CRI/A/48/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

MOSOEUNYANE MOTHAKATHI — Appellant

vs

R E X — Respondent

JUDGMENT

Delivered by the Hon. Acting Mr. Justice M. L. Lehohla on the 7th day of November, 1986
Summarily dismissed on 8th August, 1986

The appellant appeared in the Leribe Magistrate's Court on a charge of contravening Section 3(A) of Dangerous Medicine Act 21/73. The quantity of dagga specified in the charge weighed 2,314 kilograms and was contained in 121 bags. The appellant, a 66 year old man pleaded guilty to the charge. This plea was accepted by the Crown and he was convicted and sentenced to 30 months' imprisonment on 12th February, 1986.

The outline of the prosecution case is to the effect that:-

On the 9th February 1986 police acting on information received, went to Nqechane where they reported to the chief who gave them a messenger. The police in the company of this messenger proceeded to appellant's home but found that he was absent. However appellant arrived within a short time.

Police introduced themselves to him in the presence of the chief's messenger and asked for permission to search appellant's houses. The search revealed nothing. Thereafter

/accused ...

accused led them to one of the houses a distance away from other houses. This is the house in which he informed them he sleeps. Along the way to that house police were confronted with a strong smell of dagga. Appellant without any apparent prompting blurted out that there was dagga in that house. On coming into the house they saw that it was full of bags which appeared to be full. Appellant told them that the bags contained dagga. Their subsequent examination of contents of the bags confirmed appellant's information. Appellant was asked for a permit for the dagga but failed to produce any. Consequently he was cautioned and charged with dealing in dagga without a permit. The dagga was conveyed to Hlotse where it was weighed in appellant's presence and tipped the Scales at 2,314 kilograms.

It is against the conviction and sentence set out in the first paragraph to this judgment that the appellant through his attorneys Messrs C. M. Masoabi and Company has appealed to this Court on the grounds that:

(1) The appellant was not represented at the trial and the plea he tendered was without any legal advice.

(2) The appellant was alleged to have been found in possession of one hundred and thirty (131) (sic) bags (my underlining) of dagga packed in one of his houses and was convicted and sentenced on the basis that he (Appellant) was dealing in dagga yet possession per se is not enough without any further act indicating or confirming the act of dealing.

(3) There was conclusive evidence indicating that the Appellant was dealing in dagga. sic

(4) The Appellant is the first offender and could have been given an option of a fine by the learned Magistrate.

/5. There ...

(5) There was no conclusive evidence to the effect that the bags of dagga belonged to the appellant as such conviction was unjustified.

(6) The sentence was too severe and excessive regard being had to the fact that the appellant was the first offender and did not waste the Honourable court's time by denying possession.

The above grounds of appeal drawn on 21st February 1986 accompanied the record of proceedings that reached this Court on 13th June 1986.

On 29th July 1986 the appellant's attorneys filed a supplementary set of grounds of appeal reading as follows:-

1. There was no conclusive evidence that the Appellant was dealing in dagga.

2. The learned Magistrate in the Court a quo should have been cautious in accepting the plea of an unrepresented person and could have advised him to seek legal advice.

3. The Magistrate in the court a quo passed his sentence on the 12th February, 1986 and ordered that dagga exhibits be destroyed and following that order the said dagga exhibits were burnt and destroyed on the 14th February 1986, that is three days after judgment and even before the Appellant's time of appeal had lapsed. Thus pre-empting the right of the Appellant and rendering this appeal illusory. The learned Magistrate seems in his judgment to have misdirected himself by being taken away (sic) by the quantity of dagga which was not even actually found in the Appellant (sic) real house and was found in Appellant's absence.

4. The sentence of 30th (sic) months (sic) imprisonment without an option of a fine on the old man of 66 years who is a first offender is shockingly excessive regard being heard (sic) to the fact that when the Appellant applied bail (sic) in the Court a quo pending the hearing of this appeal the learned Magistrate granted bail to the Appellant in the amount of Eight Hundred

/Maluti ...

> Maluti (M800.00) without having inquired into the means of the Appellant with the result that the Appellant found it impossible to pay such a heavy bail and is still languishing in gaol at Hlotse Prison.

When this matter was placed before me on 8th August 1986, I discovered that in terms of a notice of hearing issued on 10th July 1986 and served on appellant on 29th July 1986, the matter had already been set down for hearing for 11th August, 1986. This was done purportedly in terms of Sec. 328 of the 1981 Criminal Procedure and Evidence Act. But obviously it was premature to do so because provisions of Sec. 327 of the Act were overlooked or side-stepped. Sec. 327 says "If an appeal against a conviction or sentence from a subordinate court has been duly noted, the Court of Appeal, on perusing the record of the case, ---------- may if it considered that there is no sufficient ground for interfering, dismiss the appeal summarily."

In CRI/A/55/83 WILLIAM MABOTE vs REX (unreported) Mofokeng, J in outlining the interaction between the two sections above and the procedure envisaged in their application stated at page 5:-

> " When the copies of the record of the case reach the Registrar of the High Court, he causes one copy of the case to be placed before a judge of the High Court who will peruse the whole record and then decide whether the appeal may summarily be dismissed in terms of Section 327 of the Act or whether he will order the appeal to be argued in the normal way i.e. in open court. If the Judge elects to do the former, then that will be the end of the matter as far as the High Court is concerned. If he decides on that latter course, the appeal will be heard in the normal way i.e. the Court causes (through the Registrar) a notice to be given, to the appellant, his counsel and also to the Director of Public Prosecutions, of the time when and place at which the appeal will be

/heard ...

heard (Section 328 of the Act. ....."

It was in response to a similar occasion in CRI/A/44-45/86 NKONE & Anor vs REX unreported where on page 3 thereof it was said:

" ..... that would have been premature as the right procedure is for the notice of hearing to be issued in terms of Sec. 328 supra only after the determination by the Judge to that effect". My underlining.

To return to the charge and relying on Section 8(2) of the High Court Act which reads:

" When considering a criminal appeal and notwithstanding that a point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings, unless it appears to the High Court that a failure of justice has in fact resulted therefrom ....." I took pains to see if any of the grounds of appeal reveal an actual failure of justice resulting from any irregularity or defect; vide Section 329(2) of the C. P. & E.

In doing so I found that in his reply to the main grounds of appeal and taking them seriatim the learned Magistrate dealt with them satisfactorily in my view.

Suffice it to say the supplementary grounds are but supplementary in name only; since, with the exception to some extent of ground 4, they are either a negation toto caelo of the main grounds or a mere repetition thereof - C/F ground 3 of the main grounds which is negated by ground 1 of the supplementary grounds; and ground 2 of the supplementary grounds which is a repetition of ground 1 of the main grounds; and further grounds 4 and 6 of the main grounds which are subsumed

/in ground ...

in ground 4 of the supplementary grounds except to the extent where the latter introduces an entirely new and irrelevant factor of bail respecting which provisions of Section 108(b) would furnish an adequate remedy in the event that appellant was aggrieved by the excessive amount of bail required as a condition for his release pending appeal.

Assuming that the main grounds of appeal were timeously submitted in terms of Order No. XXXV Rule 1(1) which provides:

> " An accused person wishing to appeal against any conviction or sentence in a criminal case shall note his appeal within fourteen days after such conviction and sentence by lodging with the Clerk of the Court a written statement setting out clearly and specifically the grounds on which the appeal is based,"

it is doubtful whether the supplementary grounds of appeal were timeously submitted or whether the proper procedure was followed in submitting them,

(a) first because the record of which the main grounds of appeal form part reveals that conviction and sentence occurred on 12th February 1986;

(b) secondly because the supplementary grounds of appeal were filed of record with the Registrar on 29th July 1986;

(c) thirdly because there is no indication that notice of supplementary grounds of appeal was given to the Clerk of Court as required by Rule 1 (5) of the above order which provides with respect to (b) and (c) above, that:

> " The accused person may, within the time limited for the noting of an appeal, by notice to the Clerk of the Court amend the statement of his grounds of appeal, and the judicial officer may in his discretion within seven days thereafter deliver to the Clerk of the Court a further statement of reasons for judgment."

/From ...

From the above it is clear that the supplementary grounds of appeal for all they are worth cannot properly be regarded as forming part of the record of the case as they fail to comply with the requirements of the rules referred to above and provisions of Rule 2 flowing therefrom.

With regard to ground 1 of the main grounds of appeal it is bewildering to see what purpose legal advice would serve in relation to the plea which required the accused to plead either guilty or not guilty and in exercise of his unfettered discretion chose to plead guilty. Vide CRI/A/64/86 Bernard Mofo vs Rex (unreported) at 11.

Section 162(1) of the C. P. & E. provides that where provisions of Section 159 of the Act have not been invoked accused shall either plead to the charge or except to it on the ground that it does not disclose any offence cognisable by the Court. In the instant case the charge and outline of the Crown case clearly disclosed an offence committed. Subsection (2) provides that if he (accused) pleads he may plead -

" (a) that he is guilty of the offence charged. ---------- or

(b) that he is not guilty; or

(c) that he has already been convicted or acquitted of the offence with which he is charged; or

(d) that he has received the Royal pardon for the offence charged; or

(e) that the Court has no jurisdiction to try him for the offence; or

(f) that the prosecutor has no title to prosecute."

/If any ...

If any of the alternatives from (c) to (f) applied appellant through his attorney was at large to base his appeal on it as a sound ground constituting a failure of justice as envisaged by provisions of the High Court Act and C. P. & E. supra.

I cannot underrate the importance of accused person's right to legal representation. In fact as was pointed out in Case No. 46/84 CAIPHAS DLAMINI vs REGINA (unreported); at page 11 Swaziland Court of Appeal decision delivered by Welsh J.A. /..... in S. vs Baloyi 1978(3) S. A. 290 (T), at p.293, Margo, J. referred to a number of cases dealing with "the right of an accused to legal representation where he wishes it" and holding that "the mere fact of being denied legal representation can by itself be fatal to the validity of the trial," and, says Welsh J. A. Margo, J. said this :-

> " However, where he (the accused) does not seek it, and where no irregularity occurs by which he is deprived of it, there is no principle or rule of practice of which I am aware which vitiates the proceedings. ....." my underlining)

Our Section 329(2) of the C.P.&E. supra reads exactly the same way as Section 327 of the Criminal Law and Procedure Act, No.67 of 1938 of Swaziland. Welsh J.A. goes further to say 'In the well-known case of Rex vs Patel, 1946 A.D. 903, at 908, Tindall, J. A., in dealing with the corresponding provision in the South African Act of 1917, said that' :-

> " Whatever form of language is used to enunciate the principle on which an appeal court acts under the proviso -------, the point of importance is that the appeal court does not attempt to divine what the particular trial court would have decided had the irregularities not been committed, but concerns itself

/with ...

with finding out what a reasonable trial court, properly directed and unaffected by any irregularity would have decided."

With regard to ground 2 of the main grounds of appeal I am of the view that the reply thereto by the learned magistrate succinctly sets out the legal position. Indeed Section 30(1)(a) of the Dangerous Medicines Act 21/73 provides that:

" If in any prosecution for an offence under Section 3 it is proved that the accused was found in possession of dagga --------- exceeding 115 grams of mass, it shall be presumed that the accused dealt in such dagga unless the contrary is proved."

Nothing contrary was proved; accused having pleaded guilty and having admitted as correct the outline of the Crown case. Consequently the presumption became conclusive against his innocence.

In this case the dagga of which he was in possession and for possession of which he failed to produce a permit as required by law weighed over 2,000 kilograms. Consequently the presumption that appellant was dealing in dagga is not out of place. Throughout the record reference is made to 121 bags of dagga but for some unknown reason this is rendered in ground 2 of appeal as one hundred and thirty bags (in words) and represented in figures as 131.

With regard to ground 3 there is nothing to add because in it the appellant concedes that "there was conclusive evidence indicating that the Appellant was dealing in dagga." But in the event that a contrary impression was sought to be conveyed then the simple answer to any such argument is to be found in Section 30 supra.

As far as ground 4 is concerned it is important to appreciate the purport of the oft-repeated phrase that the

/question ...

question of sentence is pre-eminently in the discretion of the trial court. In this instance where large quantity of dagga was involved it would have been ludicrous to give option of a fine to the appellant on the grounds that he is a first offender despite clear indication that he is a big dealer in dagga.

There is absolutely no merit in the ground that dagga found in accused's house used by him for sleeping purposes and in respect of whose existence he expressed his knowledge without prompting and regarding which he finally pleaded guilty, does not belong to him.

The sentence imposed does not give me any sense of shock.

I may just add that if ever there was any occasion where the acronym SNAFU was of any relevance it could not have been more so than in the grounds and purpose of this appeal. Vide the number of sics in the grounds of appeal.

I accordingly dismissed this appeal summarily in terms of Section 327 of the 1981 Act No.9, having considered that there is proof of guilt beyond reasonable doubt C/F S vs Tuge 1966(4) S.A. (AD) at p. 568.

M. L. LEHOHLA
ACTING JUDGE

7th November, 1986

For the Appellant : Mr. C. M. Masoabi
For the Respondent :