together with a further three years suspended. The present case is different in some respects. The appellant, although a first offender, is an older person. The maximum penalty provided for in the legislation under which he was convicted is far less than that prescribed by the Pharmacy Act. Nonetheless the offence committed is the same and the effective sentence should be commensurate.

This is very much a borderline case, but it would not be undue fracture of the principles enunciated above to hold that the Magistrate did misdirect himself. The appellant has already been in custody since 26th April 2002. It is not possible to turn the clock back. His experience of being in custody should be enough to warn him of what he may expect in the event of a future transgression.

The sentence is set aside and the following substituted.

The Appellant is sentenced to

1. Imprisonment for one year without the option of a fine, which shall be deemed to have been commenced being served on 26th April 2002. (i.e. " backdated")and

2. A fine of E2 000 in default of payment of which, a further

one years imprisonment.

Sapire CJ

Masuku J