



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Crim. Case No. 265/2013

In the matter between:

REX

Applicant

VS

BUSTER VILAKATI

1st Respondent

MTHOKOZISI MKHATSHWA

2nd Respondent

BANELE WILLIAM MASEKO

3rd Respondent

SIBUSISO SIKITA DLAMINI

4th Respondent

MANDLA VINCENT VILAKATI

5th Respondent

Neutral citation:

Rex vs Buster Vilakati and 4 Others (265/2013) [2016]
SZHC 107 (19 April 2016)

CORAM

MAMBA J

HEARD:

11 & 12 August, 2015
15 & 16 December, 2015
01, 02 & 03 February 2016

DELIVERED:

19 April, 2016

[1] *Criminal Law – Application for the discharge and acquittal of an accused at the close of the crown case per section 174(4) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Test to be applied is whether there is evidence on which a reasonable man acting carefully or judiciously might convict.*

[2] *Criminal Law and Procedure – application for acquittal and discharge of accused under section 174(4) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Where there is evidence implicating the accused at the close of the crown case, the Court has a judicial discretion in deciding whether or not to grant the application for a discharge.*

JUDGMENT

- [1] On the first count, all the accused persons are charged with the offence of Contravening section 12(1)(a) of the Pharmacy Act 38 of 1929 (as amended) (hereinafter referred to as the Act). It is alleged that on or about the month of April 2013 and at or near Pigg's Peak in the Region of Hhohho, either one or all of them acting jointly and in furtherance of a common or shared purpose, unlawfully possessed ten (10) kilograms of dagga, which is a poison and thus did contravene the said Act.
- [2] The second count charges a Contravention of section 12(1)(b) of the Act in that again in the month of April 2013 and at or near Pigg's Peak in the Region of Hhohho, they unlawfully and intentionally conveyed an unspecified quantity of dagga, which is a poison, from Pigg's Peak Plantations to Ngowane area whilst they had no permit or licence to do so. It is alleged that they were acting jointly or severally in furtherance of a common purpose.
- [3] On count three, all five (5) accused persons are charged with a Contravention of section 12 (2) of the Act in that on or upon the month of April 2013 and at or near Pigg's Peak area in the Region of Hhohho, the accused, either one or all of them acting jointly in the furtherance of a

common purpose and not being holders of a permit or licence to deal by way of sale of dagga, they unlawfully dealt by way of sale of ten (10) kilograms of dagga which is a poison. It is alleged that they sold the said dagga to Bhekimpi Ndwandwe.

- [4] On the fourth count, the crown alleges that the first and second accused are guilty of the crime of Defeating or Obstructing or attempting to Defeat or Obstruct the Course of Justice in that during the month of April 2013 and at or near Pigg's Peak in the Region of Hhohho 'the said accused either one or both of them acting jointly and in furtherance of a common purpose in that they being police officers in the Royal Swaziland Police Service, did unlawfully and intentionally fail to arrest Zakhele Mndzebele and Mandela Mndzebele to face justice after having been found in possession of dagga weighing about ten (10) kilograms, but converted the same exhibit in the form of dagga for their personal use and did thereby commit the said crime.'
- [5] On being arraigned, the accused all pleaded not guilty to the respective charges each is facing. I note, however, that it is common cause that at the material time both the first and second accused were Police officers within the Royal Swaziland Police Service and were both stationed at Pigg's Peak Police Station.

[6] The evidence by the crown is made up of the testimony of seven witnesses. I do not think that it is necessary for me at this stage of the proceedings to detail the evidence of these witnesses. Suffice to say that two of these were introduced as accomplice witnesses. These were PW5, Thulani Magagula and PW7, Manzabila Ginindza. PW4, Bhekimpi Nxumalo and to some extent PW1, David Langwenya, although they were not introduced as accomplice witnesses, were in my view such witnesses. David was involved in the transportation or conveyance of the dagga whilst Bhekimpi bought some of it for E2000-00. The evidence of Manzabila implicates all five accused persons herein. Manzabila was, according to him, involved in all the stages of the transaction involving the conveyance and disposal of the dagga. He was also involved in the sharing of the proceeds of the sale of the drug. All five accused persons according to him, received a share or portion of the money received from the said sale.

[7] At the close of the case by the crown, all the accused applied for their acquittal and discharge on all the counts herein in terms of section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). The sole ground for this application, as I understand it, is that there is no evidence that the substance that the accused are alleged to have dealt with

was in fact dagga. The argument by the accused persons is that the alleged substance or dagga was not brought to Court as an exhibit and there is no expert evidence that indeed what the accused are alleged to have possessed, conveyed and dealt in or sold was dagga.

[8] I agree that there is no expert evidence that what the accused possessed or conveyed and sold was dagga. However, the want of expert evidence is certainly not fatal to the case for the crown, at least at this stage of the proceedings. All the crown witnesses, bar PW6, Police officer Sibusiso Dlamini, told the Court that the cargo in question was dagga. PW6 of course did not see the consignment in question. There is therefore absolutely no merit in this application and it was accordingly dismissed immediately after it was made and argued before me.

[9] In *Rex v Themba Phineas Dlamini and 6 Others*, (420/2010) [2015] SZHC 153 (11 September 2015), this Court stated as follows:

‘In *R v Mphumelelo Mamba and 3 Others*, case 138/2009 a ruling delivered on 2nd December 2009, this court stated the position as follows;

‘These provisions have been the subject of many judicial decisions within this jurisdiction. Amongst these cases is

Rex v Duncan Magagula and 10 Others, Criminal Case 43/1996 (unreported) when Dunn J said:

“This section is similar to section 174 of the South African Criminal Procedure and Evidence Act 51 of 1977. The test to applied has been stated as being whether there is evidence on which a reasonable man acting carefully might convict.”

See also *Rex vs Obert Sithembiso Chikane and Another Criminal Case 41/2000* where the court (per Masuku J) emphasized the point that the Court has a discretion, to be exercised judicially in deciding whether or not to grant the application for a discharge. (See also the decision of this court in *Rex vs Mario Masuku, Criminal Case 348/2008* delivered on 23 September 2009).’

See also the remarks by Levinsohn J in *Crim. Case 158/2010* delivered on 03 February 2016 where the Learned Judge stated that:

‘The test laid down in the concept of no-evidence, has consistently been stated to be evidence upon which a Court, acting carefully, might convict. Generally speaking, it is improper to consider and take into account issues of credibility at this stage. In my view, it is undesirable and prejudicial to embark on detailed analysis of the crown evidence.’

I agree. (*Vide R v Ndwandwe Fannie 2000-2005 SLR (1) 110 at 117*).

[10] These, then, were my reasons for dismissing or refusing the applications by the accused persons herein.

MAMBA J

For the Crown	:	Mr. A. Matsenjwa
For 1st and 5th Accused	:	Mr. M.P. Simelane
For 2nd Accused	:	Mr. S. Bhembe
For 3rd Accused	:	Mr. S. Dlamini
For 4th Accused	:	Mr. L. Ndzinisa