CRI/A/8-9/87

IN THE HIGH COURT OF LESOTHO

In the matter between:

DANIEL SAKOANE — APPELLANT
TS'EPO MASOABI — APPELLANT

J U D G M E N T

Delivered by the Honourable Justice G.N. Mofolo
on the 15th day of December, 1995.

The appellants were charged along with accused 3 at the trial in the Magistrates Court for the District of Berea for contravening section 3 sub-section (a) of Act No.21 of 1973 relating to Dangerous Medicines in that

> on or about the 22nd day of February, 1986 and at or near Ha 'Matiotio' in the Berea district the said accused one or the other or both of them dealt with prohibited medicine or any plant from which such medicine can be manufactured to wit: six bags of dagga weighing 102 kg without a permit, licence or certificate.

Appellants and accused 3 had pleaded not guilty and accused 3 at the trial having been found not guilty appellants had been found guilty and sentenced to 15 months imprisonment each.

It was against their conviction that appellants had appealed to this court.

At the trial there had been evidence by P.W.1 Detective Trooper Khoele that while he and the other policeman were on local patrol at 'Matiotio's their attention had been drawn to

people playing dice and while they had altercation with these people a yellow vehicle had approached them moving deviously and moving where there was no path and this had immediately aroused suspicions and the police had approached the vehicle in which six (6) bags of dagga were found.

Detective Sergeant Khoele went on to say that he noticed each of the six bags contained dagga, that he knew dagga very well by its appearance. Questioned about the dagga accused 1 had said he had asked for a lift in the vehicle and had no knowledge of the contents of the canopy while accused 2 admitted the dagga as his and accused 3 said she had merely asked for a lift. According to the witness, he was not satisfied with accused 1's explanation as the latter had been driving the vehicle but accused 1 had retorted that the reason was accused 2 could not drive. This witness goes on to say that accused asked to say to whom the vehicle belonged the name of one Khoeli cropped up though it seemed accused did not know whether Khoeli was first name or surname. I can only assume that reference to accused by P.W.1 refers to accused 1 with whom he (P.W.1) was in course of conversation.

In cross-examination it emerged that P.W.1 had found the vehicle stationary, with no driver on the seat and the keys were on the floor of the vehicle dumped there. Also questioned who P.W.1 found to be the owner of the dagga he said accused 2

appeared or presented himself dagga owner.' Questioned by accused 2, P.W.1 said that he handed the key to a person he requested to drive the vehicle. In the course of his interrogation, P.W.1 elicited information that there had been four (4) occupants in the front seat, that the fourth person who was driver had fled leaving the key behind. P.W.1 had nevertheless not believed that there was such a 4th person as alleged.

It was, nevertheless, P.W.1's contention that accused 2 was, in fact, the driver and I fail to understand why, if accused 2 was the driver P.W.1 did not instruct accused 2 to drive ; in the event, that accused 2 was the driver could have been confirmed or accused 2 would have protested his inability to drive. It was also repeated in cross-examination that the canopy of the vehicle was not locked and that it was accused 3 `Mampe who helped P.W.1 unload the bags of dagga.

Accused 2 in cross-examination put it to P.W.1 that when he (accused 2) denied knowledge of the dagga P.W.1 had assaulted him with a stick until it broke into pieces.

After accused persons had given evidence and been cross-examined MR. MATLHARE attorney for the accused had arrived and had been given an opportunity to cross-examine P.W.1. It went like this, inter alia:

Q. I understand this Mothethwa has possession and control of those bags?

A. That understanding is wrong - was not in possession and control as was not at the scene where I found the vehicle was at his parents home.

Q. Did you investigate whether he had connection with this offence?

A. Did investigate from him.

Q. Why did you find it necessary to investigate from him if was just an innocent person?

A. For A.1 complained to me that I separated him with his dagga bags and made Mothethwa to drive his vehicle so Mothethwa was then in possession.

On the above score Mothethwa cross-examined by Mr. Matlhare said:

Q. Did you make any statement at charge office concerning these accused?

A. Never made a statement and police never questioned me about accused.

Q. Did you tell police knew nothing of three accused or dagga?

A. I never made any statement to that effect as never asked anything by anybody in relation to accused and dagga.

A quick glance at what P.W.1 testified to under cross-examination by Mr. Matlhare and what Mothethwa testified to under cross-examination shows that either P.W.1 or Mothethwa could not have been telling the truth as to whether or not Mothethwa was questioned by the police regarding his connection with accused persons. P.W.1 says they questioned Mothethwa on this score but the latter denies this. There is also another thing; P.W.1 and P.W.2's evidence is simply to the effect that they requested

Mothethwa to drive them to T.Y. thus giving the impression that it was a direct approach while Mothethwa said he could not help unless his father's permission was obtained which permission was in any event granted by his father.

In his defence, 2nd appellant has testified that in truth accused 2 was the driver of the vehicle. He also testified that 10 bags of maize were loaded. On the contrary, 1st appellant told the trial court that he had merely asked for a lift and that when arrested 10 bags of dagga had been found.

When this matter came before me for argument on 28 November, 1995, Mr. Sakoane for the Crown had appeared and Mr. Fosa for the 2nd appellant it being claimed that Mr. Phoofolo represented the 1st appellant although instructions were not compelete .

In view of the unexplained absence of Mr. Phoofolo 1st appellant had been given an opportunity to find him and the matter was stood down to 2.30 p.m.

At 2.30 p.m. Mr. Phoofolo had not appeared but as Mr. Fosa was going to be elsewhere on 29 November, 1995 he was given the opportunity to address court and thereafter the matter had been postponed to 29 November, 1995 at 10.00 a.m.

On 29 November, 1995 Mr. Phoofolo made no appearance and the

appeal proceeded. The Crown had made its submissions and the court holding that as Mr. Phoofolo was instructed to appear for the 1st appellant and not appearing that 1st appellant could not address the court, nevertheless allowed 1st appellant to address the court in support of his appeal.

It was in course of address by 1st appellant that Mr. Lehana arrived intimating that he would conduct 1st appellant's appeal. The court being fed up with the circus and playing fields into which the court had been turned and as it was in the middle of 1st appellant's address the request was refused and 1st appellant addressed the court. 1st appellant insisted that there were six (6) bags of maize belonging to Mothethwa and that he (1st appellant) had allowed Mothethwa to load the six (6) bags of maize on the vehicle; this, of course differs from 1st appellant's suggestion in cross-examination of P.W.1 that 10 bags of maize were loaded.

Although there were unsatisfactory elements in the crown evidence which left much to be desired, the question must also be asked whether appellants defence was not a smokescreen to divert the trial court from real issues seeing that appellants defence was not even put to Mothethwa.

Mr. Fosa has submitted on behalf of 2nd appellant that mere physical detention is not enough and that there must be, in

addition, knowledge and intention or mens rea. Further, that the trial magistrate has misdirected himself in finding that physical detention is alone sufficient.

On the contrary, MR. SAKOANE for the crown has submitted that possession or intention do not arise in that the law in this regard is to the effect that once the quantity of dagga exceeds 115 grammes the otherwise offence of possession becomes dealing. Moreover, that because the subject-matter of the crime involves a prohibited substance the need for a permit or licence is not in issue.

The view of this court is that Mr. Sakoane's submissions are spot on in that where the dagga exceeds the magical figure of 115 grammes the crime becomes dealing and consequently that the onus is then placed on the accused to prove on a balance of probabilities that he was not dealing. A recent judgment of the Constitutional Court in South Africa attacks this concept but since it has not been published and we have no access to it yet, it is safer to stick to the beaten road.

As I have said, Mr. Fosa has furiously attacked the finding of the trial court as for example where the court a quo said Sakoane (1st appellant) was a well-known man, the assertion being unsupported by the evidence.

In this regard, in REX v. DHLUMAYO & Or. 1948(2) S.A. 677 (A.D.) it was said

> The appellant court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

I would add that neither does one swallow make a summer. That the learned Magistrate may have slipped up here and there can hardly amount to failure of justice as Mr. Fosa has suggested.

As I have indicated, appellants have contested the assertion that dagga was found on them in that to their knowledge bags of mealies were loaded on the van they were travelling in. Against the appellants though is the fact that they do not seem to have satisfied themselves whether or not the bags loaded were in fact bags of maize. But assuming that the so-called bags of dagga were contested, i.e. that the appellants were claiming the bags were not dagga, it seems to me that it cannot be said that the crown had proved that these mealie bags were dagga. This must be read in conjunction with the evidence of P.W.1 who, cross-examined testified that it was accused 3 at the trial who opened the canopy of the van and helped P.W.1 off-load the bags of dagga. Of course we are not here concerned with possession but with dealing which, amongst other things, encompasses conveyance.

The view of this court is that where an accused person denies that the substance is dagga the crown is called upon to

produce more weighty evidence. As was said by Vieyra, A.J. in THE STATE v. NGWANYA, 1962(3) S.A. 690 (T.P.D.) at p.691

> The question that arises in this appeal is whether the court below was justified in finding that it had been established beyond reasonable doubt that the substance found was indeed dagga. It is clear that when a person is charged with being in possession of a substance such as a type of liquor or drug, contrary to the provisions of some statutory enactment, the evidence of a state witness who says that he knows what the substance is and that it is of the nature charged is prima facie proof of the state's allegation. Such prima facie proof would in the absence of any other evidence be sufficient to found a conviction. But when such evidence is challenged by the accused and witness are moreover produced to deny the allegation made, then something more is required before it can be said that the court is justly satisfied as to the nature of the substance in question;

also see R. v. MODESA, 1948(1) S.A. 1157(T.). And where the contents of a bottle were challenged VAN DER RIET, J. in R. v. MGOTYWA, 1958(1) S.A.99(E) said at p.101H.

> Now in this case the bottles were produced, sealed, labelled and bearing the seller's personal label, and was stated to contain brandy or gin. If this was a reasonable assumption - and in my view it was unless the nature of the contents was challenged by the defence - a prima facie case was established. Where the defence contended otherwise, to the extent of such contention, the crown would have to elaborate its proof even to the necessity of analysis.

Whether the quantity of dagga found on appellants vehicle was dagga or not dagga, this was not seriously challenged by the appellants for their defence seemed to be that they loaded maize bags and not dagga. As I have said, that the bags found on their vehicle was dagga was not seriously challenged so that the state witness P.W.1 Detective Trooper Khoele who testified that

> I know dagga very well by its mere appearance'

is prima facie proof of the state's allegation and is, in my view, sufficient to found a conviction.

Accordingly, the conviction by the trial court is confirmed.

Regarding sentence, there has been no appeal as to sentence and I have found nothing to convince me, even were there an appeal in this regard, to disturb the sentence imposed by the learned Magistrate.

Having said this, it will be noticed that the sentence imposed on the appellant was so imposed on 20 May, 1986 which is almost ten (10) years ago. No reason was advanced why this sentence was allowed to hang over the heads of appellants for such an inordinate length of time. 2nd appellant did, however, give this court a glimpse of what transpired for he said his attorney a long way in 1987 had informed him that the appeal had been dealt with and he (2nd appellant) was not to have sleepless nights about the appeal; that, according to 2nd appellant, when he heard the appeal was resuscitated he was taken aback and hence why he was not able to consult his lawyers timeously.

An appeal is a most serious branch of our law and must neither be taken or treated lightly the reason being, as was said in DHLUMAYO'S case above,

'No judgment can ever be perfect and all-embracing

I would add that no judgment is necessarily right and hence why there are appellate tribunals to test the correctness of judgments of inferior courts. Once a person is on appeal, it is vital that his appeal should be heard at the earliest possible time. Some judicial systems value the early disposition of appeals to such an extend that special courts are set up to deal with appeals or, alternatively, Judicial Officers alternate in disposing of appeals. Where the expeditious hearing of appeals is on hold, unenvious conditions may result as where an appellant having lodged his appeal and being refused bail pending appeal serves the entire period of his sentence before his appeal is heard so that when it is eventually heard it becomes of academic interest only.

There are also cases where appellants seek bail ostensibly to cheat the law by never appearing before court on appeal.

These are serious matters and need to be seriously addressed. I understand that a process is now in place whereby appellants from the Subordinate Court will, on noting their appeals, simultaneously set down their appeals with the Registrar of this court to ensure the speedy resolution of their appeals. I would add that save for unforseen circumstancés such appeals be heard as set-down.

I have said that appellants were convicted and sentenced way

back in 1986 and I have not been informed why this appeal came only in November, 1995.

1st appellant is ageing and fast approaching his journey's end: 2nd appellant is, since his conviction and sentence, in his winter months and I doubt he will survive them, I am of the view that interests of justice will be best served by suspending sentences imposed on the appellants.

In the result the appeal against conviction is dismissed and although there was no appeal against sentences for reasons I have already stated sentences imposed on appellants are confirmed but suspended for a period of 3 years on condition that during the period of suspension appellants are not convicted of an offence under the Dangerous Medicines Act.

G.N. MOFOLO
JUDGE
15th December, 1995

For the Crown: Mr. Sakoane
For the 1st appellant: Mr. Fosa
For the 2nd appellant: In Person