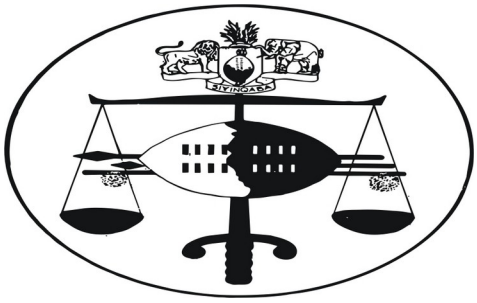

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CRIM. CASE NO. 6/2009

In the matter between:

CHRISTOPHER NKAMBULE **APPELLANT**

v

REX **RESPONDENT**

CORAM : Q.M. MABUZA
FOR THE APPELLANT : IN PERSON
FOR THE RESPONDENT : MR. P. MDLULI OF THE DIRECTORATE OF PUBLIC PROSECUTIONS

JUDGMENT
02/03/20106/2009

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[1] The Appellant was convicted and sentenced on the 15 January 2009 in the Magistrates Court in respect of two counts namely:

Count 1: He was found guilty of the offence of contravening section 12 (1) (a) as read with section 12

(10 (c) of the Pharmacy Act 38/1929 (unlawful possession of a poison or potential harmful drug) as amended.

> **"In that upon or about the 08th September, 2008 and at or near Mhlangeni area in the Manzini Region, the said accused person not being the holder of a licence or permit to possess dagga did wrongfully, unlawfully and intentionally possess 96.2 kg of dagga, a poison or potentially harmful drug and thus contravene the said Act.**

Count 2: He was found guilty of the offence of contravening section 2 (1) (b) read with section 8 (1) of the Opium Habit Forming Drug Act 37/1922 as amended.

> **"In that upon or about the 08th September, 2008 and at or near Mhlangeni area in the Manzini region, the said accused person not being a holder of a licence or permit to cultivate dagga, did wrongfully and unlawfully and intentionally cultivate or allow the cultivation of 1 226 plants of dagga a Habit Forming Drug and did hereby contravene the said Act.**

[2] The Appellant pleaded guilty in respect of both counts. He was found guilty in respect of both counts and was sentenced to 3 years imprisonment without an option of a fine in count 1 and sentenced to 2 years

imprisonment without an option of a fine in count 2. The sentences were ordered to run consecutively and were backdated to 9th August 2008.

[3] The Appellant who was unrepresented initially filed an appeal against his conviction. When he filed his heads of argument he amended this ground of appeal to that of requesting this court to order that the sentences run concurrently and to give him an option of a fine.

[4] When he addressed the court he re-iterated his wish to have the sentences to run concurrently so that he could be released early from custody. He informed the court that he had two young children who depended on him. He requested the court to give him an option of a fine.

[5] It appears from the evidence that before the present sentence, the Appellant was convicted and sentenced for having committed the same offence as the present one on the 30 January 2008. He served a custodial sentence and upon release he committed the same offence within a year of his release.

[6] Mr. Mdluli for the Crown correctly submitted that the ***court aquo*** could not give the Appellant an option of a fine because of the recent (fresh) previous conviction of

the same offence namely contravention of the same acts as in the present case.

[7] Mr. Mdluli further submitted that ordering that the two sentences run consecutively was proper in that the offences committed related to two separate statutes namely; contravention of the Pharmacy Act 38/1929 and the Opium and Habit Forming Drugs Act 37/1922. He submitted further that the two statutes each had their own separate penalties. We agree with Mr. Mdluli's submission.

[8] Section 12 (1) (11) of the Pharmacy Act provides that the sentence for a second or subsequent offender is imprisonment not exceeding twenty (20) years. The sentence of five years imprisonment for the infringement of the Pharmacy Act is in our view proper in the circumstances.

[9] Section 8 (1) of the Opium and Habit Forming Drugs Act 37/1922 provides for a maximum of five (5) years imprisonment. The sentences of two years imprisonment is in our view proper in the circumstances.

[10] It is further our view that the sentence of imprisonment without the option of a fine is appropriate. The Magistrate correctly held when he stated

> "that means the accused has not learnt from the previous conduct in which he was punished from the same offence. To make matters worse is that this was only a year ago".

[11] It is our further view that the ***court aquo*** did not err when it held that the sentences should run consecutively. As correctly pointed out by Mr. Mdluli the Appellant infringed two separate pieces of legislation with separate penalties.

[12] However, what is of paramount importance is that the Appellant does not seem to have learnt a lesson from the previous punishment. Perhaps a longer custodial sentence will help him mend his ways; that drug trafficking is a serious offence. The Magistrate correctly held that the large amounts of dagga (96.2 kg) and cultivated plants (1,226 plants) were for commercial use.

[13] Finally, the sentence meted out by the learned Magistrate does not induce a sense of shock. Appeal Courts are loathe to interfere with such sentences; as sentencing is within the discretion of the trial court

unless the sentence is startingly inappropriate. We hold that the sentence imposed by the learned Magistrate is appropriate in the circumstances.

[14] The appeal is dismissed and the sentence is confirmed.

Q.M. MABUZA
JUDGE OF THE HIGH COURT OF SWAZILAND