IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No. 24/13

MLUNGU NKOSINGIPHILE MAKHANYA	**1ST APPELLANT**
ABRAHAM ADBUL	**2ND APPELLANT**
OMARI KAMBI	**3RD APPELLANT**
ISSA MWAKISULU	**4TH APPELLANT**
And	
THE KING	**RESPONDENT**

Neutral citation:	*Mlungu Nkosingiphile Makhanya and Three Others vs The King* (24/13) *[2013] SZHC94 (2013)*
Coram:	**OTA J.**
Heard:	**4 April 2013**
Delivered:	**17 April 2013**
Summary:	***Conviction under the Pharmacy Act 1929 for possession of 55 kilograms of dagga: appeal against custodial sentence of 5 years: guiding factors considered: appeal dismissed***

OTA J.

[1] All the Appellants as Accused persons, stood trial before the Manzini Magistrates Court per Ndlela – Kunene, charged with the offence of contravening section 12 (1) (a) as read with section 12 (1) (i) of the Pharmacy Act 38 of 1929, as amended by Act 11 of 1993.

[2] The indictment alleged that on or about 27th September 2011 at or near Mafutseni area in the Manzini District, the said Accused persons either one or all of them acting in furtherance of a common purpose not being holders of valid permit or licence, unlawfully and wrongfully did possess 4 bags of dagga weighing 55 kilograms which is a potentially harmful drug and thus contravened the said Act.

[3] The 2nd, 3rd and 4th Accused persons were also charged with a second count of the offence of contravening section 14 (2) of the Immigration Act 17/1982.

[4] This appeal however concerns the first count of possession of dagga.

[5] The record shows that when the Accused persons were arraigned before the court *a quo*, the 1st, 2nd and 3rd Accused persons pleaded not guilty to this count of offence whilst the 4th Accused person pleaded guilty.

[6] At this stage there should have been a separation of the trial of 1st , 2nd and 3rd Accused persons who pleaded not guilty from that of the 4th Accused who pleaded guilty. That is not however what happened. The learned trial Magistrate proceeded with the trial of all the Accused persons together. Since there is no appeal against conviction, I will not concern myself with this.

[7] Suffice it to say that at the end of the trial in which the crown led two witnesses in proof of its case and all the Accused persons also testified, the court *a quo* convicted all the Accused persons for the offence committed and thereafter sentenced them respectively to 5 years without the option of a fine.

[8] The reasons for the sentence as appear in the record are as follows:-

> *"Accused pleaded not guilty. Evidence proved beyond reasonable doubt that the committed offences are very serious. Sentence is deterrent"*

[9] It is the aforegoing sentence that the Accused persons as Appellants decry in this appeal.

[10] I should mention at this juncture that the 1st Appellant appeared in person, 2nd , 3rd and 4th Appellants were represented by learned defence counsel Mr Leo Gama; whilst Crown counsel Mr Mathunjwa appeared for the Respondents.

[11] All Appellants challenge the sentence on grounds that the learned trial Magistrate failed to consider their personal circumstances as required by law before imposing sentence. Mr Gama contended, that the court *a quo* clearly misdirected itself in this regard. He submitted that the court failed to further interrogate the Appellants to ascertain their personal circumstances, especially the reason why they were in possession of the dagga. That the court failed to consider that the Appellants are first offenders and therefore

entitled in law to a discount in sentence. He further contended that the trial Magistrate also misdirected herself by stating in her reasons for sentence that all the Appellants pleaded not guilty, when it is crystal clear from the record that the 4th Accused pleaded guilty before the court. That these are factors which ought to have mitigated the sentence imposed.

[12] Mr Gama therefore posited that the learned trial Magistrate was clearly determined not to exercise some mercy on the Appellants in view of these mitigating factors which she failed to consider, only stating that the sentence imposed is deterrent.

[13] Counsel finally contended that the sentences imposed induce a sense of shock as it has always been the culture of the courts in similar cases to give the option of a fine where Accused persons are first offenders. For these propositions Mr Gama urged the following cases; **R v Phiri 1986 SLR 508, Dlamini Madunguzele v The King Criminal Appeal No. 29 / 2002, Rex v Khumbulani Eric Matsenjwa Review Case No. 24/2010, R v Dlamini Criminal Case No. 103 / 2009, Rex v Bonginkosi Kunene and Another,**

R v Nomcebo Gabela and R v Bafana Dlamini Review Case Nos. 20/10, 21/10 and 24/10.

[14] In response, the Respondents contend per Mr Mathunjwa, that the court *a qu*o did not commit any material misdirection or irregularity resulting in a miscarriage of justice, which would entitle this court to interfere with its sentence. Counsel drew the courts attention to the position of jurisprudence which prescribes custodial sentence for the offence committed by the Appellants.

[15] Counsel conceded a variation of sentence only to the extent of its back dating to include the period of the Appellants pre- trial detention, which it is obvious from the record was not taken into account by the court *a quo*. Mr Mathunjwa urged the following authorities in support of Respondents position:- **Vusi Madzalule Masilela v Rex Criminal appeal No. 14/2008, Bhekizwe Motsa v Rex Criminal Appeal No. 37/2010, Chicco Fanyanya Iddi and Others v Rex Criminal Appeal No. 03/10 and 09/10, R v Phiri (Supra).**

[16] Now, since this is an appeal against sentence, it is imperative that we return to the first principles that must guide this court in dealing with the task at hand. It is the overwhelming accord of jurisprudence, that the issue of sentence lies predominantly in the discretionary bossom of the trial court who saw and heard the witnesses and is thus in a better stead to access a fitting sentence, based upon the peculiar facts and circumstances of the case. An appellate court will only interfere with the exercise of discretion if there has been an improper exercise of same, in the sense of a material misdirection or irregularity resulting in a miscarriage of justice. For instance, where the trial court failed to consider relevant facts; considered irrelevant facts; imposed a sentence not permitted by law; exceeded its sentencing jurisdiction, or the sentence is so severe that it induces a sense of shock. An appellate court will not however interfere with the sentence of a lower court just because it would have imposed a different sentence.

[17] Now, from the record it is obvious to me that the court *a quo* called evidence in mitigation in line with section 294(2) of the CP&E, before it proceeded to sentence. This is very clear from paragraph [15] of the record where the following appears:-

"Mitigation

They are first offenders, all accused persons state that court be lenient. A2 says court be lenient supports his children. A3 says court be lenient supports his family. A 4 states that court be lenient he supports his children"

[18] Having called evidence in mitigation, I hold the view that the trial court discharged the responsibility placed on it in this regard and was not required to carry out any further inquiries into the circumstances of the Appellants as **Mr Gama** proposes with reference to the pronouncement of **Annandale J** in **Khumbulani Eric Matsenjwa Case (Supra).** I should mention that the facts of **Matsenjwa** are distinguishable from facts of this case. In that case the trial court had not called any evidence in mitigation before it proceeded to sentence. **Annandale J** reiterated in paragraph [10] thereof, the inalienable right of the Accused to address the court personally and also call witnesses before sentence is passed. His Lordship stressed that the court also has the right and often the duty, to ask questions of the accused, at least to the extent of being able to make a proper assessment of personal circumstances. For instance to know if the person is employed, the impact of incarceration, the ability to pay a fine and if not forthwith, whether it can be done in installments or to defer payment, his or her age, marital status etc.

In paragraph [11] of that decision, **Annandale J** made it categorically clear that *"It is when none of this is done and the trial court 'summarily sentences' an accused person without affording him the right to be heard that it vitiates the right to a fair trial*". I entirely agree with my learned brother.

[19] *In casu*, the trial court called evidence in mitigation thus discharging the responsibility placed on it by section 294 (2) before proceeding to sentence. Having stated as above, it is important that I emphasise here that the essence of taking evidence in mitigation is to enable the court consider the circumstances of an Accused person in honour of the triad of circumstances, consisting of the personal circumstances of the Accused, the circumstances of the offence and the interest of the society, before passing sentence. See **Chicco Fanyanya Iddi and Another v Rex (Supra), Sikhumbuzo Mazibuko v Rex Appeal Case No. 46/2011.**

[20] Having taken the Appellants plea in mitigation as I demonstrated in paragraph [17] above, there is no indication that the court *a quo* considered it in imposing sentence. The court does not seem to have weighed the

mitigating factors i.e that the Appellants are first offenders, support their families, pleaded for leniency and that the 4th Appellant actually pleaded guilty to the charge, in a delicate balance together with all the other factors in its reasons for sentence. What the court appears to have done is to stress the seriousness of the offence committed and that the sentence imposed is a deterrent.

[21] It is this state of affairs that elicited the Appellants contention that the court *a quo's* sentencing discretion miscarried, because if it had bothered to consider their personal circumstances, especially the fact that they are first offenders, it would at least have given them the option of a fine. Therefore, so goes the argument, the 5 years custodial sentence imposed induces a sense of shock.

[22] In the face of these facts, it becomes necessary for me to ascertain whether the sentence imposed can be described as unreasonable and disturbingly disappropriate to the gravity of the offence committed that it induces a sense of shock. There is no doubt the fact that the Appellants are first offenders, have families to support, have pleaded for leniency and 4th Appellant

pleaded guilty are factors that should serve to mitigate their sentence. I am however unable to agree with the Appellants that these factors, especially the fact that they are first offenders, is a carte blanche to option of a fine to the custodial sentence imposed *a quo*. This is the way and manner they argued this appeal which I find very disturbing. I say this because, the mere fact that the court in the cases of **Matsenjwa and Bonginkosi Kunene and Anothers, R v Nomcebo Gabela and R v Bafana Dlamini**, deemed the option of a fine necessary, does not spell an automatic entitlement to equal treatment in all related cases. A court is still entitled in sentencing to disregard the mitigating factors urged in order to emphasise some other sentencing principle, like deterrence, especially in the face of prevalence.

[23] The offence committed is a serious and prevalent one. The possession, and trafficking of illicit drugs like dagga, is ubiquitous in the Kingdom. The destructive effects of such substances in generations past, present and yet unborn, cannot be over emphasized. It is an agent of misery, devastation and death. In the very recent case of **Bongani Roy Vilakati v Rex, Criminal Appeal Case No. 9/12**, the Appellant killed the deceased by ambushing him in a lonely location and shooting him at close range, execution style, with a gun. The bone of contention was a consignment of

dagga worth E36,000. The High Court sentenced the Appellant to life imprisonment. On appeal, the sentence was set aside and substituted with a sentence of 18 years.

[24] It is worth mentioning that the effect of this demon is more palpable in the youths of the nation who history demonstrates invariably become victims. It renders this very vital crop of the human resources, in whom vests the future of the nation, a miserable visue; robs them of their future and by implication the future of the nation. That is why the law across national borders inveighs this offence and prescribes punitive measures for same as a deterrent.

[25] The Kingdom of Swaziland is not left out of this crusade. Parliament in a concerted effort to achieve this aim, firstly, enacted the Opium and Habit Forming Drugs Act 37 of 1922. It was under this Act that the case of **R v Phiri (Supra),** which was urged vociferously by the two sides of this contest, was tried. In that case **Phiri** was charged with being in unlawful possession of 14.85 kilograms of dagga in contravention of section 7 of the Act, which offence was made punishable under section 8 (1) thereof, by

way of *"a fine not exceeding two thousand Emalangeni or, in default of payment thereof, imprisonment not exceeding five years or such imprisonment without the option of a fine; or both such fine and imprisonment"*.

[26] The Pigg's Peak Magistrates Court had sentenced **Phiri** to a fine of E300 or 300 days in default. In setting aside this sentence as being too lenient, and substituting it with a sentence of three years imprisonment of which 18 months was suspended for three years, **Hannah CJ** espoused a series of guiding factors in coming to a just sentence in every given case of drugs and related offences. These factors include the purpose for possession of the drugs. **Hannah CJ** came to the conclusion in paragraphs E – G of that decision, that from the quantity of dagga found in **Phiri's** possession, which was 14.85 kilograms, worth approximately E700 and the fact that **Phiri** indicated in mitigation that he was concerned in distribution of dagga for financial gain, it was clear that he was either a retailer or a courier in a network where considerable profits were at stake. The learned Chief Justice held that it was therefore a case where the only appropriate sentence was an immediate custodial sentence, that a financial penalty alone was not only wrong in principle but was glaringly inadequate and the appellate court was

empowered and also under a duty to increase the sentence imposed. It is worth mentioning that **Phiri** was decided on the 19th of November 1986. That is 27 years ago. I take judicial notice of the fact that since then there has been an upsurge rather than a reduction of this sort of offence.

[27] It was still in a bid to eradicate this social ill that parliament enacted the Pharmacy Act of 1929, as amended by Act No. 11 of 1993, which has a more punitive undertone than the erstwhile Opium and Habit Forming Drugs Act. Section 12 (1) (a) (b) and (c) of the Pharmacy Act, deals with unlawful importation, exportation, manufacture, possession, conveying e.t.c of poison or potentially harmful drugs. Conviction for offences under that section attracts a punishment of

> " *imprisonment not exceeding 15 years*
>
> *(ii) For a second or subsequent offence (to) a fine not exceeding E20,000.00 or imprisonment not exceeding 20 years"*

[28] This is the statute we are concerned with in this appeal. The **Chicco Fanyanya Iddi Case** which concerns possession of large quantities of cocaine and opium was also decided under this statute. **Moore JA** who

delivered the unanimous decision of the court in that case, recognized that the offences in contravention of section 12 of the Pharmacy Act 1929 *"are much more serious in nature and carry much heavier penalties"* than the offences under the Opium and Habit Forming Drugs Act, under which **Phiri** was tried. The learned justice of appeal also distinguished the fact that **Phiri** was placed before the court for review in contradistinction with **Chicco Fanyanya** which was on appeal. **Moore JA** notwithstanding the above, in para (34) thereof, applauded the factors espoused in paragraphs (a) – (i) of **Phiri** as worthy of consideration in imposing sentence. He paid particular homage to the factors evolved in paragraphs (d) - (f), which weighed in **Chicco Fanyanya**, and which in my respectful view, also apply with equal force as a guide in this case, as follows:-

> *"(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 back - ground 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. <u>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.</u>*

(e) *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 partly suspended sentence may be considered"* (emphasis added)

[29] **Moore JA** after weighing the above factors *vis a vis* the facts of the case concluded as follows in paragraph [37]

"Persons convicted under section 12 of the Pharmacy Act 1929 must, on the authority of Phiri be awarded substantial custodial sentences, discounted by a trial court if it is satisfied that a small reduction is appropriate because the particular offender has acted under the instigation or direction of a network leader or some other person. The retail supplier and other courier should both be dealt with by way of a substantial custodial sentence" (emphasis mine)

[30] Therefore, custodial sentences are fitting for these sort of offences, however, the discretion still lies with the court to discount such sentences if it deems it necessary.

[31] *In casu*, I agree with **Mr Mathunjwa** that there is enough evidence in the record to demonstrate the purpose for which the Appellants were in possession of the 55 kilograms of dagga. This rendered any further inquiry into the purpose of possession of the dagga prior to sentencing, *otiose*. The quantity of dagga itself, 55 kilograms, in my respectful view, speaks for itself. It was certainly not for private consumption. The Appellants all admitted that they were illegally transporting the dagga to South Africa. The 4th Appellant, whose evidence none of the other Appellants disputed *a quo*, and which thus remains binding upon them, told the court that the 2nd and 3rd Appellants needed help to illegally enter South Africa. He told them that he would assist them. They then went to Madlangempisi to buy the dagga, and to take it to South Africa, Pongola. He called 1st Appellant who was to take them in his vehicle to South Africa with the dagga. The police intercepted them at Mafutseni area and they were arrested. Under cross examination the 4th Appellant told the court that all the Appellants knew that they were

carrying the dagga. They were together in transporting the dagga to South Africa as they needed money.

[32] It follows from this brief resume of the facts that the Appellants were correctly found guilty of being in possession of dagga. They were therefore well advised not to pursue an appeal against their conviction.

[33] It is obvious to me from the facts that the Appellants are traffickers who were in the process of transporting the dagga to South Africa for financial gain when they were apprehended. These group of people, on the authority of **Phiri** and **Chicco Fanyanya,** deserve an outright substantial custodial sentence, except the trial court in its discretion discounts the sentence, because it is satisfied that the particular offender acted under the instigation or direction of a network leader or some other person.

[34] The court a quo exercised its discretion in imposing a custodial sentence of 5 years imprisonment without the option of a fine, as a deterrent. This sentence to my mind is not so unreasonable or disturbingly disappropriate to

the gravity of the offence committed, which attracts a sentence of 15 years, that it induces a sense of shock, especially in view of its prevalence. I see no basis to interfer with it. The sentence must stand.

[35] It remains for me to emphasise, that the prevalence of these offences and the degree of success registered in the prosecution of the offenders, does not seem to deter other potential offenders from committing similar crimes. Instances of even repeat offences are on the increase. In the circumstances, speaking for myself, I am far from impressed with the suspended sentences and options of fines, handed out to these offenders like candies to kids in a candy store. If this trend is encouraged and allowed to subsist, I fear it will eventually sound a death knell to the intent of parliament in enacting more punitive measures via the Pharmacy Act, in a bid to curb this vile crime. Dire circumstances call for desperate measures. To my mind, what is expected of the courts in view of the pervading atmosphere of impunity, is to send the appropriate message when necessary to convicted offende rs while seeking to deter potential ones.

[36] This will certainly augur well for the retention of public confidence in the judiciary especially in the crusade against drug abuse and trafficking. A lot of public resources are put in the justice delivery system, particularly in maintenance of the police force and its investigation machinery. It will constitute a major setback in the fight against drugs and related offences, if the security forces become frustrated due to the nature of sentences meted out to serious offenders, like retailers, couriers and traffickers. Such inertia could also have detrimental consequences to national security, stability and public order.

[37] I however agree with **Mr Mathunjwa** that the Appellants are entitled to have the sentence imposed backdated to include the period of their pre-trial detention, pursuant to Article 16 (9) of the Constitution Act 2005.

[38] On these premises, I confirm the sentences imposed by the court *a quo* on all Appellants, with the following variation:-

> *"Sentence backdated to the 27th of September 2011 the date of Accused's arrest and incarceration"*

1st Appellant in person

For 2nd, 3rd and 4th Appellant's **L. Gama**

For the Respondent **M. Mathunjwa**

DELIVERED IN OPEN COURTIN MBABANE ONTHIS

THE ..17.....DAY OF...April.....2013

OTA J

JUDGE OF THE HIGH COURT