THE HIGH COURT OF SWAZILAND

REX

VS

WILLIAM TOUCH DLAMINI

Criminal Case No. 160/2002

Coram	S.B. MAPHALALA – J
For the Crown	MR. P. DLAMINI
For the Accused	MR. MABILA

JUDGEMENT ON SENTENCE

(12/07/2002)

The accused in this matter was charged with and have pleaded guilty to contravention of Section 12 (1) (a) of the Pharmacy Act as amended by the Pharmacy Amendment Order No. 11 of 1993. The court has convicted him of the said charge after the crown has accepted the plea of guilty and a statement of agreed facts was entered by consent as evidence *aliunde*. What remains for me is to pass an appropriate sentence in the circumstances. I have heard submissions in mitigation by the accused's attorney Mr. Mabila.

In determining a proper sentence the trenchant words of Holmes J in ***S vs Rabie 1975 (4) S.A. 855 (A)*** at ***861 – 862*** contain a comprehensive and useful guideline of the principles to be applied in imposing sentence and are applied by the courts in this country.

After a careful analysis of the principles applicable to this subject, Holmes JA summed up at page 862, in general, as follows, and I quote:

> "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances".

What must also be considered is the *triad* consisting of the crime, the offender and the interest of society. (See ***S v Zinn 1969 (2) S.A. 537 at 540 G*** and also the case of ***S vs Scheepers 1977 (2) S.A. 154 (A)***)

According to Friedman J in the case of ***S vs Banda and others 1989 – 90 B.L.R*** at page ***290 J*** the elements of the *triad* contain an equilibrium and a tension. The learned judge proceeds at paragraphs [A – B] at page 291 and stated the following, I quote:

> "A court should, when determining sentence, strive to accomplish and arrive at a judicious counter balance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation; the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less".

The punishment in *casu* is to be meted out within the principles of law premised above and also within the purview of the Act. Section 12 (1) (a) of the Pharmacy Act, provides as follows:

> *"Unlawful importation, exportation, manufacture, possession, conveying, etc of poisons or potentially harmful drugs.*
>
> 12 (1) A person who-
> a) is found in unlawful possession of a poison or potentially harmful drug;
> b) …
> c) …
> shall be guilty of an offence and liable on conviction…
> i) <u>for a first offender, to a fine not exceeding E15, 000-00 or imprisonment not exceeding 15 years;</u>
> ii) for a second or subsequent offence to a fine not exceeding E20, 000-00 or imprisonment not exceeding 20 years…"

It is clear from the above that such crimes are viewed in a very grim light by the Legislature. In the present case the accused person is a first offender and thus stands

to be treated under Section 12 (a) (i) of the Act. He was found in possession of 25, 000 tablets containing methaqualone and disphenhydramen and it was conceded by Mr. Mabila for the accused person in mitigation that indeed this is a very serious matter which would attract a hefty sentence. But the court was urged to give the accused person a sentence with an option of a fine.

Mr. Mabila in a very spirited address in mitigation drew the court attention to a similar case which was decided by Thwala J (as he then was) where an Indian man was found with 79, 671 tablets at the Matsapha International Airport in 1994 in the case of ***Rex vs Bilal Ahmed Abdul Aziz Kaskar Criminal Trial No. 214/94*** (unreported). The accused in that case had pleaded not guilty, however, the court convicted him on the evidence presented by the crown. He was sentenced to six (6) years or six thousand emalangeni fine. Two (2) years or E2, 000-00 suspended for three (3) years on condition that the accused was not found to have contravened Section 12 (1) (a) of the Pharmacy Act.

Mr. Mabila argued that in the present case the accused pleaded guilty to the offence showing that he was remorseful unlike in the ***Kaskar*** case *supra* where the accused person pleaded not guilty throughout and the amount of tablets in that case was far more than the case in *casu*. That in the present case I should apply the principles of *stare decisis* and follow what was decided in ***Kaskar*** *op cit*.

My attention was also drawn to a case decided by Sapire CJ in ***Rex vs Mzikayifani Mncina Criminal Case No. 1/2001 (unreported)*** where the learned Chief Justice adopted what was held by Hannah CJ (as he then was) in the case of ***R vs Phiri 1982 – 86 (2) S.L.R. 508***, a case which has become a *locus classicus* in the classification of offenders under the Opium and Habit Forming Drug Act No. 37 of 1922 which principles can also be applied to offenders under the Pharmacy Act. In R***ex vs Mzikayifani Mncina (supra)*** the accused persons were charged with and pleaded guilty to contravention of Section 12 (1) (a) of the Pharmacy Act. They were duly convicted on their own pleas and the learned Chief Justice sentenced them each to 7 years imprisonment 3 years of which were conditionally suspended for a period of 3 years. The accused took the matter on appeal challenging only the sentence imposed. The Court of Appeal in ***Mzikayifani Mncina & another vs Rex Criminal Appeal No. 1/2001*** confirmed the sentence imposed by the Chief Justice in the court *a quo*. Zietman J who delivered the judgement of the Appellate Court endorsed the *ratio decidendi* in ***R vs Phiri (supra)***. The learned judge of the Court of Appeal had this to say at page 5 of the unreported judgement:

> "In the present case a large quantity of dagga was possessed by the appellants. They have known that Mazibuko was a wholesale supplier of dagga and that they were assisting him with his distribution of dagga. These facts are relevant even though the appellants were charged only with possession of dagga.
>
> It was urged upon us that the appellants are first offenders and that they were tempted to commit the offence by the promised payment of E10, 000-00 to them. They were however

fully aware of what they were doing and of the seriousness of their offence…" (my emphasis).

Mr. Mabila argued that the accused in the present case was not a member of a wholesale distribution network but was involved in an isolated transaction where he was tempted by a certain Indian to carry his parcel through the border for a fee. I must say though that according to the *dicta* in ***Rex v Phiri*** *op cit* the accused person acted as courier who played a vital role in the wholesale distribution network. He was motivated purely by financial gain. According to Hannah CJ in R***ex vs Phiri*** *op cit* "those who engage in dagga trafficking should not expect to be dealt with leniency. Normally they should be dealt with by way of a substantial custodian sentence".

I have considered all the personal circumstances of the accused as submitted by Mr. Mabila. These are the following:

a) The accused is a first offender;

b) The accused person is a married man with one minor child;

c) The accused person is only a breadwinner to his immediate family but this extends to his parents as well. Although I must say this is not always a factor in mitigation as the accused persons should have thought of the consequences of his actions.

d) The accused is relatively young, and is employed as a driver earning a sum of E1, 400-00 per month.

I have also considered the law which governs in *casu*. This indeed, on the accused own admission is a very serious crime. Drug trafficking in this part of the world is rampant at the detriment of the youth who end up taking these drugs to their peril. Other law enforcement agencies spend sleepless nights in terms of man power and money to eradicate the incident of drug trafficking. The courts should also play their part in the fight against this social evil. The only way the courts can be seen to be doing their part is to mete out appropriate sentences. Sentences with a sting.

In the present case though the accused person pleaded guilty and is a first offender a large quantity of mandrax tablets was possessed by him acting as courier for a supplier. He has not taken the court to its confidence by outlining the details surrounding him being approached by this mysterious Indian man. One can only assume that the accused person has a lot to hide. He was fully aware of what he was doing and of the seriousness of his offence.

My considered view, after balancing the three competing interests of the *triad* is that a custodial sentence is called for in the present case following the outcome in

Mzikayifani Mncina case which was subsequently confirmed by the Court of Appeal.

I must add further, that the ***Kaskar case*** *op cit* was decided 7 years age where it may well have been that the incidents of drug trafficking had not reached such high proportions as it is at present. For sentences to be effective they should be attuned to current criminal trends.

In the circumstances of this case I sentence the accused to (7) seven years imprisonment without the option of a fine, 2 years of which is suspended for a period of three years on condition that the accused is not convicted of an offence under the Pharmacy Act No. 38 of 1929 (as amended) committed during the period of suspension. The sentence is backdated to the date when the accused was first arrested.

S.B. MAPHALALA

JUDGE