IN THE HIGH COURT OF SWAZILAND

In the matter between:

Crim. App.4/89

SIBONGILE DLAMINI — 1st APPELLANT
EDWARD DUMISANE SIMELANE — 2nd APPELLANT

VS

THE KING — RESPONDENT

CORAM: — DUNN.J

FOR APPELLANTS — MR. FLYNN
FOR RESPONDENT — MR. NSIBANDZE

JUDGMENT

15/09/89

Dunn, J

The two appellants together with the first appellant's husband (Austin Sangoma Dlamini) were charged as follows before the Senior Magistrate (the late Mr. Okaya)-Count 1

The accused are guilty of the crime of contravening Section 12 (1) (a) as read with Section 12 (1) (1) of the Pharmacy (Amendment) Act 1983 (unlawful possession of Harmful Drugs) in that upon or about the 22nd March 1987 and at or near Matsapha Airport in the Manzini District, the said accused, each or all of them acting with common purpose did wrongfully and unlawfully possess 50,000 tablets containing methaqualone, a potentially harmful drug.

Count 2
The accused are guilty of the crime of contravening Section 113 (1) (e) of the Customs, Fiscal, Excise and Sales Duties Act 1971 as read with Section 2(1) (a) of Act No. 37 of 1922 (unlawful importation of habit forming drugs) in that upon or about the 21st March 1987 and from at or near Nairobi, Kenya, and to at or near Matsapha Airport, Swaziland, in the district of Manzini the accused each or all of them or acting with common purpose did wrongfully and unlawfully import to Swaziland 50,000 tablets containing methaqualone a habit forming drug.

Count 3
The accused are guilty of the crime of contravening Section 81 of the Customs, Fiscal, Excise and Sales Duties Act 1971 (unlawful failure to declare goods the importation of which is prohibited) in that upon or about the 22nd March 1987 and at or near Matsapha Airport in the district of Manzini the accused each or all of them or acting with common purpose did wrongfully and unlawfully fail to declare goods viz 50,000 tablets containing methaqualone, the importation of which is prohibited.

The appellants together with Austin Dlamini pleaded not guilty to the charges. At the conclusion of the trial Austin Dlamini was found not guilty and was acquitted on all three counts. The first appellant was convicted on all three counts.

The second appellant was convicted on counts 1 and 2 and was acquitted and discharged on count 3.

The Senior Magistrate committed the appellants to the High Court for sentence in terms of Section 292 of the Criminal Procedure and Evidence Act No. 67/1938 on the grounds that "the quantity of the drugs involved . in this case is such that the question of sentence would be more appropriately dealt with by their Lordships in the High Court." On the 7th June 1988 Rooney J set aside the committal of the appellants for reasons which are fully set out in his judgment dated 24th June 1988. The case was in effect remitted to the Senior Magistrate to proceed with the question of sentence. The Senior Magistrate died before dealing with the matter. The case was then placed before the Principal Magistrate Mr. Van Loggerenberg who proceeded to pass sentence on the appellants as follows

1st Appellant
Count 1: 6 years imprisonment
Count 2: E1.000 or 12 months
Count 3: E2.000 or 2 years.
2nd Appellant
Count 1: 6 years imprisonment
Count 2: E1.000 or 12 months.

The present appeal is against the conviction and sentence. The notice of appeal (as amended) is a lengthy and highly repetive document the gist of which is so far as conviction is concerned is that
Ad Count 1
1. the crown failed to prove that the appellants were in possession of the tablets.

2. the crown failed to prove that the tablets that were analysed and found to contain methaqualone and which were subsequently exhibited in the court a quo were the tablets that were taken from the appellants.

In so far as the sentence is concerned, it is submitted that "the sentence is excessive and renders a sense of shock."

It is necessary at this stage that I deal with certain aspects of the charges as framed. In so far as count 1 is concerned the reference in that count should have been to a contravention of Section 12 (1) (a) of the Pharmacy Act No. 38/1929 as amended by Act No. 6/1983. The reference to the penalty clause, section 12 (1) (b) (i) (wrongly set out in the charge as section 12 (1) (1)) was totally unnecessary. Section 12 is headed "unlawful possession or conveying of or dealing in poisons or potentially harmful drugs." Methaqualone is deemed to be a potentially harmful drug under the Act and should have beend described as such throughout count 1 and not as a harmful drug.

In so far as count 2 is concerned the charge as framed does not make any sense and I am at pains to understand how the appellants were called upon to plead to it. Section 113 of what should have been cited as The Customs and Excise Act No. 21/1971 prohibits the importation into Swaziland of various classes of goods. The class of goods referred to under Section 113 (1) (e) is "prison - made and penitenttary made goods." I can only say that I have heard of the type of tablet in question being manufactured in back street laboratories and not in prison.

It could be that it was intended to refer to Section 113 (1) (f). The goods set out under* subsection (f) are (goods the import of which in terms of this Act or any other law require to be authorised by a permit, certificate or other authority, unless imported under such permit, certificate or other authority which purports to have been issued thereunder." The Customs and Excise Act does not specifically prohibit the importation of methaqualone or potentially harmful drugs and the crown then set out to identify Section 2 (1) (a) of the Opium and Habit Forming Drugs Act No. 37/1922 as a law under which the importation of the tablets containing methaqualone was prohibited. Section 2 (1) (a) of the Opium and Habit Forming Drugs Act reads-

(1) Save as provided in this Act, no person shall-

(a) import , export, produce or manufacture, or assist in, or permit or allow, the importation, exportation, production or manufacture of any habit forming drug.

The definition of "habit formingdrug" is given under Section 15 of the Act. Methaqualone is not one of the substances set out under the section. If it was the crown's contention that methaqualone is a salt or derivative of any of the drugs set out under that section the allegation should have been set out in the charge in order to fully apprise the appellants of the charge against them. Methaqualone as earlier pointed out is classified as a potentially harmful drug under the Pharmacy Act. The Pharmacy,Act does not prohibit the importation of potentially harmful drugs. It is clear therefore that even assuming that

the reference to Section 113 (1)(e) was an error and should have been to Section 113 (1) (f), the charge is still lacking in an essential averment namely that the importation of Methaqualone is prohibited by a particular law. Methaqualone cannot be brought within the ambit of Section 2 (1) (a) of the Opium and Habit Forming Drugs Act No. 37/1922.

Turning to count 3, Section 81 of the Customs and Excise Act deals in part with the failure "to declare any dutiable goods or goods the importation or exportation of which is prohibited or restricted under any law." It was necessary for the Crown for purposes of preferring a coherent charge and in fairness to the appellants to specify the law by which the importation of Methaqualone is prohibited. It was further necessary for the crown to specify which of the two offences, created by Section 81, the appellants were being charged with.

I will now proceed to consider the evidence which was led at the trial to ascertain whether the charges as framed were proved beyond reasonable doubt. Consideration will at the same time be given to the question as to whether any of the deficiencies in the charge sheet (counts 2 and 3 in particular) were cured by the evidence.

The first appellant's husband was employed by Royal Swazi National Airline (R.S.N.A.) as the Personnel and Training Manager and was stationed at Matsapha Airport. The second appellant was employed by Royal Swazi National Airline and was based in Nairobi, Kenya. The first appellant was involved in the operation of a retail outlet in Manzini styled Alladins Carve.

In the afternoon of the 22nd March 1987 members of the Royal Swaziland Police, based at the airport, carried out routine checks of the cargo that had arrived from Nairobi on flight No. ZC 305.' Two bales were placed in an X-ray machine and it was observed that the bales contained tablets.

Later that afternoon the first appellant and her husband reported to Sipho Mkhonta, a cargo assistant and enquired whether or not their goods had arrived on the Royal Swazi National Airline flight that afternoon. Mkhonta confirmed that the goods had arrived and handed an airway bill to the first

appellant's husband for him to comply with the customs formalities. The airway bill reflected the second appellant as the consignor and the first appellant as the consignee. The first appellant and her husband left Mkhonta's office. The first appellant returned to Mkhonta after complying with the customs formalities and the two bales containing what was described on the airway bill as sisal baskets were handed to the first appellant. The two bales were placed outside the cargo section by the first appellant whilst her husband drove his vehicle from the parking lot to where she was.

At that stage customs officers walked up to the first appellant and requested permission to inspect the two bales. According to one of the officers, Sabelo Nhlengethwa, the first appellant "refused saying that the bags were ready to be taken to Johannesburg."

Some police officers arrived on the scene and the bales were opened. The two bales contained sisal bags, the precise number of which is not clear. According to Nhlengethwa the first bale contained forty two sisal bags. The second bale

8

had 27 bags. According to this evidence the total number of sisal bags was 69. According to Detective Inspector Mghabi 67 sisal bags were found. Inside the sisal bags a total of 50 packets containing tablets were found. The tablets were counted and according to 1273 Detective Inspector Mghabi "each packet contained 1030 tablets while others contained 1020 tablets. I took the average average of 1000 tablets per packet. I came to this conclusion after counting tablets in four of the packets." The appellants were charged with the possession of 50,000 tablets. The police should have counted the tablets and arrived at a fixed number and not at the average number. The police questioned the first appellant and she denied knowledge of the tablets stating that she only knew of the sisal bags which she had requested the second appellant to purchase and send on her behalf to Swaziland. The first appellant's husband equally denied knowledge of the tablets.

The second appellant learnt of what had transpired and on his return to Swaziland he reported to the police. He admitted having sent sisal bags to the first appellant but denied all knowledge of the tablets. The tablets and sisal bags were siezed by the police and the appellants were charged accordingly.

According to Mghabi, the tablets "were taken to the police station (Manzini), From the police station, the tablets were sent to Pretoria for analysis." Mghabi was cross-examined by Mr. Lukhele for the appellants on this aspect of his evidence and the record reflects the following-

9

Q. When were the packets sent to Pretoria for analysis?
A. I have forgotten the date. They were sent by police headquarters.
Q. You didnt see them sent to Pretoria?
A. I did not.

By consent, an affidavit by one Brigadier Heinrich Strauss of the South African Police attached to the Forensic Science Laboratory, Pretoria was handed into court as part of the evidence. In the affidavit Brigadier Strauss sets out that he received a parcel from the Swaziland Police Headquarters on the 25th March 1987. The parcel contained 50 plastic bags. The bags contained "a quantity of tablets, broken tablets and powder." On analysis Brigadier Strauss found

> "1. the total mass of the tablets, broken tablets and powder in the 50 plastic bags to be 21517,98g. Calculated according to the average mass of one tablet, this mass (21517,98g) is equivalent to forty nine thousand three hundred and thirty one (49 331) tablets. 2. the exhibits to contain methaqualone."

There was no evidence whatsoever linking the tablets which were siezed by the Police at the airport with the "tablets, broken tablets and powder" which Brigadier Strauss was asked to analyse . The crown made no effort to remedy the deficiency in its case which became obvious, When detective Inspector Mghabi was cross-examined about the tablets. The onus of proving that the tablets that were analysed were the tablets

10

that were siezed at the airport, rested on the crown and in the absence of any formal admissions by the defence it was necessary for the crown to lead evidence of the sealing and conveyance of the tablets from the police headquarters to Pretoria. The need for clear and satisfactory evidence in this respect cannot be over-emphasized. The police may be called upon to deal with several cases involving considerable numbers of tablets which have to be analysed and it is essential in the circumstances to ensure that the exhibits are carefully labelled and monitored to rule out or minimize incidents of error. As it is in the present case no explanation was given as to where the broken tablets and powder came from or as to the difference in the number of tablets testified to by Mghabi and that calculated by Brigadier Strauss.

The evidence on counts 2 and 3 was simply that the appellants did not declare the tablets to the customs officer. There was no mention of the being either dutiable or prohibited in terms of the Customs and Excise Act.

The appellants gave evidence on oath in the court a quo . The first appellant denied all knowledge of the tablets. She told the court that she telephoned the second appellant in Nairobi and requested him to send 100 sisal bags to her and promised to pay him at a later date. The first appellant denied that she refused to have the bales inspected. She explained that she wished to keep the bags intact because there was a lady who was going to take the bags to Johannesburg.

11

The second appellant's evidence was to the effect that -he did not have sufficient money to purchase the 100 bags requested by the first appellant. He purchased 80 bags at a market in Nairobi. The bags were left with a woman at the market in order that leather straps be attached to the bags. On the following morning the second appellant collected the bags. They were contained in two sacks which were sealed. The second appellant drove to the airport and complied with the necessary formalities to have the two sacks consigned to the first appellant. The second appellant gave details of how the sacks were removed by the porters from his vehicle, weighed and labelled. He was not personally responsible for the labelling of the sacks and stated that there were other consignments of sisal bags at the airport, destined for Swaziland.

The second appellant explained that the sisal bags which were eventually received by the first appellant were not the bags he purchased and suggested that there could have been an error at Nairobi airport when the bags were weighed and labelled. He pointed out that the number of bags found at Matsapha airport did not correspond with the number (80) he had purchased in Kenya.

In convicting the first appellant on count 1 the senior magistrate relied solely on the evidence of her refusal to grant permission to the customs officers to search her consignment. Unfortunately, the senior magistrate allowed himself to be carried away by the unfounded play on this aspect of the evidence by crown counsel. The evidence of Nhlengethwa which I set out earlier was that the. first appellant refused to have the two bags searched.

12

When the first appellant was crossed examined (page 47 of the record) the following was put to her

Q. You heard Nhlengethwa (PW2) say in his evidence that you persistently pleaded with customs officials not to search the bales?

A. Yes

Q. I put it to you that you pleaded with them not to do the searching.

A. I did not plead with the customs officials not to search the bales.

This cross-examination should not have been allowed as it was not what Nhlengethwa had stated in his evidence. At page 67 of the record the following appears in the submission by crown counsel- "coming to accused no.1 (first appellant) if one looks at her behaviour at the airport when the bales arrived she pleaded with the officials not to search the two bales because she was in a hurry to send them to Johannesburg. She did all this becuase she knew the contents of the bags and tried to avoid a search." In his reasons for judgment the senior magistrate stated-"Nhlengethwa goes on to state that he followed her (first appellant) in company of other custom officers to where the goods were.

When they asked to search the bags the first accused refused saying that the bags were ready to be taken to Johannesburg. Nhlengethwa stated that they persisted on searching the bags despite the first accused's (first appellant) pleas."

13

It is abundantly clear from the senior magistrate's reasons for judgment that the inference which he drew was not from evidence led at the trial and was accordingly not justified. The first appellant was perfectly justified in refusing a search for the reason she gave to the customs officers. She did not wish to have the bags re-packed before sending them to Johannesburg. In any event the first appellant could not have had the last word with regard to a search as the customs officers have power to search goods in terms of the Customs and Excise Act without the consent of the owner thereof.

In so far as the second appellant is concerned, his evidence was summarily rejected on the grounds that the possibility of an error in the weighing and labelling of the consignment was too remote. Crown counsel in his submissions, introduced his personal knowledge of Nairobi airport and submitted "Kenya is amongst the better development (sic) countries in Africa and the. Airport in Nairobi is one of the major ones in Nairobi (Africa?) It is therefore better administered than the confused situation accused no.3 had indicated. The "I dont care" attitude described by accused no.3 of the parcels he sent after he spent his own .... money is unreasonable."

The senior magistrate was pursuaded by this submission and stated at page 83 of his reasons for judgment-

> "It would be ridiculous to assume (as was indicated by the learned prosecuting counsel) that the situation at an international airport like Nairobi Airport is so chaotic that goods are misaddressed."

14

No onus rested on the appellants to convince the court of the truth of their evidence. It was stated in the case of. R v Difford 1937 AP 370 that if an accused gives an explanation. "even if that explanation is improbable, the court is not entitled _to_ convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled. to his acquittal." The only reason given for rejecting the second appellant's evidence was that errors such as he testified to were not possible at Nairobi Airport. Unfortunately no evidence was given by the crown to establish that that was in fact the position.

Rejecting as I do the senior magistrate's reasoning in drawing the inferences he drew in convicting the two appellants on count1, an essential element of the offence namely mens rea is then lacking. What this amounts to is that the crown failed to prove that the appellants had knowledge of the tablets in the consignment. On this basis the appellants could not be convicted on count 1. As I have also pointed out the crwon failed to establish that the tablets siezed at the airport were the same tablets that were analysed at the Forensic Science Laboratories, Pretoria.

The appeal in respect of count 1 is allowed. The conviction and sentence are set aside.

I have already dealt with certain aspects of counts 2 and 3. Nothing emerged in the course of the crown's evidence to cure the deficiencies I pointed out. This factor taken alone would be sufficient for setting aside the conviction and sentence on

15

these two counts. There is, however, the further factor that the crown failed to prove that the two appellants had knowledge of the tablets in the sisal bags. It is not necessary for me in the circumstances to deal with the submissions regarding possession and importation of the tablets by the second appellant who was in Nairobi at the relevant time.

The conviction and sentence on counts 2 and 3 are set aside.

Consideration should in my view be given by the office of the Attorney General to amending the Pharmacy Act to deal with the question of the imporation of potentially harmful drugs along the lines of Secion 2 (1) of the Opium and Habit Forming Drugs Act No. 37/1922.

B. DUNN

JUDGE.