IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 94/14

In the matter between

PHILISIWE MOTSA **Applicant**

and

REX **Respondent**

Neutral citation: *Philisiwe Motsa v Rex* (94/14) [2015] SZHC 13 (5 February 2015)

Coram: Mamba J

Heard: **7 November 2015**

Delivered: **5 February 2015**

[1]Criminal Law and Procedure – bail application pending appeal after conviction – Applicant to prove reasonable prospects of success in the appeal and that interests of justice would not be compromised by her release on bail.

[2]Criminal law – sentence following conviction of a Contravention of section 12(1) (a) of the Pharmacy Act 38 of 1929 (as amended) or the Opium and Habit Forming Drugs Act 37 of 1922. Court not enjoined to grant an option of a fine on any sentence imposed.

[3]Criminal law and Procedure – Application for bail on a charge of being found in unlawful possession of dagga weighing 15kg or more. Principal Magistrate and lower courts have no jurisdiction to hear such and the High Court is the court of first instance on such, per section 95 (1) of Act 67 of 1938 (as amended).

[1] The Applicant, a 25 year old Swazi mother of three children was convicted by the Manzini Principal Magistrates Court on 19 August 2014. She had been charged with a contravention of section 12(1)(a) of the Pharmacy Act 38 of 1929 (as amended). She was found in unlawful possession of 322.8kg of dagga and was sentenced to an effective custodial sentence of 4 years, without the option of a fine.

[2] Following her conviction and sentence, she moved a bail application pending appeal before the same court on 26 August 2014. This application was refused by the court on the basis that, *inter alia*, the court *a quo* did not have jurisdiction to entertain the application in view of the amount of dagga for which she had been convicted and that in any event, the applicant had failed to establish that there were prospects, let alone reasonable prospects, of success in her appeal. She has now moved this application before this court.

[3] I should mention that, during the trial the applicant who was represented by Counsel pleaded guilty to the charge and was subsequently found guilty as charged and sentenced as stated above. She then, on 20 August 2014 filed a notice of appeal against the sentence only. Albeit her notice of appeal lists six grounds of appeal; there are in effect two such grounds: namely

(a) that the trial court erred in not affording her the option to pay a fine in lieu of the prison term and

(b) that the sentence of four years of imprisonment is so harsh that it induces a sense of shock.

[4] After hearing submissions on the matter on 07 November, 2014, I dismissed the application and indicated then that my written reasons for such an order shall follow in due course. These then are those reasons.

[5] In terms of section 95(1) of Act 67 of 1938 (as amended) where an accused is charged of having been found in possession of dagga weighing 15kg or more any bail application in respect of that charge must be filed before this court – as the court of first instance. A Principal Magistrate's Court or any Magistrate's Court has no jurisdiction in such an instant. I would find it logical that although the section refers to an accused person, it equally

applies to a convicted person as the purpose of the section was, in my judgment, simply to remove the jurisdiction of the lower courts in matters of such magnitude or gravity. For that reason, I think the court *a quo* was correct in refusing to hear the matter in view of the quantity of dagga for which the applicant had been convicted. That leads me to the next issue, which is the severity of the sentence imposed.

[6] There is absolutely no merit on the ground of appeal that the sentence of four years of imprisonment induces a sense of shock. The quantity of the drug involved is, in my judgment huge. A few sampling of the judgments by this court and the lower courts plainly shows that. If the sentence herein errs at all, it is on the side of leniency.

[7] In an application for bail pending appeal and following a conviction, the applicant must establish that

(a) there are reasonable prospects of success in his appeal and

(b) that the interests of justice would not in any way be prejudiced by his release on bail.

See *R v Mphumelelo Mamba & 3 Others (138/2009) [2014] SZHC (19 November 2013),* (unreported judgment delivered on 19 November 2013 and

the cases therein cited). Vide also *S v Williams 1981 (1) SA 170 (ZAD) and Moses Sifiso Mabuza v R (59/14) [2014] SZHC 150 (11 July 2014).*

[8] Again, whilst the provisions under which the applicant was sentenced do refer to an imposition of a fine, this is clearly not mandatory or peremptory. It is discretionary. See *R v Phiri 1982-1986 (2) SLR 508 at 509*. In the instant case, the amount of dagga was large and was certainly not for the personal consumption by the applicant. It was for retail or wholesale purposes. *Phiri's* case has been consistently and unreservedly followed in this jurisdiction and is the law on this point. *Vide Chicco Fanyana Idd and Others v R, Cr. Appeal 3/2010* and the cases therein cited and *Philile Dlamini and Another v The Senior Magistrate N.O. Nhlangano and Another, case 4345/2007*, judgment of this Court delivered on 25 January, 2008. *Phiri (supra)* concerned interpretation of section 7 and 8 of the Opium and Habit Forming Drugs Act 37 of 1922. However, there is no reason why such interpretation should not apply to the provisions of the Pharmacy Act which are similarly worded.

[9] It is now perhaps axiomatic that sentencing is predominately a matter for the discretion of the trial Court. In *Chicco (supra)* Moore JA stated this position as follows:

> 'It has been held time without number by this court that sentencing is a matter entirely within the discretion of the trial Court and that a Court on appeal will only interfere with that discretion where there has been a misdirection by the trial Court or it has imposed a sentence which is excessive in the sense that there is a substantial discrepancy between it and the sentence which the court of appeal would have imposed had it been sitting as the court of first instance. In casu there is no misdirection by the trial court.'

The same principle was enunciated or stated by this court in *Johannes Khoza v R Crim Appeal 76/2006*, judgment delivered on 13 March 2008 (unreported).

Where the following appears:

> '[10] Sentencing is predominantly a matter for the discretion of the trial court. It is, however, not the exclusive preserve of such court. For example, the legislature may, in certain cases legitimately have a say in this, as in cases where minimum or maximum sentences are set by Parliament. And, an appeal court will not interfere in the exercise of the trial court's discretion just because that trial court has arrived at a decision different from that which the appeal court or judge would

> have arrived at. If, however, the court on a consideration of all the material or evidence relevant for purposes of sentence, such as the nature of the offence, the circumstances under which it was committed, the personal circumstances of both the Accused and the victim of the offence, comes to the conclusion that the sentence imposed by the trial court, is vastly different from that which the appeal court would have imposed such that an inference can be drawn that the trial court acted improperly or unreasonably, the court on appeal would be obliged to set aside the sentence imposed by the lower court and be at large to impose an appropriate sentence. **(see S v Anderson 1964 (3) SA 494(A) and S v Human 1979 (3) SA 331(E).'**

[10] In the present application, the applicant has failed in my judgment to show that there are any prospects of success in her appeal or that the Court below erred in imposing the relevant sentence on her. There is thus no reason or justification why she should not continue serving the custodial sentence imposed on her.

[11] For the avoidance of doubt, it must be noted that this judgment relates to the bail application pending appeal and does not at all purport to decide the issues raised in that appeal. All that this judgment decides is that the

applicant has, on a balance of probabilities, failed to establish that she is entitled to the relief she seeks.

MAMBA J

For the Applicant : **Mr. O. Nzima**

For the Respondent: **Mr A. Matsenjwa**