IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 09/2014

In the matter between:

MLUNGU NKOSINGIPHILE MAKHANYA Appellant

And

REX Respondent

Neutral Citation: *Mlungu Nkosingiphile Makhanya v Rex (09/2014)* [2014] SZSC 44 (3 December 2014)

Coram: RAMODIBEDI CJ, LEVINSOHN JA and DR ODOKI JA

Heard: 3 November 2014

Delivered: 3 December 2014

Summary

Criminal appeal – Appeal against sentence – Appellant sentenced by a magistrate court to five years imprisonment, without option of a fine, for offence of unlawful possession of dagga – Sentence confirmed by the High Court – Appeal against sentence on grounds that it is harsh and fails to take into account the role played by the Appellant in the commission of the crime – principles governing sentencing in cases of possession of dagga – No material misdirection or irregularity by court a quo found – Appeal dismissed.

JUDGMENT

DR B. J. ODOKI, JA

[1] The Appellant together with three others were convicted on count one of being unlawful possession of four bags of dagga weighing 55 kilograms contrary to section 12 of the Pharmacy Act as amended by Act 11 of 1993. They were each sentenced to five years imprisonment without an option of a fine.

[2] The other three accused persons who were non-Swazi citizens were convicted on count two, with unlawfully entering and remaining in Swaziland without a resident permit, thus contravening the Immigration Act. They were each sentenced to a fine of E500.00 or 5 months imprisonment, both sentences to run concurrently.

[3] The Appellant together with his co-accused appeled to the high court against sentence on count one. The high court dismissed the appeal. The Appellant alone with leave of the High Court has appealed to this Court against his sentence.

[4] In his Notice of Appeal, the Appellant raises a number of grounds of appeal. He complains that the learned judge in the High Court erred in law in upholding the sentence of five years without an option of a fine. He states that the sentence induces a sense of shock. He argues that the learned judge erred in law in not separately considering the roles played by the individual accused persons in the commission of the offence. Instead they were put under one bracket. This was prejudicial to the Appellant. He criticizes the court *a quo* for not giving due consideration to the fact that the Appellant was a first offender who ought to have been given the option of a fine. Finally, the Appellant complains that the court *a quo* erred in not treating him leniently since he had acknowledged his guilt and was remorseful.

[5] During the hearing of the appeal counsel for the Appellant dwelt mainly on the ground that the court *a quo* erred in not considering the separate roles played in the accused in the commission of the offence. Counsel argued that the appellant was merely hired to transport in his car the other

three accused persons who were carrying dagga. According to counsel, the Appellant came to know the consignment was dagga after it had been in his car. Counsel conceded that the Appellant was promised more money for carrying the dagga. Therefore, counsel submitted, the roles played in the crime by the Appellant and the owners of the dagga were different, and the court *a quo* erred in not differentiating their roles in imposing sentence. Counsel referred us to the case of ***R v Phiri 1986 SLR 508*** in supporting his submissions.

[6] The Respondent submitted that the high Court did not commit any error or misdirect itself in confirming the five (5) year sentence of imprisonment without an option of a fine. It was further submitted that the High court correctly ruled that there was no material misdirection or irregularity in the court *a quo*, resulting in miscarriage of justice. The respondent contended that the sentence does not induce a sense of shock to warrant interference by this court.

[7] The Respondent maintained that the High Court committed no error in holding that the trial court took into account the personal circumstances of the Appellant, the circumstances of the offence as well as the interest of society. It was the Respondent's submission that since sentencing is a matter that lies pre-eminently in the discretion of the trial court, the High

Court was justified in not interfering with the sentence imposed, as there was no misdirection or irregularity committed by the trial court.

[8] Finally, the Respondent argued that the court *a quo* was unduly lenient in sentencing the Appellant to five years imprisonment when the maximum sentence for the offence is fifteen (15) years. The Respondent relied on the decision of this court in the case of ***Mzikayifani Mncina & Another v Rex, Criminal Appeal Case No. 1 of 2001*** in support of the above argument.

[9] The principles governing sentencing in cases of unlawful possession of dagga have been expounded in the cases of ***R v Phiri (Supra), Mzikayifani Mncina &Another v R (Supra) and Chicco Fanyana Idde and Others v R Criminal Appeal No. 3/2010.***

[10] In ***Phiri v R (Supra), Hannah CJ*** enumerated the various factors which a court should take into account when passing sentence in offences of unlawful possession of dagga. The factors are whether dagga is for (a) personal consumption only (b) supply to wholesaler or retailer (c) the wholesaler supplier and network (d) the wholesalers distribution (e) the retailer supplier (f) the isolated transaction and (g) the social supplier. The Court should also consider the reason for the offence, the

circumstances of the offender and the public interest. Each of these factors has a different effect on the sentence as it may constitute aggravating or mitigating circumstances in the case.

[11] The above factors were approved by this Court in the cases of ***Mzikayifani Mncina & Another v R (Supra) and Chicco Fanyana Idde & Others v R (Supra).*** In the ***Mncina case (Supra)*** the Court agreed with the observation made by Hannah CJ in ***Phiri v R (Supra)*** that when a person is convicted of possession of dagga, two factors that are relevant to his sentence are the quantity of the dagga possessed and the reason why the dagga was in the possession of the accused.

[12] In the present case the Appellant in effect argued that the role he played in the commission of the offence as a taxi driver was minor compared to that of the three co-accused who had hired him to transport the dagga. He stated that he did not know that the consignment he was transporting was dagga.

[13] However, the Appellant admitted that he smelt something in the vehicle. He also admitted that he knew one of the Appellants (A4) who was the leader of the group and who called him to transport the dagga as he was his customer and had hired him before to take him to a hotel and also to

transport some consignment. According to A4, the group was going to South Africa through the fence and not the border as they did not have any passports. Indeed A4 admitted coming to Swaziland to buy dagga and trafficking it to South Africa as he and the other accused needed money.

[14] It seems apparent from the above evidence that the Appellant knew the leader of the group (A4) who had hired him before to transport some consignment. The Appellant did not disassociate himself from the group when he smelt something in the vehicle. He was driving the accused to the border with a view to smuggling or trafficking the dagga to South Africa. Therefore he did not play a minor role in the commission of the offence, but he facilitated its commission.

[15] Given the large quantity of the dagga the Appellant and his co-accused were found in possession and the reason for its possession namely to transport it to South Africa for sale or distribution, the Appellant and his co-accused deserved a substantial custodial sentence.

[16] In the ***Mzikayifani case (Supra)*** the two Appellants who were charged with seven others for possessing 63 bags of dagga with a total weight of 614 kilograms and pleaded guilty, were each sentenced to seven years

imprisonment, three years of which were conditionally suspended for a period of three years. The sentence was confirmed by this court.

[17] In the present case the Appellant was sentenced to only five years imprisonment for trafficking in dagga as he was transporting it out of the country. The sentence imposed on the Appellant met the circumstances of the offender, the circumstances of the offence and the interest of society. It is not correct that the court *a quo* did not take into account the fact that the Appellant was a first offender. The sentence meted out to the Appellant was neither too harsh as to impose a sense of shock, nor was it too lenient as to amount to a miscarriage of justice.

[18] I agree with the observation made by the learned judge in the High Court regarding the gravity and consequences of trafficking in illicit drugs like dagga, when she stated:

> *"The offence committed is a serious and prevalent one. The possession and trafficking of illicit drugs like dagga is ubiquitous in the Kingdom. The destructive effects of such substances in generations past, present and yet unborn, cannot be over emphasized. It is an agent of misery, devastation and death"*

[19] For the foregoing reasons, this appeal fails, and it is accordingly dismissed.

DR B. J. ODOKI
JUSTICE OF APPEAL

I Agree

M. M. RAMODIBEDI
CHIEF JUSTICE

I Agree

P. LEVINSOHN
JUSTICE OF APPEAL

For the Appellant: Mr. T. Fakudze

For the Respondent: Ms. Phila Dlamini