IN THE HIGH COURT OP SWAZILAND

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| In the appeal of: | Criminal Appeal No. 15/82 |
| THE KING | Respondent |
| VS | |
| PETROS NKONTANE | Appellants |
| | MADOEA NKAMBULE |
| CORAM: | NATHAN C.J. |
| | HASSANALI J, |
| FOR RESPONDENT: | NSIBANBE |
| FOR APPELLANTS: | EAHNSHAW |

JUDGMENT

Delivered on 10th September, 1982

NATHAN C.J.

The two Appellants were charged with contravening Section 2 read with Section 25 of Legal Notice No.13 of 1981 in that either one or both of them did wrongfully and unlawfully import 160 bags of onions from the Republic of South Africa without an import permit- They were convicted and sentenced to imprisonment for forty five days. This is an appeal against the severity of the sentence.

The charge in this case was inaccurately drawn. Regulations were originally promulgated under Section 6 of the Public Health Act (Chapter 86 in 1935 and these, with amendments, continued to be in force after the passing of the present Public Health Act 5/1969. By Legal Notice No.12 of 1981 the Regulations were



amended in various respects. There was an alteration to Regulation 1, which became Regulation 1 bis, and the insertion in that Regulation of a new sub-paragraph (e) which empowered the Minister inter alia by notice in the Gazette to prohibit the importation into Swaziland of any animal, article or thing, from any place or area outside Swaziland, which place, area, animal, article or thing he considers to be infected with certain named diseases, of which cholera is one. A new Regulation 24 was inserted, which provided that a person who contravened any instruction, order, requirement or notice issued or made under the Regulations should be guilty of an offence. A new Regulation 25 provided that a person convicted of an offence under the Regulations should be liable to a fine of E100 or imprisonment for three months or both. There was also a new Regulation 26 dealing with the forfeiture, destruction or disposal of the animal, article or thing, in question.

In section 1 of Legal Notice No.12 of 1981 it was provided that these Regulations may be cited as the Public Health (amendment ) Regulations, 1981, shall be read as one with the Public Health Regulations, 1935, and shall come into force on 23rd February, 1981.

In Legal Notice No.13, promulgated on the same day, 19th February, 1981 as Legal Notice No.12 of 1981 it was provided in paragraph 2 that "The importation from the Republic of Sought Africa or the Peoples Republic of Mozambique with Swaziland of any vegetables or fruits in an unprocessed state or the conveyance of such fruits or vegetables withing Swaziland is hereby prohibited".

It will be appreciated from the above survey that the charge correctly referred to Section 2 of Legal Notice No.13 of 1981; but the reference to Section 25 of that Legal Notice was incorrect. The reference should have been to Regulation 25 of the Public Health (amendment) Regulations 1981, or to Regulation 25 of the Public Health (Regulations, 1935, as amended by Legal Notice No.12 of 1981.

However, as it is clear that the offence charged was fully understood by the Accused and there has been no prejudice, I do not think it is necessary to amend the charge.

It appeared from the evidence of Sub-Inspector Gule that the two Accused had purchased 160 pockets of onions from a South African from Piet Retief in the Republic of South Africa. A receipt in respect of the purchase in the sizeable amount of E528.00 was produced.

The first Appellant stated in evidence that he had been sent, presumably to make the purchase, by Prince Masitsela; and the second Appellant said he had been sent by Prince Masitsela to accompany the first appellant to collect the onions from South Africa. Each of the appellants was aware of the ban on the importation of vegetables from South Africa.

It must be assumed that the evidence of the appellants in regard to having been sent by Prince Masitsela is correct. There is nothing in the evidence to justify the inference that the Appellants had not been sent by Prince Masitsela to make the purchase as they alleged. The purchaser on the receipt was stated to be "Dlamini". The Magistrate in his reasons for judgment said "The Accused persons were in organised breached of the law and being in full control of their mental faculties they were in the service of a Prince who they thought could be used as a cover". This appears to suggest



that the Magistrate accepted that the Appellants had been sent toy the Prince. On this "basis there would be no question of using the Prince as a cover. If the Magistrate intended to suggest that using the Prince as a cover aggravated their action, then I disagree. The Appellants may well have considered that it was a mitigating factor, if not a complete defence,that they were carrying out the instructions of a Prince.

It is of course clear that effect must be given to the legislation by every person, be he Prince or beggar. But the Appellants may not have realised this.

In regard to the offence generally, the Magistrate said "Eight thinking citizens of the kingdom will undoubtedly support a deterrent sentence for the accused persons for their deliberate and conscious breaches of the importation laws. I am of the opinion that the magic first offenders palance (query whether he means "parlance " or "balance") is purely academic in this very exercise and legislation".

I am not impressed by this high-flown verbiage.

The. Magistrate correctly regarded this as important legislation, although, there is a body of opinion which is of the view that the legislation goes too far and is unnecessary in order to achieve its professed purpose. But as long as it remains on this statute book effect must be give to it. But on the question whether the present case called for a sentence of imprisonment without the option of a fine, I am of the opinion that the Magistrate over-looked or at least had insufficient regard to several important factors.

Each of the appellants was a first offender, the first appellant being, according to the charge sheet, 32 years old, and the



second appellant 19. The first appellant stated in mitigation that he is sick and has children, and the

second appellant said that he is still attending school and wants to go to University. The Magistrate does not appear to have had regard to these factors at all.

It was, furthermore , stressed in S v Shirindi, 1944(1) S.A. 481 (1) and in R v Fitzwana, 1974(1) S.A. 479(I) that imprisonment for first offenders should only be imposed in extreme cases. The reason, as has frequently been pointed out, is the danger of first offenders being brought under the influence of other criminals. Viewed from a slightly different aspect it has been laid down in a number of cases that imprisonment should be resorted to only when there is really no suitable alternative. See S. v Shange, 1976 (2) S.A. 81(c),S. v Mafuya, 1972(4) S.A. 565 (o), S. v Cenkic , 1968(2) S.A. 541 (c) ; S. v Bepela 1978 (2) S.A. 22 (B.H.) At least two suitable alternatives to imprisonment without the option of a fine suggest themselves - either a fine or in default of payment imprisonment, or such fine with a suspended sentence of imprisonment. I do not consider that the legislation calls for any harsher penalty than that commonly imposed for contraventions of the Opium and Habit Forming Drugs Act. It is to be noted, indeed, that the maximum penalties prescribed under the legislation I am now considering are far less stringent than those imposed under the Opium and Habit Forming Drugs Act.

As the Magistrate has erred in several important respects this Court is at large to impose a suitable punishment. Having regard to all the circumstances I think that the convictions should be confirmed but the sentences altered in the case of each Appellant to a fine of E90 , or failing payment to imprisonment for one month. It will be so ordered.



C. J. M. NATHAN

CHIEF JUSTICE

I agree :

SIGNED: J. HASSANALI

JUDGE