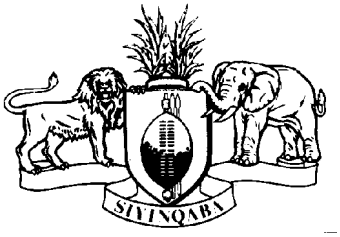

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.22/02

In the matter between:

WILLIAM TOUCH DLAMINI
VS
REX

CORAM	**LEON JP**
	STEYN JA
	TEBBUTT JA
FOR THE APPELLANT	**MR. M. MABILA**
FOR THE CROWN	**MR. P. DLAMINI**

JUDGMENT

Tebbutt JA:

The appellant was on 14th March 2002 found by the Swaziland police at the Lomahasha border post between Mozambique and Swaziland to be in possession without a permit of 25 000 mandrax tablets. Mandrax is a prohibited substance and is a potentially harmful drug in terms of the Pharmacy Act No.38 of 1929, as amended (the Act). He was charged in the High Court before Maphalala J with a contravention of Section 12(1)(a) of the Act which provides that anyone who is found in unlawful possession of a potentially harmful drug shall be guilty of an offence. He pleaded guilty and a Statement of Agreed Facts was admitted in which the appellant conceded the accuracy of the facts set out above. He did not dispute that he imported the 25 000 mandrax tablets from Mozambique

into Swaziland and which he had concealed in the glove compartment of a light delivery van he was driving at the time.

The appellant was legally represented by an attorney, Mr. Mduduzi Mabila.

After hearing submissions by Mr. Mabila in regard to sentence, Maphalala J sentenced the appellant to seven years imprisonment, two years of which were conditionally suspended for three years.

The appellant initially noted an appeal only against the severity of the sentence. He has, however, now applied to this Court for leave to appeal against his conviction as well and he seeks leave, in consequence, to amend his grounds of appeal. He now wishes to aver that the learned Judge erred in convicting him on the Statement of Agreed Facts which, he submits is not evidence *aliunde* of the commission of the offence and that therefore the trial Judge improperly invoked the provisions of Section 238(1) of the CRIMINAL PROCEDURE AND EVIDENCE ACT NO.67 of 1998 in both convicting and sentencing him. Before setting out that section, it is necessary to detail the Statement of Agreed Facts and then refer to what occurred before the trial Judge when that statement was admitted. The Statement of Agreed Facts reads as follows:

> "Whereas the accused is charged with the contravening of Section 12 of the Pharmacy Act in that on or about 14th March 2002 and at/or near Lomahasha Border Post the accused was found in possession of 25 000 mandrax tablets without a permit and/or licence.
>
> And now the accused makes the following concessions:-
>
> 1. The accused pleads guilty to the possession of the mandrax tablets.
>
> The accused possessed the tablets knowing that they contained banned substances.
> 2. The accused admits that the tablets found in his possession are mandrax tablets.
> 3. The accused does not dispute that the tablets were 25 000 in number.
> 4. The accused does not dispute that the 25 000 tablets

contained a prohibited substance.

5. That the chemist report be admitted by consent
6. The accused does not dispute that he imported the 25 000 mandrax tables from Mozambique into Swaziland.
7. The accused does not dispute that the mandrax tablets were conceal (sic) in the glove compartments of a white Mazda LDV registered MNY 118 GP."

The Statement bears the signatures of Mr. Dlamini, who appeared at the trial as Crown Counsel, and of Mr. Mabila as "Defence Counsel". At the start of the trial Mr. Mabila told the court that the Statement of Agreed Facts had been draw up. He then said –

"Before we commence with the trial I just wanted to confirm what is in the Statement of Agreed Facts".

When the charge was put to the appellant he said –

"I understand the charge and I plead guilty".

Mr. Mabila said, "I confirm the plea, My Lord".

The following then appears from the record –

"**CROWN COUNSEL:** I accept his plea, and My Lord the statement of agreed facts to be handed in to curtail the proceedings.

DEFENCE COUNSEL: I confirm My Lord.

JUDGE: Yes, stand up accused. You are charged with contravening Section 12(1)(a) of the Pharmacy Act in that on or about the 14th day March 2002, at or near Lomahasha Boarder Post you were found in possession of 25 000 (twenty five thousand) mandrax tablets without a permit and/or licence. You have pleaded guilty to this offence and the Crown has accepted your plea of guilty and a Statement of Agreed Facts has been entered by consent. In this statement of agreed facts you have made a number of confessions. Firstly that you plead guilty to the possession of mandrax tablets and also that you knew that they contained banned substances. You also agree that the tablets found in your possession are indeed mandrax. And thirdly that you do not dispute that the tables were 25 000 (twenty five thousand) in number. And also fourthly you do not dispute that the 25 000 (twenty five thousand) tablets contained prohibited substance."

To these questions the appellant answered "yes". The record then continues:

> "DEFENCE COUNSEL: Yes My Lord. My Lord I would humbly ask that in view of the fact that we have already entered a statement of agreed facts and for purposes of curtailing the proceedings My Lord, I would mitigate on behalf of the accused person as opposed to putting him in the witness box."

It is quite clear from the aforegoing that the appellant agreed to what was contained in the Statement of Agreed Facts, his legal representative confirmed them and wished them to be accepted by the trial court as part of his desire to curtail proceedings.

Mr. Mabila's attempt now to attack the validity of those proceedings on the basis that they did not comply with Section 238 of the criminal code smacks, in my opinion, of impropriety, a matter to which I shall advert at the conclusion of this judgment.

The immediate question is whether that attack has any validity. As this is an application for leave to appeal and to amend his grounds of appeal, the appellant must satisfy this Court *inter alia* that he has reasonable prospects of success on appeal. He can only do so if such attack is a valid one.

Section 238(1) reads as follows:-

> "238. (1) 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 –
>
> (a) the High Court, and the accused has pleaded guilty to any offence other than murder, sentence him for such offence without hearing any evidence; or,
>
> (b) a magistrate's court, sentence him for the 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 of opinion that such offence does not merit punishment of imprisonment without the option of a fine or of whipping or of a fine exceeding sixty rand, it may, if the prosecutor does not tender evidence of the commission of such offence, convict the accused of such 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 sixty rand, or it may deal with him otherwise in accordance with law".

It is clear from the aforegoing that on the appellants plea of guilty, accepted as it was by the prosecution, the court *a quo*, being the High Court, could sentence him without hearing evidence. It could, however, in the absence of evidence of the commission of the offence with which he was charged not sentence him to imprisonment. Did the Statement of Agreed Facts provide the requisite evidence of the commission of the offence? Mr. Mabila submitted that it did not and that the trial court should have required oral evidence as provided for in Section 172(1) of the Code. He cited certain South African cases as authority for that submission. Those cases, however, do not assist him. Some dealt with the situation where, in the days when preparatory examinations were held, the trial court could not receive the evidence tendered at the preparatory examination and convict accused person on that evidence. Others were not relevant at all to the present issue. In my view, the contents of the Statement of Agreed Facts are sufficient to constitute a compliance with the requirements of Section 238(1). They contained admissions of the factual elements which any *viva voce* evidence by the Crown witnesses would have placed before court.

Moreover, if any doubt still exists in this regard it is resolved by Section

272(1) of the Criminal code which reads as follows:

> "In any criminal proceedings the accused or his representative may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact".

In casu the admissions of the relevant facts were formally and unequivocally recorded in the statement which the appellant and his attorney wished the court to consider for the purposes of the trial. There is accordingly no validity in the appellant's attack on the proceedings in the court *a quo* and his application for leave to appeal and to amend his grounds of appeal to do so must be refused.

On sentence, Mr. Mabila again referred to Section 238(1) arguing that the trial court in the absence of evidence, should only have imposed a fine on the appellant. I have rejected this argument as to the absence of evidence. He contended, however, alternatively that in imposing the custodial sentence that he did the learned trial Judge had misdirected himself in certain respects. One of these, he said, was contained in a finding by the Judge that the appellant possessed a large quantity of mandrax tablets "acting as a courier for a supplier". There was, he contended, no basis for such a finding. However, in his submissions on mitigation to the trial court Mr. Mabila told the court that the appellant, who was a driver for a company, travelled between Swaziland, Mozambique and South Africa and at the border gate between Mozambique and Swaziland had met "an Indian fellow" who had promised him an incentive for conveying the mandrax. Having regard to the very large number of tables – 25 000 – which obviously were not for his own use, the inference is irresistible that in conveying them, and seeking to keep them hidden while doing so, he was acting as a courier for a supplier. There was thus no misdirection on the learned Judge's part.

Mr. Mabila further contended that the learned Judge had not considered the factors advanced by him in mitigation of sentence. In a careful and well-reasoned judgment on sentence, Maphalala J, indeed did advert to all the mitigatory factors which Mr. Mabila also advanced. They are also those advanced by him in this Court. He took into account the fact that the appellant was a first offender and had shown remorse by his plea of guilty. He, however, also pointed to the fact that the penalty laid down in Section 12(1)(a) of the Act for possession of a potentially harmful drug such as mandrax was, in the case of a first offender, a fine not exceeding

E15 000 or imprisonment not exceeding 15 years. The offence is therefore regarded in a most serious light by the Legislature. He also drew attention to the fact that drug trafficking and the taking of drugs by the youth of the country was rampant. Sentences with a sting were therefore appropriate to act as deterrents to would-be offenders. To be effective courts' sentences should be attuned to current criminal trends. With all these comments I am in complete agreement Mr. Mabila also referred this Court to sentences in a number of other cases notably that in REX V BILAL AHMED ABDUL AZIZ KASKAR CRIMINAL TRIAL NO.214/94 (unreported) where an accused who was found in possession of 79,671 tablets was sentenced by Twala J to six years or E6 000,00 fine of which two years or E2 000,00 was conditionally suspended. Mr. Mabila urged this Court to follow that and other cases where lesser sentences than the present had been imposed.

It has been held time without number by this Court that sentencing is a matter entirely within the discretion of the trial court and that a court on appeal will only interfere with that discretion where there has been a misdirection by the trial court or it has imposed a sentence which is excessive in the sense that there is a substantially discrepancy between it and the sentence which the court of appeal would have imposed had it been sitting as the court of first instance. *In casu* there is no misdirection by the trial court.

The final question then is: Was the sentence excessive? Having regard to the very large quantity of tablets involved and the fact that the appellant was importing them into Swaziland, obviously for distribution here, and to the prevalence of the offence to which the learned Judge referred, a custodial sentence was clearly warranted. Nor, given the penalty provisions for the offence contained in Section 12(1)(a) of the Act, can a sentence of seven years imprisonment, two years suspended, be considered as remotely excessive. True, it is a more severe sentence than in the Kaskar case, where the number of tables was greater than in

the present one but that case was decided eight years ago in 1994 and the prevalence of the offence in question has increased since then. In any event each case depends on its own
merits and, as stated, the sentence lies within the discretion of the trial court. As there is no basis for interfering with that discretion in this case, the sentence of the trial court must stand.

I said earlier that I would return to the grounds for the present application for leave to appeal as Mr. Mabila's conduct in regard thereto in my view requires some comment. He was a party to the Statement of Agreed Facts and was not only content that the proceedings before the trial court should be conducted on the basis of it but indeed expressed the desire that that should be so. To now wish to attack those proceedings as being invalid amounts to conduct which falls short of the ethical standards this Court would expect from practitioners of standing. Mr. Mabila sought to justify his approach by telling this Court that his intention in raising the point was to have the matter referred back to the court *a quo .* I have great difficulty with that statement. In his heads of argument Mr. Mabila says, "In conclusion, both the conviction and sentence have to be set aside and the appeal upheld". There was no suggestion anywhere that the matter should go back to the court *a quo* until this Court questioned him on the propriety of his actions. In my view, Mr. Mabila's conduct is deserving of this Court's strong disapproval.

In the result, therefore, the appellant's application for leave to appeal against his conviction is dismissed as is his appeal against his sentence. The conviction and sentence are accordingly confirmed.

DELIVERED IN OPEN COURT THIS DAY OF NOVEMBER 2002.

_____
P.H. TEBBUTT
Judge of Appeal

I agree _____

R.N. LEON
Judge President

I agree

_____
J.H. STEYN
Judge of Appeal