

SOUTH AFRICA / JUDGMENT

Ndlela v S (A278/2018) [2019] ZAGPJHC 213 (31 May 2019)

[2019] ZAGPJHC 213

COURT

South Gauteng High Court, Johannesburg

BEFORE

M B Mahalelo, H Ngomane

CASE / FILE NUMBER

A278/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A278/2018

In the matter between

NDLELA: SIPHO Appellant

and

THE STATE Respondent

J U D G M E N T

MAHALELO J:

[1] The appellant was charged before the magistrate sitting at Magaliesburg, Johannesburg with one count of contravention of section 5(b) read with sections 1, 13, 17(c), 18,19,21 and part 111 of schedule 11 of Act 140 of 1992 (the Act) i.e., dealing in dagga alternatively contravention of section 4(b) read with sections 1,13,17(d),18,19,20,21,25 and part 111 of the same Act i.e., possession of 19,840kg of dagga. He was legally represented and he pleaded not guilty to the charges. On September 2016 he was convicted of dealing in dagga and was sentenced to 7 years imprisonment of which 4 years imprisonment was suspended for 5 years on certain conditions.

[2] With leave of the court a quo he appeals against his conviction and sentence.

AD CONVICTION

- [3] The appellant was on 18 May 2016 a passenger in a public taxi, travelling from Johannesburg to Rustenburg when the taxi was stopped by Constable Macedisi Mkhathswa and Sergeant Minies at a stop and search check point. There were approximately 22 passengers in the taxi and each one of them were requested to alight with their belongings/luggage. All the passengers were searched including their luggage. A black bag containing a black plastic inside was found in the possession of the appellant. Constable Mkhathswa asked the appellant about the contents of the black plastic bag and he replied that it was dagga. Mkhathswa opened it and confirmed that it was indeed dagga. The appellant was arrested and taken to a place called Obaro where the dagga was weighed in his presence. It weighed 19.840 kilograms. It was later booked in SAP13 register.
- [4] The appellant's case, as set out in his evidence in chief is that when the taxi in which he was a passenger was stopped along the way all passengers were instructed to alight with their belongings. He was not in possession of a black bag. He was searched and thereafter taken back in the taxi. He was then asked about a bag which was left inside the taxi near the door and who it belonged to. He told the police that he did not know the bag and the first state witness told him to take his bag. He was then arrested and placed in the police van. In essence the appellant denied any knowledge of the dagga and that he was in possession of the black bag in which dagga was found and that he told the police that what was inside the bag was dagga.
- [5] Sergeant Minies was called as the second state witness. He confirmed the main elements of Constable Mkhathswa's version. He testified that after the taxi was stopped all the passengers alighted with their luggage and there was no luggage left inside the taxi. Constable Mkhathswa searched all the passengers and their belongings when he was only observing at close proximity. He testified that the appellant was in possession of a big black bag. Constable Mkhathswa opened the appellant's bag and there was a black plastic bag inside. Mkhathswa opened the black plastic bag and found dagga. The appellant was then informed that he was going to be arrested for being in possession of dagga. The dagga was weighed in the presence of the appellant and it weighed 19.840 kg.
- [6] The trial court rejected the version of the appellant. It pointed to the improbabilities in the appellant's version. The trial court was satisfied that both State witnesses would not have any reason to falsely implicate the appellant with the dagga amongst the 22 passengers of the taxi. It was satisfied that the State had proved beyond a reasonable doubt that the appellant was guilty of dealing in dagga.
- [7] The appellant's exculpatory version is highly improbable and in my view justifies its rejection as false beyond a reasonable doubt. Given the fact that all passengers of the taxi were ordered to alight with their belongings it is highly improbable that a black bag could have been left unattended in the taxi and the police then planted it on the appellant. The appellant's version is clearly untruthful. According to Mkhathswa when he asked the

appellant about the contents of the black plastic bag inside the bag which was in his possession he replied that it was dagga. The appellant at no stage offered an explanation regarding whose dagga it was therefore necessitating the inference that he was dealing in or transporting dagga.

- [8] No onus rests on the appellant to prove his innocence or guilt. Mr Mkhathswa and Mr Minies are police officers who were performing their duties on that day. They did not know the appellant prior to the incident. It cannot be said that they knew that the taxi in which the appellant was travelling was going to use that route on that day. Based on this, it is highly improbable that they would plant the black bag containing dagga on the appellant, an innocent member of the public. The appellant's version in this regard, taking into account the versions of the two state witnesses as well as the probabilities can simply be rejected.
- [9] In considering the judgment of the court a quo, this court is mindful of what was said in *S v Monyane and Others* 2008 (1) SACR 543 (SCA) para 15:

"This court's powers to interfere on appeal with the findings of fact of the trial court are limited...In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe, 1997 (2) SACR 641 (SCA))."

- [10] The judgment of the Magistrate is found to be clear and well-reasoned on the facts and the law and free of any misdirection. Where an accused person is found to be in possession of large quantities of dagga, it might, depending on all the circumstances and in the absence of an explanation giving rise to reasonable doubt, be sufficient circumstantial evidence of dealing. The large quantity of dagga which the appellant had in his possession, coupled with his demonstrably false denial of possession, further coupled with the absence of any explanation from him as to why the dagga was in his possession and that he was transporting the

dagga in a taxi is what resulted in the court a quo drawing the inference that he was engaged in dealing in dagga within the meaning

of section 5(b) of the Act. This court is mindful of the fact that its interference with the trial court's findings of fact is limited. In the absence of any misdirection the trial court's conclusion, including its findings of fact is presumed to be correct. See *S v Biya* 1952 (4) SA 515 (A).

- [11] When all the evidence is considered in its totality the conviction of the appellant on contravention of section 5(b) of the Act is not wrong and should therefore stand. No misdirection by the trial court is found on the

facts.

AD SENTENCE

- [12] The principles underpinning the power of a court on appeal to interfere with the sentence imposed by the trial court are well established in our law. In *S v Romer* 2011 (2) SACR 153 (SCA), at paras [22] and [23] they were discussed as follows:

“[22] It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognized grounds justifying interference on appeal have been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is ‘(a) disturbingly inappropriate; (b) so totally out of proportion to the magnitude of the offence; (c) sufficiently disparate; (d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and (e) is otherwise such that no reasonable court would have imposed it.’ See S v Giannoulis; S v Kibido; S v Salzwedel & others.

- [13] In considering an appropriate sentence the trial court took into account the Zinn triad. It took into account the appellant’s personal circumstances, the mitigating and aggravating circumstances as well as the interest of society.
- [14] Mitigating factors are that the appellant is a 37 year old first offender. He has six children who are partly dependant on him. The appellant is not married and was doing part time jobs.
- [15] Aggravating circumstances include that appellant had been convicted of a serious offence. There is a high degree of prevalence of this type of offences in our Country. The appellant was found in possession of a large quantity of dagga. He showed no remorse for his actions. Though it is not clear what he was going to do with the dagga one cannot lose sight of the fact that there is a possibility of him selling or supplying members of the community with it. This would have a devastating effect on the community as it may destabilise families. Violence, trauma, fear, low self-esteem becomes the order around people using dagga. Having considered all factors the sentence impose by the trial court is not shocking or inappropriate. This court is not competent to interfere with the discretion of the trial court on sentence

ORDER

The appeal against conviction and sentence is dismissed.

The conviction and sentence are confirmed.

M. B MAHALELO

JUDGE OF THE HIGH COURT

I AGREE

H NGOMANE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANT: MR A MAVATHA

INSTRUCTED BY: JHB JUSTICE CENTRE

FOR THE RESPONDENT: ADV RANCHHOD

INSTRUCTED BY: STATE ATTORNEY

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