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THE HIGH COURT OF SWAZILAND

Petrus Charel Swartz

Appellant

v

The King

Criminal appeal Case No 20/99

Coram	SAPIRE, CJ MAPHALALA, J
For Appellant	Mr. Dunseith
For Crown	Susan Nderi

Judgment

(15/09/99)

Sapire CJ

The appellant was charged in the Subordinate court for the district of Hhohho held at Pigg's Peak with having contravened section 7 read with section 8(1) of the Opium and Habit Forming Drug Act 37/1922. The offence as particularised was the possession of 50.594Kg of Dagga without the prescribed permit.

He pleaded Not Guilty to the charge, but the magistrate found that the prosecution had proved the offence. On conviction the Appellant was sentenced to three years imprisonment without the option of a fine.

The appellant admitted that three boxes containing the Dagga had been found in the motor car driven by him, but claimed that persons who he could not identify had brought the boxes onto the vehicle. He claimed to have picked up these persons who were strangers to him at a garage stop. They, he said, jumped from the vehicle when it approached a police roadblock leaving the incriminating boxes containing dagga on the vehicle.

The magistrate did not believe this story. Indeed it has a strong element of *deus ex machina*, to afford an innocent explanation of the presence of a substantial amount of dagga found on the vehicle. It is true that for the validity of the conviction it was not sufficient for the magistrate to have found that the account given by the accused was false; he had to go further, as he has, and found that the appellant's version could not reasonably be true. In other words, which have been repeated time and time again, the Appellant's version must be shown to be false beyond reasonable doubt.

Despite the criticism leveled at the magistrate's reasoning and the conclusion to which he came, we do not think that on the evidence any other conclusion would have been proper. One cannot imagine three people jumping off a vehicle travelling at high speed risking injury and pursuit in order to avoid detection rather than jettisoning the illegal cargo.

In advancing the appeal against the conviction, the appellant is faced with a further difficulty. After conviction he reentered the witness box and gave evidence on oath in mitigation. After describing his personal circumstances he said, presumably referring to the offence and his conviction, "I am sorry for what I have done" His attorney in arguing in mitigation said, "accused had told me that the dagga was meant for local market". (Without knowing at what stage this revelation was made to the Appellant's attorney no criticism can be made of the attorney's conduct of the case. If the revelation was made at any time before conviction it would have been unethical for the attorney to conduct the case on the basis of his client's fabricated defense). As it is we find these statements made in mitigation an insurmountable obstacle to a successful appeal on the merits.

Turning now to the question of sentence, it is important to bear in mind that the appellant was charged with a contravention of the Opium and Habit Forming Drugs Act[1]. This Act creates

[1] Act 37/1922

several offences including that of being in possession of dagga without being licensed thereto. Section eight of the Act prescribes the penalties for all the offences, being contraventions of the provisions of sections 2 3 5or 7. The section does not draw a distinction, as far as sentence is concerned, between a conviction on a charge of the importation, export, production, or manufacture of habit forming drugs prohibited in terms of section 2(1), and a conviction for the mere possession of the prohibited substance as provided for in section 7.

The judgment of Hannah CJ in R v Phiri[2] has long been a guideline for sentencing of persons convicted for contraventions of the same statutory offence which is the subject matter of this case. Hannah CJ identified different classes of possessors of dagga and indicated what he considered would generally speaking be an appropriate sentence for the different categories of offenders. The Learned Judge observed that

"The circumstances in which an offender may be found to be in possession of dagga will vary enormously from case to case and the proper sentence to be passed will vary accordingly. Without attempting to be exhaustive the following are the more obvious factors which should be considered"

This is a clear indication that the Learned Judge had in mind that sentence in each case had to be considered on the facts applicable to that particular case, but that there were factors which would be found in each case which would indicate the appropriate sentence. One of the factors was the reason for the accused person's possession of the prohibited substance. In cases where only a small quantity of dagga is involved the court may properly infer that the accused possessed the dagga for personal consumption. Where such an offender had no previous convictions a fine would normally meet the case. Where possession of dagga is found to be for purposes of trading or supply different considerations apply. Possession of a large quantity of the prohibited substance, in the absence of evidence to the contrary could lead to the inference that the dagga was possessed by the accused to supply others

The criticism levelled by appellant's attorney at the judgment was that because it suggested that sentence should be based on whether possession was for private use or public supply meant that the accused was to be punished for an offence with which he was neither charged or convicted. In other words he was being punished for dealing in the prohibited substance rather than the mere possession.

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[2] SLR 1982 –1986 508

This argument leads to the unacceptable conclusion that motive is not relevant to sentence. It means that the quantity of the substance in possession of which the accused is found plays no part in the sentence, which he is to receive. The argument also overlooks that the legislature has provided for the same penalty for the different offences constituted by contraventions of different sections of the act. We are not persuaded that R v Phiri was wrongly decided. On the contrary, it seems to us that the analysis of the factors to be taken into account in passing sentence for contravention of the section provide a logical, relevant, and acceptable guideline.

In the present case the Appellant's attorney informed the court *a quo* that, "The accused is not an exporter of dagga. Accused has told me that the dagga was meant for the local market". There is no need to draw any inference from the amount of dagga found in the Appellant's possession. It is expressly admitted that the substance was to be sold locally. This we find to be an aggravating factor.

There has been no misdirection by the magistrate. The sentence is not one, which induces a sense of shock. The Appellant is a man of mature years. He is a citizen of the Republic of South Africa who was in this country to participate in the illegal but lucrative trade in dagga. Although he has no previous convictions there has been little sign of remorse. For these reasons this is not a case where we would be inclined to interfere with the with the discretion properly exercised by the magistrate in passing sentence. even if we were permitted in law so to do.

Our attention has been drawn to the sentence imposed on the accused persons in the case of **Solomon Maphosa and Another.** In that case too the Accused persons were found in possession of dagga. Having regard to the amount of dagga involved and the circumstances in which the accused persons were found in possession thereof, it was clear they were involved in the wholesale supply of dagga. It is true that in that case the sentences insofar as they were custodial were suspended. The motivation therefor was that the accused had been in custody for a substantial length of time at the point when sentence was imposed. There were other factors. The accused were young and immature and in the case of one of them the forfeiture of an expensive motor vehicle added to the severity of the punishment.

The appeal against the conviction and the appeal against the severity of the sentence are dismissed.

S W Sapire CJ

I Concur

Maphalala J