

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 50 of 1983
High Court Criminal Appeal No. 172 of 1983

In the matter between:

SIBUSISO MBUSO GABELA
ISHMAEL RAMASINONG

1st Appellant
2nd Appellant

and

THE STATE

Respondent

Mr. C. R. Mailer for the Appellants
Mrs. L. I. Dambe for the State

J U D G M E N T

CORAM:

Maisels, JP
van Winsen, JA
Isaacs, AJA

ISAACS, AJA

The appellants in this matter were convicted in the Magistrates' Court at Francistown of unlawful importation of Habit Forming Drugs into Botswana in contravention of section 3(1)(a) as read with section 9(1) of the Habit Forming Drugs Act (Cap. 63:04).

They had pleaded guilty to the charge and were each sentenced to a fine of P1 000 and in addition to 18 months' imprisonment.

They appealed against the sentence to the High Court and their appeal was dismissed by Corduff J. Leave to appeal to this Court was granted by the learned Judge. The drugs in question were Mandrax Tablets of which 1 000 were found in the vehicle in which the appellants had arrived in Botswana and another 20 found on the ground near the vehicle. The vehicle was confiscated. The importation occurred on the 26th May 1983.

In his judgment the learned magistrate said inter alia -

"The Courts now take a sterner course in an effort to show all concerned with this pernicious pastime that the inevitable consequence of a conviction could entail a lengthy term in jail as well as confiscation of vehicles used ..."

Both in the appeal before the learned judge a quo and in this Court it was contended that the magistrate had misdirected himself inter alia by fettering his discretion by holding that "the inevitable consequences of such a conviction" entailed a jail sentence. It was contended also in this Court that the magistrate erred by ignoring an important principle of sentencing that where a fine and a term of imprisonment are competent in terms of a statute, it is an indication that a fine should ordinarily be imposed unless there are extreme circumstances.

In my view there was no misdirection on the part of the learned magistrate. In the first place the words complained of did not mean that a jail sentence would always

be inevitable. The word "could" not "would" was used. In terms of the statute a jail sentence was, of course, competent. The magistrate also said,-

"The fine, of course, is a relatively paltry price to pay when the profits emerging from a successful shipment in this racket are considered."

It was contended that the magistrate also misdirected himself in that there was no evidence as to the profits that could be made from habit forming drugs. It is a matter of common knowledge that large profits can be made in the traffic of habit forming drugs. While we think it might have been advisable to have obtained evidence on this matter we cannot see that any error of justice has occurred because the magistrate assured this to be the case.

It was contended also that there was a misdirection by the magistrate when he assumed that mandrax was injurious to health. It was contended that there was a conflict of medical opinion on this question.

We think that the mere fact that mandrax is included in the list of Habit Forming Drugs in the statute and that the statute provides severe penalties for its mere possession is an indication that the Legislature considered it injurious to health. We think that it might have been advisable for the State to have produced evidence on this question but we could not see that there has been any error of justice as to effect of the magistrate assuming the danger to health.

It was contended that as the appellants were only carriers they should be treated more leniently than if they were dealers. We could not see any reason for such a distinction. Without carriers, dealers would find it much more difficult to continue to trade as they would have to become both carriers and dealers and thus increasing the dangers of detection.

In the case of the first appellant who was 19 years of age at the time of the offence, it was contended that the magistrate had not taken into account his youthfulness in passing sentence. The judgment, however, shows that the magistrate considered this fact as well as the fact that both appellants were first offenders.

The question of an appropriate sentence is always one for the trial Court which has a discretion in considering this matter. An appeal Court will not interfere with such discretion except on certain very limited grounds. We could not see any ground for interference in the present matter and accordingly we dismissed the appeal.

We were told however, that the appellants had been in prison for 6 months before being released on bail. We considered that this should be treated as portion of their gaol sentence. Accordingly the sentence was altered to a fine of P1 000 plus 12 months' imprisonment to begin from 22nd May 1984, or from the date of their arrest, whichever is the later.

Given at the Court of Appeal, Lobatse, this 22nd day of
May 1984.

J. Isaacs
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I. ISAACS
ACTING JUDGE OF APPEAL

for J.A. Maisels
J. Maisels
I agree:
I. A. MAISELS
JUDGE PRESIDENT

for L. de van Winsen
J. Isaacs
I agree:
L. de van WINSEN
JUDGE OF APPEAL