



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Crim. Case No. 476/2018

In the matter of:

THE KING

VS

KATALA NASSER MOHAMMED

Neutral citation: **The King vs Katala Nasser Mohammed (476/2018) [2018] SZHC 98 (18th May, 2018)**

Coram: **M. Dlamini J**

Heard : **15th May, 2018**

Delivered : **18th May 2018**

Civil - bail - The triad approach considers the nature of the crime, the personal circumstances of the accused and the interest of society - the mere evidence that there is prevalence of a certain crime should not outweigh a consideration of the accused personal circumstances

Summary: The plaintiff stood arraigned on four counts, the first on violating section 81 of the Customs and Excise Act of 1969 and the following three counts on contravention of the Pharmacy Act No. 38 of 1929. Before his plea, Prosecution withdrew the first count. He pleaded guilty to the three counts against the Pharmacy Act. Having been convicted following his plea, my duty is to decide on the appropriate sentence.

Variables on Sentencing

- [1] A number of factors are considered in the passing of sentence. These factors although inexhaustible, have been summarised as comprising a triad. The triad approach considers the nature of the crime, the personal circumstances of the accused and the interest of society.
- [2] Society has moved away from viewing a convict as one deserving punishment for the unlawful conduct. It has taken the view that a convict deserves to be meted out with a sentence that is rehabilitative rather than punitive. It is for this reason that institutions have been converted from prisons to correctional centres. In **S v Matoma**¹ the Appellate Division pointed out that the mere evidence that there is prevalence of a certain crime should not outweigh a consideration of the accused personal circumstances. The court expressed:

¹ 1981 (3) SA 838

“The gradual and justifiable aggravation of sentences in order to combat, by means of deterrence, retribution and removal for the offender from society in the interest of society, the increasing prevalence of a particular crime must not lead, in the imposition of sentence, to an inevitable negation of a particular accused’s own personal circumstances which could possibly lead to mitigation of sentence.”

[3] In considering the triad, the duty of the court is to strike a balance on the three contending interests. The court in **S v Banda and Others**² eloquently expressed on this duty:

“The elements of the triad contain an equilibrium and a tension. A court should when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances of the offence, and the impact of the crime on the community, its welfare and concern.”

[4] The above principles of the law on sentencing are at the backdrop of my mind as I seek to discharge my duty on sentencing the accused in this case. I do so by tabulating the triad.

Nature of the offences

² 1991 (2) SA 352 (B) at 355-B/C

[5] The present accused appeared before me facing four counts as follows:

“Count One

The accused is charged with Contravening Section 81 of the Customs and Excise Act, 1969.

In that upon or about 16th November 2016 at or near Ngwenya Border area in the Hhohho Region, the said accused did unlawfully fail to declare 30 Kilograms of diamorphine know as heroin, a poisonous drug under the Pharmacy Act No. 38/1929, which the accused had in his possession and did thereby contravene the said Act.

Count two

The accused is guilty of the crime of Contravening section 12(1)(a) of the Pharmacy Act, No. 38/1929.

In that upon or about the 16th November 2017 and at or near Ngwenya Border in the District of Hhohho, the said accused person not being a holder of a licence or permit under the Act did unlawfully possess 30 kilograms of diamorphine know as heroin drug under the Act in a motor vehicle registered FW 03 GD GP.

Count three

The accused is guilty of the crime of Contravening section 12(1)(b) of the Pharmacy Act, No. 38/1929.

In that upon or about the 16th November 2017 and at or near Ngwenya Border Post in the District of Hhohho, the said accused person not being a holder of a license or permit did unlawfully convey 30 kilograms of diamorphine know as heroin drug under the Act.

Count four

The accused person is guilty of Contravening section 12(1)(c) of the Pharmacy Act 38/1929.

In that upon or about the 16th November 2017 and at or near Ngwenya Border Post, the said accused person without a written permit issued by the Minister did unlawfully export 30 kilograms of diamorphine know as heroin a drug under the Act.

NB: PLEASE TAKE NOTE that upon conviction of the accused person, the Crown will apply for the forfeiture of the said motor vehicle in terms of section 12(3)(b) of the Pharmacy Act 38/1929 alternatively as an instrumentality under section 57(2) of the Money Laundering and Financing of Terrorism (Prevention) Act 2011 as amended in 2016.”

[6] Prosecution Counsel withdrew count one. Each count having been read to accused, he pleaded guilty. A signed statement of the agreed facts was submitted by consent of both Counsel to court. It was admitted as Exhibit “A”.

[7] The statement revealed on the crimes levelled against the accused that on the 16th November, 2017 around 2:30p.m Detective Constable 6733

Njabuliso Sibandze was stationed at Ngwenya Border Post. He decided to conduct a search on the motor vehicle driven by the accused before court. He was joined in the process by Constable 6294 P. Nhlabatsi and a security guard. A strange compartment was noticed underneath the rear boot. The spare wheel was removed. This exposed a metal sheet concealing the access to the odd compartment.

[8] On a further examination of the compartment, six black plastic bags were noticed inside. The contents of the black plastic bags was the heroin which is the subject of the charges. The contents as heroin were confirmed upon examination by Detective Constable 5836 A. Bhembe. His forensic report was admitted and marked as Exhibit "C" by consent of both Counsel. Exhibit "C" reveals that the total weight of the heroin was 29.998 kilograms, with a content strength (confidence level) of 99% and chemically labeled as diacetylmorphine.

[9] A scenes of crime officer by the name of Detective Constable 5713 M. Dlamini took photographs of the substance heroin and the additional compartment in the motor vehicle FW 03 GD GP. The motor vehicle which was a Kia Sorento was later delivered to Kia Motors dealers who compiled a report to the effect that the observed compartment was modified outside their production factory and was not known by them. This report was admitted to court by consent and marked Exhibit "B". Other documents handed to court by agreement of both Counsel were accused's copies of passport and data on the movement of the motor vehicle FW 03 GD GP sourced from the Ministry of Home Affairs, immigration department. These were marked exhibit F4 and F1-F3 respectively.

[10] From the above analysis of the nature of the crime, it is common cause as it was so pointed out by Counsel on behalf of the accused that heroin is a substance which has far reaching devastating effect once consumed. Its strength was revealed to be almost complete as it read 99%. It cannot be equated to dagga in terms of the negative effects on users. No doubt the legislature prohibited not only its distribution but mere possession of it.

[11] On the question of prevalence, it is admittedly not so prevalent as compared to dagga. However, a number of cases have been reported previously although of smaller quantities³ in our jurisdiction. Ironically all the accused were Tanzanian nationals. The quantity in the case at hand is significant as it is about 30 kilograms whose market value was estimated at E12 million. In terms of the *locus classicus* case by **Hannah CJ**⁴ the quantity indicates that it was certainly not for personal consumption but for sale either retail or wholesale. In brief, this indicates that the accused was a dealer in heroin.

[12] The manner of conveying the substance must also be considered. Most of the accused persons in the previously prosecuted cases were mules. In the present case, the heroin was conveyed by the use of a motor vehicle. A specially designed inconspicuous compartment was used to hide the heroin.

[13] Of further concern about the nature of the offences herein is the movement of the motor vehicle FW 03 GD GP. Exhibit F3, reveals as follows:

- On 10th May 2017 it departed from the country through Ngwenya border gate and was driven by a Tanzanian holding passport number AB 330827. On affirmation, the accused testified that he was not the holder of such a passport and that he did not know the driver. It is not clear

³ See cases such as Chicco Fanyanya Iddi (Appeal No. 03/10; Jose Gabriel Machva Appeal No. 09/10 and Raymond David Malakara (Appeal No. 10/10)

⁴ R v Phiri 1982-1986 SLR 19

when and where this motor vehicle had entered the kingdom for it to depart on the 10th of May 2017. There are no records of the driver (Tanzanian, passport holder AB 330827) as to when he had entered into the country.

- On 29th May, 2017 it entered through Lomahasha border gate driven by the same Tanzanian holding passport number AB 330827. From this report, it is clear that the motor vehicle having departed on 10th May 2017, it landed in South Africa and left South Africa for Mozambique as it entered (on 29th May, 2017) through Lomahasha border gate, with Mozambique as the only country adjacent to Lomahasha.
- It left the country on the same day (29th May, 2017) to South Africa as it used the Ngwenya border gate. The driver was the same Tanzanian holding passport number AB 330827.
- On the following month, the same motor vehicle, taking the same route entered through Lomahasha border gate driven by again accused's country man who holds a different passport AB 231745. It was from Mozambique as evident by its entry through Lomahasha.
- It left the kingdom on the same day, transit to South Africa and driven by the same driver who entered through Lomahasha.
- On 3rd November 2017 the same route was taken by this motor vehicle as it is seen entering the kingdom through Lomahasha border gate and en route to South Africa as it departed on the same date through Ngwenya. Two drivers were involved in that date. The one who drove into the country through Lomahasha was a South African, holding

passport number A0610 3682. It left on the same day through Ngwenya border gate driven by a Tanzanian under passport AB 782059. When this motor vehicle departed at Ngwenya under the hand of the Tanzanian on the 3rd November, 2017, it is reflected as an Opel with the same registration number as the Kia. Were the Kia's number plates affixed to an Opel? If yes, to conceal what? I do not intend to answer these questions by making any adverse inferences.

- On 8th November, 2017 the Kia FW 03 DG GP departed from Ngwenya border gate. It was driven by the accused. Accused admitted this evidence under oath. There are no records of its entry into the kingdom. When asked how the motor vehicle entered, accused indicated that he did not know as he was sent to collect the car from the country from a person he has never met before nor did he know his particulars except that he was from Mozambique.
- Again on the 16th November, 2017 this motor vehicle is reflected as having departed from this country through Ngwenya border gate. The driver was the accused. He was however arrested before he could actually depart. Again there is no record of its entry.

[14] A further analysis of exhibit F3 shows that the said motor vehicle was driven by five different persons on the six journeys it made into the country. Counsel for the Crown urged the court to infer from this analysis that the accused was engaged in a syndicate.

[15] Exhibit "B" is evidence of a compartment designed outside the manufacturer where the heroin was concealed. This is evidence that the

perpetrator of the offences herein orchestrated a plan to conceal his merchandise. The offences were therefore premeditated.

[16] There are a number of questions left unanswered in this matter. For instance accused testified that he came from Tanzania to collect cellular phone accessories in South Africa. Upon landing from his flight, a gentleman known only as Eric in South Africa requested him to board a public transport into the country to collect the Kia Sorento. He complied in both instances, viz., 8th November, 2017 and the 16th November, 2017. He could not provide the full identities of the person in South Africa and the one from Mozambique who handed the motor vehicle to him in eSwatini. Obvious, the accused is part of a larger network. **Moore JA**⁵ pointed out in this regard:

“[T]he big kahunas who lead the networks described in (d) above (i.e. CJ Hannah judgement on the categories of drug dealers) 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 appellant (including accused herein), 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.”(my own explanation)

⁵ In Chicco Fanyanya Idd 03/10 et al page 22

[17] It is highly improbable that the accused would travel into the country not knowing who sent him and who would hand the motor vehicle to him. It is also highly improbable that he would be sent twice to collect only the same motor vehicle. This is more so because accused testified that he only came to South Africa to collect his stock which was cellphone accessories and not motor vehicles. **Tebbutt JA**⁶ explicitly stated in regard to the evidence of the accused both before conviction and in mitigation and which I concur fully with:

“In deciding whether appellant’s version of the events may reasonably possible 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.”

Personal interest of the accused

[18] The accused pleaded guilty from the onset. In fact when the accused was first brought before court, he abandoned his bail application and pointed out to the court that he intended pleading guilty to the offences preferred against him. This did not just serve the court’s time but also the Crown’s resources as prosecution was greatly curtailed. This is indicative of his remorse for the crimes committed.

[19] The accused is a first offender. He has no record of previous convictions despite that he has been in the country before as he so pointed out under affirmation and this finds support from his passport.

⁶ In *Bogosi v the State* 1996 BLR 702 at 707

- [20] He is a family man following that he testified that he is married with one child who is eight years old. He is a responsible citizen of Tanzania as he runs a business of his own by selling cellphone accessories. He also takes care of his extended family such as his nieces and nephews following the demise of his two sisters.
- [21] Accused pointed out that he was diabetic and since his incarceration, he has been attended more than ten times at the Correctional Services. However, when queried on the type of diabetes by this court, he pointed out that he did not know its type. It is difficult to believe this piece of evidence as judging from his evidence on the number of his medical attendance since 17th November, 2017, this suggests that he has a serious case of diabetes. His failure to inform the court on the type of diabetes must be inferred against him. He took an affirmation and his evidence stood to be tested and unfortunately it failed on his sickness.
- [22] Following that the accused has all his relatives in Tanzania, I indicated during trial that I am inclined to consider in the event of a custodial sentence to have him repatriated into his home country in order to be closer to his family. Counsel on behalf of accused pointed out that would be well with accused and proffered to bear any repatriation costs. This again must weigh in favour of the accused in considering sentence as he is willing to assist the justice system.
- [23] The accused surrendered the motor vehicle to the Crown upon arrest. This must go to his credit in terms of sentencing as he served Prosecutions from the pains of having to move an application for forfeiture.

Interest of Society

[24] It has been said that dagga has its own fearful repercussions in society. However, the effect of heroin far outweighs the repercussion of dagga. It is for this reason therefore that society is very wary of the distributions of such highly intoxicating drugs among its members, especially the youth. It frowns upon such offences. It expects the court to mete out a sentence against the accused which would be a deterrence not only to the accused but also would be offenders.

[25] In assessing sentence, I am guided further by precedents. I consider adopting the similar approach as in the Supreme Court judgment under cases numbers 03, 09 and 01n of 2010. All three accused had pleaded guilty and statements of agreed facts were admitted to court. The illegal substances in the three cases were cocaine and mandrax. I have already pointed out that the amounts were in terms of grams and not kilograms as *in casu*. **Moore JA**⁷ espoused on the appropriate sentence in such matters:

“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

⁷ N5 page 23 para 37

retail supplier and the courier should both be death with by way of a substantial custodial sentence.”

[26] There are no compelling grounds why I should depart from the above position of the honourable jurist in this case. From the quantity of the drugs at hand, the accused herein is a courier. It follows that a substantial custodial sentence ought to be imposed. However, as I have highlighted his personal circumstances, I shall adopt the same approach to sentence taken by Masuku J and confirmed by the Supreme Court in **Raymond Marakala**⁸ cases. The learned judge passed a custodial sentence and suspended a portion provided the accused paid a fine.

[27] In the final analysis, I enter the following as sentences:

I.

a) **Count 2**

Accused is sentenced to a custodial sentence of fifteen years imprisonment of which ten years is suspended on condition that he pays a fine of E15 000.

b) **Count 3**

Accused is sentenced to a custodial sentence of fifteen years imprisonment which is wholly suspended on condition that he pays a fine of E15 000.

c) **Count 4**

⁸ See N3

Accused is sentenced to a custodial sentence of fifteen years imprisonment which is wholly suspended on condition that he pays a fine of E15000.

II.

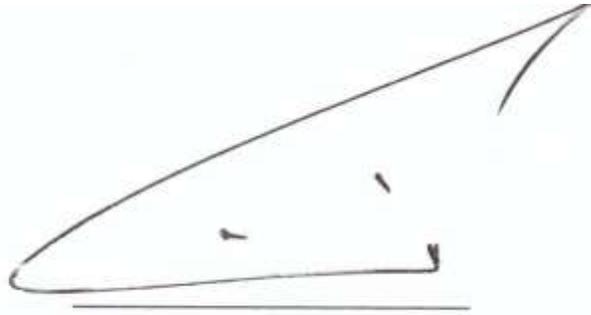
The sentences on Count 2, Count 3 and Count 4 are to run consecutively to each other. Count 2 is backdated from 16th November, 2017.

III.

His Majesty's Correctional Services is hereby ordered to repatriate the accused back to his home country – Tanzania - to serve the custodial sentences. Accused is ordered to bear his repatriation costs as per his own tender.

IV.

Motor vehicle Kia Sorento (VIN) KNE C521565628868 registered FW 03 GD GP is hereby ordered to be forfeited to the Crown.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left and a series of smaller, connected strokes on the right, all contained within a faint rectangular border.

M. DLAMINI J

For the Crown : **M. Nxumalo of DPP's chambers**

For the Accused : **C.S. Dlamini of NMK Shongwe Attorneys**