IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 4345/07

In the matter between:

PHILILE DLAMINI AND ANOTHER

APPELANTS

VS

THE SENIOR MAGISTRATE N.O. (NHLANGANO)

1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

2ND RESPONDENT

CORAM MAPHALALA J

MAMBA J

FOR 1st APPELLANT MR. MABILA

FOR 2nd APPELLANT MR. MASINA

FOR RESPONDENTS MR. SIMELANE & MR. FAKUDZE

JUDGEMENT

25th January, 2007

MAMBA J

[1] Ms Phillle Agnes Dlamini, who is 32years old is a citizen of the Republic of South Africa and is from Durban. I shall refer to her as the 1st accused in this judgement.

[2] Thokozani Mtsetfwa is 30 years old and is a citizen of the Kingdom of Swaziland and shall be referred to hereinafter as the 2nd accused.

[3] They were both arrested and detained on a charge of having been found in possession of dagga weighing 163.5kg in contravention of the sl2(l)(a) of the Pharmacy Act 38 of 1929. I shall refer to this count as the charge. The 1st accused also faced a charge of entering and or remaining in Swaziland without the necessary permit or documentation. This judgement does not relate to this count.

[4] Both accused were arrested at or near Mshololo area in the District of Shiselweni. This area is very close to the border fence between Swaziland and the Republic of South Africa. They were

arrested on the 19th of November 2007 and on being arraigned on the 27th of that month both pleaded guilty to the charge. They were represented by an attorney of their choice.

[5] The crown led evidence of one witness in proof of its case. The accused closed their respective cases without leading evidence and they were found guilty as charged and sentenced to serve a term of 4years of imprisonment. Half of this sentence was conditionally suspended for a period of 3 years.

[6] The 1st accused has filed an application for the review and setting aside of the sentence imposed upon her by the trial court. She argues that the trial court misdirected itself in not granting her the option to pay a fine as she was a first offender. The second accused's complaint is in similar terms, only that it is an appeal.

[7] As the issues for consideration centred on the very narrow ground stated above, the review and appeal were heard together by Justice Maphalala and myself. Counsel for the accused and the crown both agreed that this was the best course to take in the circumstances.

[8] Section 12(l)(a) of the Pharmacy Act 38 of 1929 (herein after referred to as the Act) provides that: "12(1) A person who -
(a) is found in unlawful possession of a poison or potentially harmful drug;... shall be guilty of
an offence and liable on conviction -(i) for a first offence, to a fine not exceeding E15000-00 or imprisonment not exceeding 15 years;"

[9] In imposing sentence the learned trial magistrate said he took into account that the accused possessed a large consignment of dagga. The quantity indicated that it was destined for resale (wholesale) outside Swaziland. The trial court further held that the accused as suppliers of the drug deserved to get a more severe sentence than the ordinary drug consumer or user who is found in possession of a substantially smaller quantity of the same drug.

[10] The court a quo did not say anything in its judgement on sentence whether or not it ever considered the imposition of a fine. It may well be that the trial court ruled out that option based on the quantity of the dagga in question. This only remains as a possibility and it is perhaps to be regretted that the learned trial magistrate did not specifically deal with it.

[11] As a general rule in this jurisdiction, first offenders should normally be afforded the opportunity to pay a fine instead of being given a straight custodial sentence. The fine imposed must also be within the capacity of the offender to pay. This is a salutary rule aimed at giving first offenders the chance not to go to jail and be contaminated by hardened and serious offenders ***&h*** recidivists. In the case of **S v Mkwina and Others 1966 1 SA 814 (NPD) at 818F-H Fannin J** had this to say:

Mn most cases the first offender should, in my opinion, be given the opportunity of paying a fine which it is within his capacity to pay. Where there have been many cases of the possession of dagga coming before the courts something must obviously be done to discourage people from smoking and using dagga unlawfully. In such cases punishment may properly be stepped up, even for first offenders, but it seems to me that the object of discouraging such persons from offending a second time will best be served by imposing upon them fines sufficiently heavy to hurt, but which they can afford to pay, and by adding a period of imprisonment suspended upon suitable conditions. This method of dealing with first offenders... will achieve two important purposes. The first will be to keep a first offender out of gaol, and this is nearly always desirable. The second will be that the unlawful user of dagga will be

punished for his contravention of the law and will be discouraged for at any rate the period of suspension from offending again."

[12] Where a court finds a reason to depart from this general rule, then, in my respectful view it must specifically say so and state that reason or reasons. In enacting sl2(l)(a) of the Act, the legislature in its wisdom specifically set out the maximum sentence that may be imposed on a first offender. The legislature was, no doubt mindful of the fact that a first offender may be found in possession of a large quantity or consignment of dagga as in the present case, but it still provided that such first offenders be given the option to pay a fine and only undergo a custodial sentence on failure to pay such fine.

[13] I am mindful and in full agreement with the judgment of Hannah CJ (as he then was) in the case of R v Phiri, 1982-1986 SLR 509 that depending on the circumstances of each case, a court would still be perfectly within its sentencing powers in imposing the maximum sentence stipulated in the Act or even ordering a first offender to undergo a custodial sentence without the option of paying a fine. There must be compelling reasons for doing so and the trial court as noted above must set out these reasons.

[14] The learned trial magistrate misdirected himself in my view in placing undue weight on the quantity of dagga that was found in

possession of the accused herein. The trial court approached the issue by simply classifying or labeling the accused as wholesale distributors and or suppliers of dagga and because of that fact only, held that the only appropriate sentence for them was a custodial one. It is this reasoning that prevented the court from enquiring into their respective means or ability to pay a fine. There is also nothing said by the court below what weight, if any, the court attached to the fact that the accused pleaded guilty to the charge and did not dispute any of the evidence adduced by the crown. This would usually be regarded as a sign of remorse and a mitigating factor.

[15] In the case of DLAMINI DUNGUZELE V REX (crim app 29/2002, unreported), a judgement by SAPIRE CJ (as he then was), with Masuku J concurring, the learned judge stated that;

"In the present case if there is any misdirection to be found, it is in the magistrate's failure to consider the financial implications of imposing a fine and the ability of the appellant to pay the fine. The magistrate seems to have given undue consideration to the message, which the imposition of a fine would be to other potential offenders. In doing so the personal circumstances of the appellant, the fact that he is a first offender and what we will hope is genuine remorse, evidenced by his plea of guilty have not been given sufficient weight...

This is very much a border line case, but it would not be undue fracture of the principles enunciated above to hold that the magistrate did misdirect himself."

[16] I am in respectful agreement with the above views of the learned judge and I think the same is to be said in this appeal. The misdirection resulted in a failure of justice inasmuch as the accused were not afforded the opportunity to pay a fine-based on the wrong reasoning by the court.

[17] I should mention also that in cases such as the present the accused is in the main motivated to engage in such activities by greed: that is to say, by the financial reward or gain involved. In such circumstances one of the best ways to punish such offenders is to hit them hard on their finances by imposing a heavy fine. By so doing, the court tells the accused that "the game is not worth the candle." See Mkhiwa's case (supra) at 817G-H.

[18] For the aforegoing reasons, I would set aside the sentence imposed by the trial court and substitute it with the following:

1. Each accused is sentenced to pay a fine of E3000.00 failing which to undergo a term of imprisonment for a period of three years. This sentence is backdated to the 19th day of November 2007 being the date on which the appellants were arrested.

2. They are each further sentenced to a term of one year of imprisonment without the option of a fine. This sentence is, however, wholly suspended for a period of 3years on condition that they are not found guilty of a contravention of sl2(l) of the Act or s8(l) of the Opium and Habit Forming Drugs Act 37 of 1922, committed during the period of suspension.

MAMBA J

I AGREE.

MAPHALALA J