

**SUPREME COURT OF SWAZILAND**

**HELD AT MBABANE**

**CRIMINAL APPEALS**

**In the matter between:**

**CHICCO FANYANYA IDDI**

**APPEAL CASE NO. 03/10**

**JOSE GABRIEL MACHVA**

**APPEAL CASE NO. 09/10**

**RAYMOND DAVID MALAKARA**

**APPEAL CASE NO. 10/10**

**VS**

**REX**

**CORAM:      FOXCROFT JA**

**MOORE JA**

**FARLAM JA**

**FOR THE APPELLANTS**

**MR. M. MABILA**

**FOR THE CROWN**

**MR. A. M. MKHALIPHI**

***Summary:***

*Pleas of guilty to offences under section 12 of the Pharmacy Act 1929 as amended – appeals against sentences – no evidence led in mitigation of sentence – statements in mitigation by counsel from the bar of little persuasive weight – proviso to section 238 (1) of the criminal law and procedure act 67/1938 applicable only to subsection 238 (1) (b) and **not***

*to subsection 238 (1) (a) - trial court entitled to take judicial notice of notorious facts - improper for trial judge to order appellants to give evidence in mitigation of sentence - persons convicted under section 12 of the Pharmacy Act 1929 must expect substantial custodial sentences - appeals dismissed - sentences of the court a quo affirmed*

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## **JUDGMENT**

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**MOORE J.A**

### **INTRODUCTION**

[1] These three appeals were heard together because the three Appellants were all convicted by Masuku J. upon their pleas of guilty of contravening various sections of the Pharmacy Act, 1929, as amended. The learned Judge sentenced them to fines and to terms of imprisonment as set out in the orders of sentence which were delivered in open court on the 29<sup>th</sup> day of January, 2010. The Appellants were all dissatisfied with the orders of the court a quo. Hence these appeals against their sentences only.

### **[2] ADMITTED FACTS**

In *Criminal Appeal No. 03/2010* the Appellant *Chico Manyanya Iddi* hereinafter *Iddi*, is a national of the United Republic of Tanzania. In the Statement of Agreed Facts, he admitted that he left Brazil having swallowed 42 satchets of cocaine and 21 satchets of heroin. He then boarded an international flight to Johannesburg South Africa where he transferred to a flight to Matsapha International Airport in

the Kingdom of Swaziland. He arrived here on the 24<sup>th</sup> July 2009 engorged with the narcotics still within his system.

[3] In *Criminal Appeal No. 9/2010*, the Appellant *Jose Gabriel Machava*, hereinafter *Machava*, admitted that he left India having swallowed 65 sloops of heroin before boarding an international flight to Johannesburg. There, he transited to a flight to Swaziland on the 5<sup>th</sup> August 2009 where he arrived that same day bearing his cargo of prohibited drugs within the interstices of his bowels.

[4] In *Criminal Appeal No. 10/2010*, *Raymond David Marakala*, hereinafter *Marakala*, flew from Qatar to Johannesburg having swallowed 51 sloops of cocaine and 13 sloops of heroin. At Johannesburg which is the greatest hub airport in Southern Africa, he took a connecting flight to Matsapha International Airport where he arrived on the 2<sup>nd</sup> August 2009 carrying the ingested sloops of potentially harmful hard core drugs within the lower reaches of his digestive tract.

[5] The similarities in these three offences appear to be so striking that the inference could properly be drawn that the sameness of these events was something more than merely coincidental.

[6] Here are three men travelling from distant parts of the world which are all notorious for being among the pivotal locations in the international drug trade. Brazil is the largest country in South America where Venezuela, Columbia and Bolivia, to cite but three examples, all rank with Brazil as being source countries of much of the world's illegal cocaine and dagga, which is the popular Southern African name for cannabis sativa, cannabis indica, or marijuana, or cali, or grass, or the other exotic appellations which it bears in different parts of the world. India had given its name to Indian hemp or kunjah which is one of the many variants in the nomenclature for dagga.

[7] The sub continent of India, as indicated earlier, is reputed for the production and distribution of Indian hemp. It is geographically proximate to Afganistan which is regarded as the world's largest producer of the opium poppy from which the lion's share of the world's heroin is processed. India enjoys the dubious distinction of being one of the principal entrepots of the international drug trafficking world and a major source from which this pernicious merchandise radiates.

[8] Qatar, also known as Dawlat Qatar, is an Arab emirate in the Middle East, occupying the small Qatar Peninsula which forms part of the large Arabian Peninsula. It shares a land frontier with the Kingdom of Saudi Arabia but is otherwise completely surrounded by water. Its strategic location therefore facilitates the movement of both legitimate cargoes as well as illicit substances into and out of that country. Qatar is so blessed with the natural resources of oil and gas that it enjoys the second highest GDP per capita in the world. Like the Kingdom of Swaziland, Qatar enjoys a monarchical system of government. It is one of the ironies of our modern world, that the more prosperous a country grows, the more likely it is to become involved not only in the importation and consumption of narcotic drugs, but also in the transit and export of these substances. The United States of America and the developed countries Europe and Asia are prime examples of this phenomenon. Qatar is, unfortunately, no exception to this sinister rule.

### **[9] THE CHARGES**

The charges in all three of these cases were laid under the Pharmacy Act, 1929 which bears the date of commencement 1<sup>st</sup> December, 1929 and is entitled "An Act to make provision relating to chemicals and to the sale, supply and possession of drugs, medicines and poisons." It is unlikely that the draftsmen of the

Pharmacy Act could foresee in 1929 the explosive development of the international trade in narcotics and dangerous drugs and psychotropic substances, both natural and man made, which plague the modern world. But even though much modern legislation now exists in many parts of the world in an attempt to suppress the sale, consumption and international trade in dangerous drugs and narcotics, venerable statutes such as the Pharmacy Act, 1929, still serve a useful and effective purpose in outlawing the sale, possession, transportation, importation, exportation and trafficking in these proscribed substances.

[10] The Appellants, upon their pleas of guilty were convicted and sentenced as follows:

NAME	OFFENCE	SENTENCE
<i>IDDI</i>	<u>Count One</u> Unlawful possession of cocaine contrary to Section 12 (1) (a).	Seven years and six months imprisonment, three (3) of which are hereby suspended on condition that you pay fine of E5 500.00
	<u>Count Two</u> Unlawful possession of cocaine contrary to Section 12 (1) (b).	Three and a half years imprisonment without the option of a fine.
	<u>Count Three</u> Unlawfully importing cocaine contrary to Section 12 (1) (c).	Four (4) years imprisonment, one (1) year of which is hereby suspended on condition that you pay a fine of E2
	<u>Count Four</u>	Two (2) years imprisonment without the option of paying a

	Unlawfully possessing heroin contrary to Section 12 (1) (a)	fine.
<i>MACHAVA</i>	<u>Count One</u> Unlawfully possessing cocaine contrary to Section 12 (1) (a).	Seven (7) years imprisonment, three of which are hereby ordered to be suspended on condition that you pay a fine of E5 000.00.
	<u>Count Two</u> Unlawfully conveying cocaine contrary to Section 12 (1) (b).	Three (3) years imprisonment which is hereby ordered to run concurrently with the effective sentence imposed in respect of Count 1.
<i>MALAKARA</i>	<u>Count One</u> Unlawfully possessing cocaine contrary to Section 12 (1) (a).	Seven (7) years imprisonment, three of which are hereby suspended on condition that you pay a fine of E5 000.00.
	<u>Count Two</u> Unlawfully importing cocaine contrary to Section 12 (1) (c).	Three (3) years imprisonment.
	<u>Count Three</u> Unlawfully possessing heroin contrary to Section 12 (1) (a).	Five (5) years imprisonment, two of which are hereby suspended on condition that you pay a fine of E3 000.00.
	<u>Count Four</u>	Two (2) years imprisonment.

	Unlawfully importing heroin contrary to Section 12 (1) (c).	
	<p><u>Count Five</u></p> <p>Escaping from lawful custody contrary to Section 43 (1) of the Criminal Procedure and Evidence Act 67/1938 as amended.</p>	A fine of E100.00 or 1 month's imprisonment in default ordered to run concurrency with sentence in Count 1.

[11] For the purposes of these appeals the charges which fall for major consideration are those brought under Section 12 (1) (a), (b), and (c) of the Pharmacy Act, 1929 as amended. Section 12 lies under the rubric “unlawful importation, exportation, manufacture, possession, conveying, etc. of poisons or potentially harmful drugs.” Since the Appellants all pleaded guilty and admitted the statements of facts presented by the prosecution, the primary focus must therefore be placed upon the sentences prescribed by the legislature for these admittedly serious offences. These penalties in respect of the offences falling under Section 12 (1) (a), (b) and (c) are, upon conviction:

*“(i) **For a first offence**, (to) a fine not exceeding E15 000.00 or 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.”* Emphasis added.

[12] It is germane to observe that the penalties prescribed for offences under Section 12 (1) are of greater severity than those

provided for under Section 12 (2) or under Section 13 where, upon conviction, a person who practises as a chemist or who sells or disposes of poisons, drugs, or proprietary medicines otherwise than as stipulated in the act, is subject:

1. *“for the first offence to a fine not exceeding Five Hundred Emalangi (E500) or in default of payment to imprisonment not exceeding twelve (12) months, and*
1. *For a second or subsequent offence to a fine not exceeding Two Hundred Emalangi (E200) or in default of payment to imprisonment not exceeding two (2) years.”*

The figure Two Hundred Emalangi (E200.00) in (ii) above is an obvious printing error.

### **[13] APPEALS**

Mr. Mabila appeared for the Appellant *Iddi* at the hearing of the appeal before this court. He had earlier filed Heads of Argument in respect of this Appellant. But he very gallantly undertook to argue the appeals of the unrepresented *Machava* and *Malakara* because the substance of all three appeals was that the sentences of the court a quo were inappropriate, and more commendably, so that he could assist the court in its consideration of the cases of the unrepresented Appellants. Mr. Mkhalihi appeared on behalf of the King.

### **[14] REASONABLE EXCUSE FOR WRONGDOING**

Counsel for the Appellants submitted that:

*“Once an accused person gives a reasonable explanation for any wrongdoing, the Court should accept the same unless it is*



*proved beyond reasonable doubt that it is false. It is trite that the explanation must be probable for it to be accepted in law.*

*..... This principle is not only restricted to the stage before conviction but extends to mitigation."*

[15] Counsel cited the case of *Rex v Johannes Mfunwa Dlamini Criminal Case No. 180/99* where, in a judgment delivered on the 14<sup>th</sup> May 1999, Masuku A.J. as he then was, expressed himself as being "in respectful concurrence with the manner in which Watermeyer A. J. propounded the law in *Rex v Difford 1937 AD 370* at 373 in these terms:

*"It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal, ....."*

[16] In the Botswana case of *Senao v The State Criminal Appeal No. CRAPP - 031 - 05* at page 21 paragraph 30 of the Computer judgment, writing with the concurrence of Tebbutt J.P. and Newman AJA, I cited a passage from *Lesolame v The State (1997) B.L.R 60* at pages 67 F - 68 A which I described as "a model and exemplary exposition of the precepts which are to be adhered to in cases such as this." Tebbutt J.A analysed the factual and legal matrix which the court was considering and articulated the principles involved in this way:

*"The only version as to how the shot was fired is that of the Appellant. No other witness could testify thereto. Could that*

*version be reasonably possibly true? The test in a criminal case is well-known. Is there a reasonable possibility that the appellant's evidence may be true? The test has been applied in the courts of Southern Africa, including courts in this country, for 60 years or more. In R. v. Difford 1937 A.D. 370 the South African Appellate Division said that even if an accused's version may be improbable he is entitled to his acquittal if there is any reasonable possibility of its being true. In R. v. M 1946 A.D. 1023 at 1027 it was said that in applying the test, the court does not have to believe the appellant's story; still less does it have to believe it in all its details. It is sufficient if it thinks that there is a reasonable possibility it may be substantially true. That test has been consistently followed in the courts of this country as well.*

*For the reasons I have set out, I agree with Mr. Phumaphi that the misdirections of the learned judge caused him to close his eyes to the test I have just enunciated. It is my view that on an analysis of all the evidence it cannot be said that appellant's version may not reasonably be substantially true. There is indeed no evidence or nothing on the record to gainsay it."*

[17] In *Bogosi v The State* 1996 BLR 702 at 707 Tebbutt J.A. gave further guidance on considering the probabilities of a case when he wrote:

*"In deciding whether appellant's version of the events may reasonably possibly be true, it is, of course permissible to consider the probabilities of the case and if on all the probabilities the version of the appellant is so improbable that it cannot be supposed to be the truth then is inherently false and should be rejected."*

[18] At page 39 paragraph 65 of *Senao*, I stated the unanimous conclusion to which the court had come. The synthesis of the principles upon which that conclusion was based reads:

1. *“For the reasons set out in the preceding paragraphs, this court is fully satisfied that, upon due consideration of all the material before it, the appellant’s version of the events in this case might reasonably possibly be true standing on its own, and a **fortiori** supported as it is in material particulars, by evidence for the prosecution. In the result then, the defence of self defence has been established and the conviction for murder must be set aside.”*

[19] Counsel for the Appellant submitted that since the Appellants gave explanations in mitigation of sentence which might reasonably possibly be true, there was no need to reject those explanations given by Counsel in submissions on mitigations. Counsel did not cite any authority in support of the proposition that if there was evidence in mitigation properly before the court, that evidence should redound to the benefit of the accused person if it was reasonably possibly true. Even in the absence of authority, however, I would be prepared to accept that submission as being inherently sound.

[20] A question arises however as to what could properly be regarded as evidence before the court. In *Senao*, the Appellant relied upon unsworn evidence which was properly before the court. She had given a statement before a judicial officer upon which she founded her defence in the trial court. She did not testify. At page 8 paragraph 14 of the judgment of the court, I set out the manner in which unsworn evidence should be treated.

*“The evidence of the appellant was not sworn evidence. It was evidence given in an unsworn statement in court as well as in her statement to the judicial officer upon*

*which she relied. But though that evidence was not sworn evidence, it was the duty of the court to give it the same careful consideration as is given to sworn evidence while bearing in mind that it was not given on oath and subjected to cross examination. The judge must decide what is the appropriate weight to be given to such evidence having regard to the fact that it was not sworn evidence. He cannot simply discard it or trivialize it because it was not given on oath."*

[21] In the case before us, as I understand it, Counsel is inviting us to treat the Statements of Agreed Facts, as well as his own statements from the bar during the trial, as evidence which the court ought to have considered in mitigation of sentence. The Statements of Agreed Facts give particulars of the offences with which the Appellants were charged. After taking their pleas, the judge was careful to ensure that they each understood the allegations which had been made against them and that they were satisfied about the correctness of those allegations before he accepted and recorded their pleas of guilty to the charges.

[22] The record shows that Counsel for the Appellants then made submissions. He did not call any evidence. From his position at the bar, he advanced the following factors in mitigation of sentence on behalf of the Appellant *Iddi*:

1. The absence of previous convictions. This fact was confirmed by the absence of any recorded convictions.
2. The age of the Appellant. This was proved through his Republic of Tanzania passport.

[23] Counsel then articulated the many matters set out in the Appellants' list of mitigating factors listed in paragraphs 35 - 37 *infra*. The 'proof' of several of these factors relied on the *ipse dixit* of

Counsel at the bar although several other assertions of fact including the Appellants' paternity and the number and ages of their children, could have been proved by documentary evidence. They were not. The assertions of cooperation with the police could have been established through the testimony of the officer or officers concerned.

[24] Counsel was alive to the possibility of leading evidence in mitigation. He referred to the case of *Ntokozo Dlamini* where Sapire CJ is reported to have commented adversely upon the failure of the accused before him to "have gone into the witness box" to explain themselves.

[25] The conduct of a case lies in the hands of the Counsel who is appearing. He makes the critical decisions about the calling of witnesses and the leading of evidence. It is well settled that the evidence which is likely to carry the greatest weight with a tribunal of fact is that flowing from testimony on oath which survives searching and astute cross examination unscathed. Even unsworn evidence may be of high probative value if it is internally consistent and coherent, and if it is buttressed by other evidence which tends to support its accuracy and quality. Demeanour may also play an important part here since it assists the tryers of fact in determining the overall veracity of the maker of an unsworn statement.

[26] If Counsel elects, as was done in this case, to rely only upon his own presentations from the bar, and a recitation of the instructions of his client, he can hardly be heard to complain if a judge finds himself unable to treat those submissions as having the same probative value as testimony given upon oath which laid itself open to cross examination by opposing Counsel and to questions from the court itself. Nor can it have the same probative efficacy as an unsworn statement which an accused person gives to the court. For

it is part of the discipline of the advocate that if he is minded to give evidence in a trial in which he is participating, he must lay aside his robes and surrender his brief.

[27] Section 294 (2) of the Act allows a court, before passing sentence, to “receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be posted.” Evidence includes testimony, unsworn statements, documents and tangible objects which tend to prove or disprove the existence of alleged facts. It was therefore open to the Appellants to give, produce or lead evidence in mitigation which the court was empowered to accept, and to take into account in determining what were the proper sentences to be passed.

[28] In the South African Book by Du Toit and Others, Commentary on the Criminal Procedure Act Chapter 28 under the Caption “Evidence Under Oath and Facts Mentioned from the Bar”, it is made clear that:

*“The present position in our law is as follows:*

*(a) It is highly desirable that mitigating or aggravating factors are to be placed before the court through evidence under oath. Such evidence can be tested in cross-examination and will place the court in a good position to make a decision based facts.*

*(b) In order to receive such evidence the opportunity will always be afforded the parties to call witnesses and lead evidence.*

*(c) Mitigating or aggravating facts can also be placed before the court from the bar (or by way of ex parte*

*statements), but will not weigh more than mere argument, unless admitted by the other party.*

*When admitted, the statements will be afforded the same weight as accepted evidence under oath.*

*(d) Where the court doubts ex parte statements, the party will be informed accordingly, and afforded the opportunity to present evidence (see Du Toit 139 - 40).*

*(e) Flemming DJP in S v Martin in 1996 (1) SACR 172 (W) decided that in determining sentence, particularly for more serious crime, no question to the accused is more important than "why did you do it?" An accused person therefore assumes some risk by not testifying in that no answer to that question would then be forthcoming and in the absence of an answer, the court may deduce that the accused acted without reason or remorse, thereby leading to a harsher sentence than what may have been appropriate.*

*Failure to afford the accused the opportunity to lead evidence on sentence, or to address the court on sentence, will usually bring about an irregularity, provided of course that such right was claimed and refused (see S v Booysen en 'n ander 1974 (1) SA 333 (c) 334; S v Leso en 'n ander 1975 (3) SA 694 (A) 695G)."*

[29] In *S v Nkwanyana and Others* 1990 (4) SA 735 at page 744 A Nestadt JA writing for a unanimous Appellate Division pointed out that:

*"An accused will, of course (unless a mitigating factor already appears from the evidence), have to raise it and adduce **whatever evidence** he can on the point. But having done so,*

*the onus should be on the state to negative, beyond reasonable doubt, the existence of such mitigating factors as are relied on by an accused. It follows that, if there remains a reasonable possibility that mitigating factors exist, the onus is discharged."*

See also *S v Sheperd and others* 1967 4 (SA) 170 (W).

[30] In *Eric Makwakwa v The King Crim. Appeal No. 2/2006* Ramodibedi JA, as he then was, noted at paragraph 8 of his then unreported judgment that a failure to testify does not always lead to a conviction. "It all depends on the particular circumstances of each case." Equally so, the failure of an Appellant to call evidence in mitigation of sentence at his trial will not necessarily operate against him in the compilation of sentence. But where his case on mitigation rests upon factors which are peculiarly within his knowledge and which can be established by the calling of witnesses, or try producing documents his failure to give evidence himself or to call witnesses, may deprive the sentencing court of material of the requisite quality which it could have brought into the balance in mitigation of sentence.

[31] Masuku J. in the course of his careful and thorough consideration of the factors relevant to the sentencing process, made reference to the *High Court Case of R v. Phiri Swaziland Law Reports 1982 - 1986, November 19*. This is a classic judgment by Hannah CJ which, like good wine has matured richly with the passage of time. Its inherent quality has been enhanced even as one millennium gave way to its successor and faded into the mists of Swaziland history. Its sound and fundamental principles are as fresh as the morning sun and as applicable and apposite today as they were when the learned Chief Justice restated them some quarter of a century ago.



[32] I think that it is necessary to reiterate some of the legal verities espoused in this case if only to debunk some of the fanciful and nebulous theories unknown to law which counsel for the appellant advanced with such vehemence before Masuku J and before this court.

[33] Some of the salient features of this case and its application in the year 2010 should be identified and highlighted:

1. *Phiri* was a case involving dagga (insangu). The appeal before us involved the much more dangerous, addictive and destructive opiates of cocaine and heroin for which the legislature has prescribed much more severe penalties.
1. The case of *Phiri* was set down for review to consider whether the sentence should be increased.
1. Hannah CJ was clearly of the view that the effective fine of E100 for what, on any view was a serious offence under the Opium and Habit-forming Drugs Act 37 of 1922, was manifestly inadequate. The offences in these appeals are in contravention of Sections 12 of the Pharmacy Act, 1929 which are much more serious in nature and carry much heavier penalties.
1. The unlawful possession of dagga and other drugs is regarded by the legislature in a very serious light. The unlawful possession of cocaine and heroin is regarded much more gravely by the legislator.
1. Generally, the Magistrate's courts took a far too lenient view of dagga related offences. The High Court may well have extended an over generous portion of its mercy in the instant appeals.

[34] The learned Chief Justice in *Phiri*, without attempting to be exhaustive, listed a number of the more obvious factors, (a) to (i), which should be considered in cases such as the ones now before

us. I shall refer only to those factors, which have the closest bearing upon the facts and circumstances of the current appellants.

*“(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 background 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. 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.*

1. *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 a partly suspended sentence may be considered.”*

[35] The above dictum is authority for the proposition that the big kahunas who lead the networks described in (d) above should receive substantial custodial sentences. It is a notorious fact that these faceless bosses who head, control and direct wholesale distribution networks are rarely, if ever caught and brought to book by prosecuting authorities. The small fry, such as these three appellants, are the expendable couriers and mules, defined in the

Concise Oxford Dictionary as a courier for illegal drugs, who knowingly, wittingly and willingly, undertake to transport illegal drugs in a number of ingenious ways across international frontiers.

[36] The resourcefulness of these purveyors of death and misery would be admirable if devoted to some lawful purpose. Now that false bottoms, hidden compartments in the lining of clothing, and other outdated methods of deception have fallen into desuetude, new methods of concealment abusing the human body are currently in vogue. “Stuffers” have been detected with illegal drugs secreted in bodily orifices such as the anus and the vaginal passage. “Swallowers” comprise the group of which these Appellants are members. More importantly, these Appellants are all active participants together with their handlers in the offences for which they now stand convicted.

[37] Persons convicted under Section 12 of the Pharmacy Act 1929 must, on the authority of *Phiri* be awarded substantial custodial sentences, discounted by the 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 the courier should both be dealt with by way of a substantial custodial sentence.

[38] Applying (f) above, Masuku J treated these offences as isolated transactions and, in the exercise of his discretion, adjusted his custodial award downwards, imposed fines, and suspended parts of the sentences he pronounced as shown in the table which appears earlier in this judgment. He cannot be faulted for this approach.

[39] Under (h) “*The reason for the offence*”, Hannah C.J makes it clear that:

*“Cultivation and possession of dagga is a criminal offence and parliament clearly regards it as a social evil. Those who choose to make it their means of livelihood, even though the alternatives may not be great or attractive, must recognise that they face sentences of imprisonment.”*

[40] In his heads of argument *Machava* wrote:

*“I am a first time offender. I was tempted to commit the offence in question. I am an Artist by profession not a drug dealer. I was used by certain greedy people for their personal gain. In a sense, I was a victim of greed. I have realized that here in prison.”*

[41] He supported his arguments that his sentence was excessive by additionally advancing in mitigation that:

1. He pleaded guilty to the charges laid against him;
1. His plea was an act of cooperation with the trial court;
1. He pleaded guilty because he was remorseful of having committed the said offence.
1. Pleading guilty was the right thing to do and the right way of expressing his sincere remorse.
1. He fully cooperated with the police who arrested and interrogated him. This cooperation evidenced:
  1. his remorse;
  2. his not being a hard core criminal or drug dealer;
  3. His being a mere victim of drug dealers;
1. He was a family man and breadwinner;

1. He was married and had two very young children who are twins;
1. His wife was unemployed;
1. His wife and two children depended upon him entirely;
1. His imprisonment affects them immensely;
1. He had learned from his mistakes and was asking for a second chance to start life afresh.

[42] The Appellant *Malakara* also relied upon the grounds set out in his Heads of Argument. These are:

1. He was a first offender;
1. He is not a practising criminal or drug dealer;
1. He had realized and corrected the mistake he made of falling into the temptation of being sent to deliver the drugs he was caught with by the Police;
1. He pleaded guilty to the charges levelled against him;
1. He was sincerely remorseful of committing the offences in question;
1. His guilty plea was an act of cooperating with the trial court;
1. He was a family man with two young children;
1. His wife was unemployed and she and the children depended on him. He is the one who had to provide for them;
1. If he remained here for the whole duration of his sentence, his wife and children would suffer a lot.

[43] **SEVERITY OF SENTENCE**

All three of these Appellants complained about the severity of their respective sentences. They urged this court to hold that the several factors which they advanced in mitigation provided ample justification for eliminating or shortening the length of their custodial sentences, for abridging the periods of suspension, and for reducing the fines which the court a quo had imposed. They gave no evidence whatever.

[44] The Supreme Court of Swaziland is not a fountain of grace before which convicted offenders could raise their suppliant pleas in mitigation, and which, out of its bountiful goodness, pours down its benevolent forgiveness upon unmeritorious Appellants, and washes away or tempers the appropriate sentencing orders of the lower courts.

[45] The superior courts of this Kingdom are courts of law which apply the precepts enshrined in the constitution, in the written laws in force, and in the common law which is declared by the judges and thereby establish binding precedents. An appropriate sentence does not arise out of the caprices of the sentencer or from the extent to which she or he may be moved by the unproven importunities of the convicted person. An appropriate sentence is fashioned, like a well tailored garment, to fit the contours of the particular offender before the court. A sentencer must consider.

1. The penalties and other forms of treatment prescribed by the legislature
2. The circumstances of the case
3. The circumstances of the offender, and
4. The interests of the society at large.

[46] Under the above broad headings, the court must also consider such factors inter alia as:

1. the **evidence** in mitigation
1. the effect of the offence upon the victim and the community
1. whether the offender had made reparation or has compensated his victim.
1. The effect which the sentence may have upon continuing relationships between offender and victim e.g in cases involving domestic violence.
1. The prevalence of the offence at the time of its commission.
1. Its potential for inflicting harm upon the innocent and the vulnerable.
1. Its potential for undermining the integrity of the society and its public officials.

[47] It is a notorious fact that dealers in illegal drugs and prohibited substances have exerted a corrupting influence upon holders of public office in many parts of the world.

[48] Counsel submitted that:

*“When one adopts a logical approach to the interpretation of section 12 (1) of the Pharmacy Act (1929), he is left with the inference that the legislature’s intention was that a person convicted for contravention of the provision, the imposition of paying a fine must be the first option **unless circumstances warrant a custodial sentence.**”* Emphasis added.

[49] Upon the authority of *Phiri*, the appeals under consideration are governed by Counsel’s qualification “unless circumstances warrant a custodial sentence.” Masuku J did not fall into the error of considering fines, unaccompanied by periods of imprisonment, as being fitting sentences in the circumstances of these appeals. Had

he imposed fines only upon the admitted facts in these cases, his sentences would have been inappropriately lenient and unsupportable by authority.

**[50] FACTORS NOT DEALT WITH IN COURT**

The approach of the court a quo under the above heading was criticized in paragraph 7 of Iddi's Heads of Arguments. Counsel submitted that:

*"where a matter is in Court, in convicting and/or sentencing an Accused person, the Court must base its decision on the evidence presented in Court and not be influenced by factors which were never dealt with in Court."*

[51] Masuku J expressed himself upon the record as wanting "to give most anxious consideration to these matters." He was referring to the matters concerned with sentencing, all of which he bore uppermost in mind as he examined all of the relevant factors. He acceded to the invitation of Counsel for the Crown that "in considering the question of sentence not to lose sight in balancing the interests of both the accused and society."

[52] The Trial Judge was careful not to visit the sins of one Appellant upon the other or others. He was undoubtedly correct to "treat each convict on the particular facts appertaining to his own case when it comes to the sentence the Court will consider appropriate in each individual case." He remembered that he should not allow his "judgment on sentence to be beclouded by anger which may result in unduly harsh sentences being meted out by this Court."

[53] Having thus set out the correct approaches to sentencing which he would adopt, the Judge then, as he was perfectly entitled to do,



indicated the notorious facts of which he would take cognizance together with those matters of which he would take judicial notice.

*“I will particularly take into account the notorious fact that offences of which you have all been convicted are fairly serious for the reason that they potentially endanger the lives, health and well being of members of this nation. Testimony to the seriousness of these offences is amply demonstrated by the stiff sentencing regime adopted by the international community in such cases, translated, in many cases to lengthy periods of imprisonment. This is clearly in recognition of the devastating effect the abuse of such substances tends to herald to those who partake thereof.*

*What is worse in the instant cases is that the obnoxious substances found in your possession may have, as often happens, found their way into the hands of impressionable and callow youths who may not have had the maturity or sagacity to eschew what may later turn out to be a monkey on their backs and from which it may not be easy to extricate themselves, considering in particular, their vulnerability. Furthermore, it is a fact and of which this Court can properly take judicial notice that the consumers of the consignments found in your bellies, more often than not, become so dependent thereon and literally become addicts such that they may waste all available resources in order to maintain an ever steady supply for their daily dose. Crime is, for that reason, an ever present and tempting source of supply to sustain their seemingly irrepressible demand.”*

[54] The topic Judicial Notice is treated in *The South African Law of Evidence* by D.T. Zeffertt, A.P. Paizes and A. St. Q. Skeen 2003 at page 715. It begins with a clear and authoritative statement. “No

evidence is required to prove facts of which the courts take Judicial Notice.” The authors correctly state at the same page that:

*“A court takes judicial notice of a fact when it accepts it as established, although there is no evidence on the point. Generally speaking, judicial notice will be taken of facts which are either so notorious as not to be the subject of reasonable dispute, or which are capable of immediate and accurate demonstration by resort to sources of indisputable accuracy.”*

[55] At page 721 under the heading “matters of local notoriety” the authors explain that:

*“Judicial notice may be taken of facts which are not matters of general knowledge but are notorious among all reasonably well informed people in the area where the court sits.”*

[56] In *Ingram v Percival* [1968] 3 All ER 657 at page 659 F. Lord Parker CJ said:

*“It has always been recognized that justices may and should – after all, there are local justices – take into consideration matters which they know of their own knowledge, and particularly matters in regard to the locality.”*

[57] In Halsbury’s Laws of England Fourth Edition Volume 17 page 79 paragraph 108 which deals with “notorious facts” the Law is stated thus:

*“The court takes judicial notice of matters with which men of ordinary intelligence are acquainted, whether in human affairs, including the way in which business is carried on, or human nature, or in relation to natural phenomena.*

*In order to equip himself to take judicial notice of a fact, the Judge may consult appropriate sources, or he may hear evidence. He may also act upon his general knowledge of local affairs."*

[58] In the Law of Evidence by I.H. Dennis at page 393 the topic of Notorious Facts is discussed as shown below:

*"A judge may take judicial notice of facts which are matters of common knowledge and which could not be the subject of serious dispute. Hence it would be pointless and wasteful to require evidence of them. Hypothetical possibilities for notorious facts are limitless: textbook writers frequently cite as illustrations the date of Christmas and the death of Queen Victoria as facts which would be judicially noticed. Reported cases contain many examples. The courts have taken judicial notice of the fact that by the laws of nature, a fortnight is too short a period for human gestation; that cats are kept for domestic purposes; that London streets carry a large volume of traffic, so that a boy employed to ride a bicycle through them runs a risk of injury; that the reception of television is a common feature of domestic life enjoyed primarily for purposes of recreation; and that one of the popular forms of entertainment on television is a series of reconstructed trials which have a striking degree of realism."*

[59] Ian Dennis assembled the above examples at my alma mater University College London over a decade ago on April 30, 1999. I have no doubt that if he was writing today, in the context of this case, he would have cited the international drug trade, and cross border trafficking in potentially harmful drugs and their penetration into Southern Africa as being among the notorious facts which

Masuku J should have taken, and did take into account, in deciding upon the appropriate penalties imposable in these cases.

## [60] PLEAS OF GUILTY - THE HIGH COURT

### Section 238 Criminal Law and Procedure Act 67/1938

Counsel for the Appellant drew an attention to Section 238 of the Criminal Procedure and Evidence Act 67/1938. The thrust of his submission is that, having regard to the proviso to sub-section (1) of the Act, notwithstanding the Appellants'

pleas of guilty, it was incumbent upon the Trial Judge to hear evidence *aliunde* of the commission of the offences charged, since the court was not competent to impose sentences of imprisonment without the option of a fine, or of a fine exceeding E2 000.00 (Two Thousand Emalangeni) "without other proof of the commission of such offences." Section 238 is so central to the resolution of the appeal on this ground, that I set it out in full, stripped down to its essential components and elements so that its meaning can be more readily discerned.

"238 (1)

(i) If a person arraigned

(ii) Before any court

1. Upon any charge
2. Has pleaded guilty to such charge, or
3. Has pleaded guilty to having committed any offence
4. (of which he might be found guilty on the indictment or summons)
5. Other than the offence with which he is charged,
6. And the prosecutor has accepted such plea,

7. The court may, if it is -

1. The High Court or a Principal Magistrate's court and the accused has pleaded guilty to any offence other than murder, sentence him for such offence without hearing any evidence or
1. A Magistrate's court *other than a Principal Magistrate's court*, sentence him for the offence to which he has pleaded guilty upon proof (*other than the unconfirmed evidence of the accused*) that such offence was actually committed." Emphasis added.

[61] Then follows the all important proviso to Sub-section (1) of the Act. As will emerge presently, I have come to the conclusion that the proviso to Section 238 (1) of the Criminal Law and Procedure Act 67/1938 as amended is applicable to and qualifies **only** Section 238 (1) (b), and is **not** applicable to, nor does it qualify in any, way the provisions of Section 238 (1) (a) of the Act. The proviso to Subsection (1) reads:

*"Provided that if the offence to which he has pleaded guilty is such that the court is of opinion that such offence does not merit punishment of imprisonment without the option of a fine or of whipping or of a fine exceeding **two thousand Emalangeni**, it may, if the prosecutor does not tender evidence of the commission of such offence, convict the accused of such offence upon his plea of guilty, without other proof of the commission of such offence, and thereupon impose an competent sentence other than imprisonment or any other form of detention without the option of a fine or whipping or a fine exceeding **two thousand Emalangeni**, or it may deal with him otherwise in accordance with law. (Amended, A.4/2004)."*

[62] In the three cases before us (*Iddi, Malakara and Machava*) the accused pleaded guilty and thereafter made the admissions set out in the documents headed 'Statement of Agreed Facts.'

[63] Presumably the statements of agreed facts were made in terms of 272 of the Criminal Procedure and Evidence Act 67 of 1938, as amended.

[64] The procedure followed was in accordance with the practice as outlined in the decision of the Court of Appeal in *William Touch Dlamini v the King, Appeal Case 22 of 2002*, dated 15<sup>th</sup> November 2002.

[65] In ***Dlamini's*** case at page 6 lines 3 - 5 of the then unreported version, the following passage appears:

*"It could, however, in the absence of evidence of the commission of the offence with which he was charged **not** sentence him to imprisonment."* Emphasis added.

[66] I would be inclined to view that portion of the 19 line paragraph in which it is set as encapsulating the kernel of Counsel's submission rather than as a definitive statement of law on the point. For the reasons discussed below, it seems clear to me that the proviso at the end of Section 238 (1) of the Act applies only to subsection (1) (b) that is to say the proceedings in a Magistrate's Court **other than a Principal Magistrate's Court**, and **not** to subsection(1) (a) which is applicable to proceedings in the High Court **or a Principal Magistrate's Court**.

[67] Apart from the fact that the proviso as it was then worded confined a court convicting an accused on a plea of guilty to fines of £15 (Fifteen pounds) or less, or such lesser sentences as a caution or reprimand, (which suggests that minor offences such as would

normally come before Magistrates' Courts were being dealt with), the section appears to have been modeled on Section 286 of the South African Criminal Procedure and Evidence Act 31 of 1917, as substituted by Section 51 of the General Law Amendment Act 46 of 1935, in which it is clear from the way that the sub-section was printed that the proviso only applies to sub-paragraph (b) (i.e., to cases in Magistrates' Courts).

[68] This makes good sense if regard is had to the fact that in 1938, when Act 67 of 1938 was passed, persons could only be tried in the High Court if they had been committed for trial after a preparatory examination had been held. Thus the judge would have been in possession of the depositions when the plea was entered and could have insisted on evidence proving the commission of the offence, despite the guilty plea, if not satisfied that the offence had been committed. This did not apply in the Magistrates' Courts, hence the need for the safeguard provided by sub-paragraph (b).

[69] The Court in Dlamini referred (at page 6, second paragraph) to Section 272 (1) of the Act which deals with admissions. That sub-section reads:

*"In any criminal proceedings the accused or his representative in his presence may admit any fact **relevant to the issue**, and any such admission shall be sufficient evidence of such fact."* Emphasis added.

[70] The South Africa equivalent of that sub-section was considered by Ramsbottom A J P (as he then was), with whom Hiemstra J concurred, in *R v Fouche 1958 (3) SA 767 (T)* at 777 A-778 E, where the point is made (at 777 F - G) that the facts an accused can admit under Section 284 (1) of the then applicable South African Act (Section 272 (1) of the Swazi Act) are facts 'relevant to the issue.' Where there is a plea of guilty there is no issue; the plea is a judicial

admission of all the material facts. Where there has been a plea of guilty in an inferior court, the court is not allowed to sentence the accused without proof that the offence charged was actually committed, 'that fact has not been put in issue by the plea - the necessity for proof is imposed by statute.'

[71] "In *Commissioner of Inland Revenue v Dundee Coal Co. Ltd* 1932 AD 331, which was also a case dealing with the question as to whether a proviso applied to the preceding sub-sections or to only to the immediately preceding sub-section, the South African Appellate Division held, following *R v Newark-upon-Trent Corporation* 3 B & C 59 and *Cohen v South Eastern Railway Co.* 2 LR Ex. Div. 253, that the question whether a proviso applies do to a particular sub-section does not depend on the manner in which it is printed. In the *Newark-upon-Trent* Case Holroyd J said:

*'In the construction of a statute the question whether a proviso in the whole or in part relates to and qualifies restrains, or operates upon the **immediately** preceding provision only of the statute or whether it must be taken to extend in the whole or in part to **all** the preceding matters contained in the statute, must depend, I think, upon its words and import and not upon the division into sections that may be made for convenience of reference in the printed copies of the statute.'*"

[72] Although an approach based on a total disregard for punctuation and the division of a statute into sections has more recently been criticised as lacking in realism (cf *R v Njiwa* 1957 (2) SA 5 (N) at 8) I think that in deciding whether a proviso applies only to an immediately preceding sub-section or all the preceding sub-sections it is appropriate to have regard to what Holroyd J called the 'words and import' of the statute.



[73] Applying that approach to Section 238, one sees that the proviso permits the conviction of an accused on his plea of guilty “without other proof of the commission” of the offence in certain circumstances. Those words clearly only qualify the statement in sub-paragraph (b) (as it was worded when the statute was originally enacted in 1938) that a Magistrate’s court may only sentence an accused for an offence to which he has pleaded guilty “upon proof (other than the unconfirmed evidence of the accused)” that [the] offence was actually committed’; they do not qualify anything in sub-paragraph (a). In my view it is accordingly clear that the proviso only applies to sub-paragraph (b) and that to hold otherwise would defeat the intention of the legislator.

[74] The correct position in my view is the following:

1. In the High Court, and now also in a Principal Magistrates’ Court, an accused who pleads guilty can be sentenced to any competent sentence without it being necessary for the commission of the offence to be proved by evidence *aliunde*.
1. In a Magistrates’ Court, other than that of a Principal Magistrate, an accused who pleads guilty cannot be sentenced to a punishment of imprisonment, without the option of a fine, or a whipping or a fine exceeding E2 000 unless evidence is tendered of the commission of the offence. Such evidence cannot take the form of an admission by the accused.

[75] **MAY COURT ORDER ACCUSED TO TESTIFY?**

Paragraph 3.1 of Iddi’s Heads of Argument reads as follows:

*“It is humbly submitted, with respect, that if His Lordship a quo was of the observation that Appellant ought to have given his explanation under oath to be tested (if it fails cross-*

*examination) so as to warrant a stiff sentence, he ought to have so ordered as opposed to allowing counsel to make submissions from the bar.”*

[76] This submission has its genesis in paragraph 12 of the judgment of Masuku J which reads thus:

*“I interpose to state that it was submitted on your behalf that you were duped and subsequently coerced into conveying the substances in issue. This remained only oral submissions by your attorneys and which could not be tested by the rigours of cross examination. Nor were these alleged facts stated in the statement of agreed facts. For that reason, on such serious allegations which would have required acceptance by the Crown or alternatively, the adduction of **viva voce** evidence, I cannot properly rely and put the said statement into the equation in assessing the correct sentence.”*

[77] I have already dealt with the near evidential worthlessness of statements made by counsel at the bar in mitigation of sentence which are totally unsupported by sworn, or unsworn, or documentary, or indeed by any other form of evidence. I am of the considered view that the Trial Judge was eminently correct to refer to the absence of *viva voce* evidence and to conclude that he was unable to rely upon the vapid oral submissions by the Appellants’ advocate in determining the appropriate sentence.

[78] But even if one were to proceed upon the unsound basis that the oral presentations of Counsel should have been taken into account by the Trial Judge, one would find in them a pitiful want of mitigating material warranting an interference with the sentencing orders of the Trial Judge which in my view were not only legally impeccable but also humane and merciful.

[79] Counsel for the Appellant did not cite any authority for his novel submission, nor do I know of any, which casts a duty upon a Judge to order that an accused person in a criminal trial should give evidence upon oath in his defence. Should any Judge accede to such an improper urging by Counsel, I apprehend that allegations of his descent into the arena, and of his conduct of the trial being unfair, would be both vociferous and well founded.

[80] By way of response to the Appellants' complaints that the Trial Judge's sentences were inappropriate and excessive, counsel for the Crown relied upon the authority of *William TouchDlamini v Rex Appeal Case 22/2002*. Tebbutt JA enunciated the well known principles which this court should follow when considering appeals against sentence. He wrote at page 8:

*"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."*

[81] In considering the sentence in the case before him Tebbutt JA analysed the relevant matters in this way at pages 8 and 9:

*"The final question then is: Was the sentence excessive? Having regard to the very large quantity of tablets involved and the fact that the Appellant was importing them into Swaziland, obviously for distribution here, and to the prevalence of the offence to which the learned Judge referred, a custodial sentence was clearly warranted. Nor, given the*

*penalty provisions for the offence contained in Section 12(1) (a) of the Act, can a sentence of seven years imprisonment, two years suspended, be considered as remotely excessive. True, it is a more severe sentence that in the Kaskar case, where the number of tablets was greater than in the present one but that case was decided eight years ago in 1994 and the prevalence of the offence in question has increased since then. In any event each case depends on its own merits and, as stated, the sentence lies within the discretion of the trial court. As there is no basis for interfering with that discretion in this case, the sentence of the trial court must stand.”*

[82] Applying a similar analytical process to the facts and law which have been set out in the preceding paragraphs, and bearing in mind the substantial quantities of two of the most potentially harmful drugs to wit cocaine and heroin, it inevitably follows that these appeals are wholly wanting in merit and must accordingly fail.

[83] **ORDER**

1. The following appeals are hereby dismissed.

(i) Criminal appeal No. 3/2010

(ii) Criminal Appeal No. 9/2010

(iii) Criminal Appeal No. 10/2010

1. The sentences of the court a quo in the above appeals are hereby confirmed.

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S.A.Moore

Justice of Appeal

Delivered in open court on this ..... day of May 2010.