

IN THE HIGH COURT OF SWAZILAND

In the matter between: REVIEW CASE NO. 223/86

THE KING

VS

BOY PHIRI

MATSEBULA MAMBA & PARTNERS

ATTORNEYS COMMISSIONERS OF OATHS

SWERN APPRAISERS

ADMINISTRATORS OF ESTATES

2ND FLOOR DHLANU'BEKA HOUSE

P.O BOX 657

MBABANE

CORAM: HANNAH, C.J.

FOR THE CROWN: MR. HASELDON

FOR DEFENCE: ACCUSED IN PERSON

JUDGEMENT ON REVIEW

(Delivered on 19. 11. 86)

HANNAH, C.J.

On 15th October, 1986, the accused was sentenced by the Pigg's Peak Magistrate to a fine of E300 or three hundred days in default for the unlawful possession of 14.85 kilograms of dagga. Two thirds of the sentence was suspended on the usual conditions and the accused therefore escaped with an effective fine of E100 for what, on any view, was a serious offence under the Opium and Habit Forming Drugs Act 1922. The case has been set down for review to consider whether the sentence should be increased.

Unlawful possession of dagga falls to be punished under Section 8(1) of the Opium and Habit Forming Drugs Act. That section provides that a person who contravenes, inter alia, section 7 of the Act shall be guilty of an offence and shall be liable on conviction:

"to a fine not exceeding two thousand Emalangeneni or, in default of payment thereof, imprisonment

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not exceeding five years or such imprisonment without the option of a fine, or both such fine and imprisonment."

By virtue of Section 8(2) any Magistrate's Court of the First Class is empowered to impose the maximum sentence regardless of any limitation of jurisdiction imposed by the Magistrate's Court Act.

Prior to the King's Order - in - Council No.2 of 1976 the maximum fine for unlawful possession of dagga was E500 and the maximum sentence of imprisonment three years and it is clear from the increase in these limits that the unlawful possession of dagga and other drugs is regarded by the Legislature in a very serious light. However, assessing the culpability of the individual offender is no easy task. From the dagga cases which come before this Court on automatic review it is clear that there is little uniformity in sentencing policy and that generally the Magistrate's Courts take a far too lenient view of the offence. The present case is a prime example.

The circumstances in which an offender may be found to be in possession of dagga will vary enormously from case to case and the proper sentence to be passed will vary accordingly. Without attempting to be exhaustive the following are the more obvious factors which should be considered:

a) Dagga for personal consumption only. This can normally be inferred from the amount possessed. If only a small quantity of dagga is involved being for personal consumption and the offender

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has no previous record of unlawful possession of drugs a fine will normally be an appropriate sentence.

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) The wholesale supplier. This offender should be regarded as standing at the top end 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.

d) The wholesaler's distribution network. Inevitably the wholesaler requires a number of couriers who play a vital role in his distribution network. These persons are motivated purely by financial gain and, not infrequently, will include persons whose background

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it is thought will lead to leniency on the part of the courts. Thus one will find youths or elderly women being used as couriers. Those who engage in dagga trafficking should not expect to be dealt with leniently. Normally they should be dealt with by way of a substantial custodial sentence.

e) The retail supplier. This offender is as vital to the distribution network as the courier and for him the profits to be made are probably greater. He also should normally be dealt with by a substantial custodial sentence.

f) The isolated transaction. A distinction should normally be drawn between the offender who is engaged in an isolated transaction and one who is part of a continuing enterprise. Depending on the scale of the transaction the sentence in such a case should be somewhat less and a partly suspended sentence may be considered.

g) The social supplier. This is the offender who supplies but has no motive of financial gain. An example is the person who hands out "reefers" or "joints" at a party. Depending on the circumstances a non-custodial sentence may be justified.

h) The reason for the offence. There is, of course, a distinction to be drawn between a wealthy

farmer who is cultivating dagga as a profitable sideline and a poor family which is supplementing subsistence farming by illegal cultivation. However, the courts

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should not fall into the trap of thinking that because cultivation of dagga represents the sole means of livelihood of a rural family it must be unduly lenient. Cultivation and possession of dagga is a criminal offence and Parliament clearly regards it as the cause of social evil. Those who choose to make it their means of livelihood, even though the alternatives may not be great or attractive, must recognise that they face sentences of imprisonment.

i) the circumstances of the offender. As with any other crime the circumstances of the offender must be put in the balance though the weight to be attached may, as I have pointed out, depend on the general circumstances of the offence.

j) The public interest. Under this head the court should consider the extent of dagga abuse and the prevalence of the offence. I have been informed by the officer in charge of the Piggs Peak drug squad that currently the cultivation and supply of dagga in that area is rife and that on the black market dagga is sold for fifty cents for a small box or packet containing 10 grammes and for E400 for a sack. The dagga in the present case has a black market value of E700 and it would realise substantially more in the Republic of South Africa. The officer has also said, and I accept his evidence, that the extent of the abuse is such that even school children smoke dagga leading to anti-social behaviour both at school and at home.

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I now turn to the facts of the present case. The accused was spotted by a police officer together with two other men carrying a bag in the Nkamazi area at Piggs Peak. The three dropped the bag and ran off but when the police officer shouted the accused returned. He was questioned by the police officer but again ran off and as the police officer was acting as escort to some women he was unable to give chase. He was later arrested. In fact two bags were abandoned by the accused and his accomplices and it was discovered at the police station that they contained 14.85 Kilograms of dagga.

In mitigation the accused, who is responsible for various members of his family, said that he had been unemployed since 1984 and committed the offence because he had no money. It was, he said, the first time he had committed such offence and the prosecution confirmed that he had no previous convictions.

It is clear both from the quantity of dagga involved and from what the accused said in mitigation that he was concerned in the distribution of dagga for financial gain. On the scanty information available it cannot be decided what his precise role was. He says that he expected to receive E160 upon selling the dagga but he gave no more detail. In view of the fact that the dagga in his possession was worth approximately E700, it is clear that he was either a retailer or a courier in a network where considerable profits were at stake. It is a case where the only

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appropriate sentence was an immediate custodial sentence. A financial penalty alone was, in my view, not only wrong in principle but was glaringly inadequate. In these circumstances, this Court is not only empowered but has a duty to increase the sentence.

In view of the fact that the accused, initially at any rate, behaved responsibly by responding correctly to the police officer's call for him to stop and that by pleading guilty he showed remorse it is possible to suspend part of the sentence. I therefore order that for the sentence passed by the learned Magistrate there be substituted a sentence of three years imprisonment of which eighteen months will be suspended for three years on condition that the accused is not convicted of any offence contrary to section 7 of the Opium and Habit Forming Drugs Act 1922 or Section 12 of the Pharmacy Act (as amended) committed during the period of suspension. The fine of E100, if paid, must be refunded.

N.R. HANNAH

CHIEF JUSTICE