IN THE HIGH COURT OF MALAWI
CRIMINAL DIVISION
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 21 OF 2018
(Being Criminal Case Number 110 of 2017 before the First Grade Magistrate Court sitting at Mangochi)

BETWEEN:

ADINI MWATULAPANSI.....APPELLANT

-AND-

THE REPUBLIC.....RESPONDENT

CORAM: HON. JUSTICE Dr. C.J. KACHALE, *Judge*
Nkhono, of Counsel for the Appellant
Kuyokwa, Senior State Advocate for the Respondent
Namagonya, Court Reporter
Choso, Court Clerk and Official Interpreter

JUDGEMENT

Adini Mwatulapansi was convicted on his own guilty plea before the First Grade Magistrate Court at Mangochi on a charge of being found in possession of medical products without licence or permit contrary to section 45 as read with section 65 of the Pharmacy Medicines and Poisons Act. He was sentenced to 40 months imprisonment with hard labour with effect from 12th May 2017. Through his lawyers *Mr. Mwatulapansi* has filed seven Grounds of Appeal as follows (as appear in the court process):

1. The learned magistrate erred in law in convicting the appellant on a defective charge;
2. In the alternative the learned magistrate erred in law and in fact in entering a plea of guilty in a purely equivocal plea hence a defective plea;
3. The learned magistrate erred in law and I fact in reading into the matter issues which were never led in evidence;

4. The learned magistrate erred in law in failing to properly explain to the appellant the consequences of a plea of guilty as by law required;
5. The learned magistrate erred in law and in fact in passing sentence based on irrelevant considerations not supported by law;
6. The learned magistrate blotted out sentence without legal basis and no reason was given vis-à-vis the Fines and Conversions Act hence this technically deprived the Appellant any chance of reaching out to the quantum of the fine;
7. All in all, the sentence was excessive in the circumstances.

Thus the first four grounds attack the conviction while the rest question the soundness of the sentence. The state do not support the conviction and has moved the court to uphold the appeal.

In disposing of the present case this court has taken note of the principle that an appeal comes by way of rehearing. Thus my court is mandated to study the lower court record afresh and arrive at its own factual conclusions without being bound by the trial court conclusions. Thus, in so far as the soundness of the conviction is concerned, it is quite significant to observe just how meticulously the magistrate recorded the facts which formed the basis of the conviction. What emerges from a close study of the trial record is that the appellant was openly admitting without any equivocation that he was found in possession of various medical products both in person and at his house; he clearly acknowledged lacking any lawful licence to handle or deal with such products at that time. This court concludes that it is rather incorrect to describe what took place at plea stage as either misleading or unclear to *Adini Mwatulapansi;* rather the appellant seems to have admitted without any qualification the matters that were properly put to him by the magistrate. It is rather out of order to try and fault the conviction on the basis of some purported equivocation in his pleas at trial.

Furthermore, the suggestion that there was such defect in the charges as would warrant a reversal of the conviction would go against the thrust of the material on record. The decision of **Rep-v-Rashidi [1990] 13 MLR 410** where a defect in the charges resulted in an acquittal on appeal is distinguishable from the present case. The distinction emerges from the fact that in **Rashidi (above)** the provision cited in the charge sheet was found to be unrelated to the charges levelled at the convict; in our case, the charging sections are quite accurate.

In other words this court is satisfied that section 45 (1) of the Pharmacy, Medicines and Poisons Act (the Act), to the extent that it limits the sell (whether on retail or otherwise) to persons conducting a pharmacy business or on premises registered as a pharmacy or operated by a pharmacist contemplates that such business requires a licence. For example section 2 of the Act defines 'pharmacist' as someone registered under part III of the statute. That part is titled 'Licensing of Premises and Persons'. Thus licensing is integral to the lawful conduct of business in medical products. Section 45 clearly proscribes the sale of or dealing with medical products unless one is lawfully permitted (as evidenced by a valid licence) to do so.

To describe the offence arising from a breach of section 45 in the manner reflected in the charge sheet-namely 'being found in possession of medical products without licence or permit-is quite proper drafting of the offence. The reference to section 65 of the Act addresses the question of applicable penalties for the offence. This scenario is substantially different to that obtaining in **Rep-v-Mohammed 6 ALR (M) 314** where it was held that where an accused is charged with an offence not known to the law the same is defective and cannot be cured under the law. On the basis of these legal considerations the challenge of the validity of the charges must fail as being misconceived.

The appellant also challenged the determination of the value of the contraband which was seized from him by the police. This court is at pains to appreciate the significance of that challenge: the record shows that the valuation submitted by the prosecution was properly received in court; to suggest that somehow appellant should have participated or witnessed the valuation exercise is quite ludicrous to say the least. The state explained the basis of the valuation and the relevant table was admitted as part of the facts without any contest. One is aware that sometimes laboratory analyses in respect of suspected drugs and other substances are submitted in court proceedings as part of prosecution evidence-one is unaware of any offender witnessing or participating in the laboratory tests with respect to such samples; why should it be different for valuation of medical products?

In any event, it is important to remember that the value of the contraband per se, has no material effect on the adequacy (or otherwise) of the admitted facts forming the basis of the conviction. This therefore renders the decision of **Rep-v-**

Benito 9 MLR 211 being invoked for the proposition that one must admit to all elements of the offence without any qualification charge quite different: the value of the contraband is not a constitutive element of the offence under discussion. Rather the key elements are that one is found in possession or selling medical products without the qualifications outlined under section 45 (1) (a) to (d). This limb of the appeal has accordingly not been established and must accordingly fail.

As regards sentencing, this court has had occasion to scrutinize the record of proceedings in the lower court. The magistrate was minded to impose a fine and granted the convict some opportunity to raise the funds necessary to settle the penalty. When that arrangement failed, the trial court resorted to imposing a custodial term of 40 months with hard labour. The same has been described as being excessive in the present appeal; the Pharmacy, Medicines and Poisons Act is a 1991 statute. The multiplier under the Fines (Conversions) Act of 2005 for that is 50; thus the fine of K50, 000 under section 65 (1) of the Pharmacy, Medicines and Poisons Act must be multiplied by 50 to get the effective fine here. i.e. K2, 500,000. The magistrate imposed a fine of K1, 864,385.48 on *Adini Mwatulapansi;* that was well within the permissible range under the law applicable. This court cannot fault his decision in that regard.

In addition, under section 65 (1) of the Pharmacy, Medicines and Poisons Act the maximum custodial penalty is 5 years (or sixty months). *Adini Mwatulapansi* was condemned to a total of forty months imprisonment. In reaching his decision the magistrate carefully reflected upon the gravity of the situation around provision of medical products in public health facilities; it was his view that since this offender was obtaining his contraband from such facilities he was deserving of a stern penalty in order to effectively address the pernicious conduct of looting such supplies to the detriment of many members of the public. In the considered opinion of my court, the magistrate invoked appropriate principles of sentencing in considering his decision.

There is evidence to show that this was an established racket of which the appellant was a key player; it was proposed on appeal that since his accomplice was never put on trial that renders his conviction and sentence unfair: to the extent that *Adini Mwatulapansi* has admitted to having broken the law, he must pay for his wrongdoing. The decision as to who will be charged or not rests with

the state; One expects such a mandate to be exercised based on principle and not caprice. Nonetheless, the remedy for any capricious exercise of the prosecuting authority would not be leniency against convicted felons.

Nevertheless, the challenge is not about the principles used by rather the ultimate tariff imposed on the offender; it has been argued that forty months is rather excessive. In all fairness, given the maximum sentence available and the overall value of contraband found it would indeed appear that forty months imprisonment might be on the higher side; there are surely worse instances of this type of offences in contemplation. As such this court on appeal will set aside that penalty for being excessive. Instead a penalty of 30 months imprisonment will be imposed.

CONCLUSION

In closing, therefore, this court has found no merit in the appeal against the conviction; the lower court properly exercised its mandate in entering a guilty plea on the charges against *Adini Mwatulapansi*. The appeal against conviction is therefore dismissed.

However, the court accepts that the corresponding sentence was on the high side; the same has been replaced as appropriate. **In the final analysis this court has imposed a sentence of 30 months imprisonment on *Adini Mwatulapansi*** for the offence charged under section 45 as read with section 65 of the Pharmacy, Medicines and Poisons Act. The sentence is **effective from 12th May 2017**.

Order accordingly.

Pronounced in Open Court this..12th..day of October 2018 at Lilongwe.

***C.J.Kachale*, PhD**

JUDGE