

SOUTH AFRICA / JUDGMENT

S v Mathibe (CA & R220/08) [2008] ZAECHC 172 (9 October 2008)

[2008] ZAECHC 172

COURT

High Courts - Eastern Cape

BEFORE

Greenland, Sangoni

CASE / FILE NUMBER

CA & R220/08

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FORM A

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JUDGMENT

ECJ no

PARTIES:

ZINGISANE MATHIBE

AND

THE STATE

CASE NO: CA&R 220/08

HIGH COURT: GRAHAMSTOWN, EASTERN CAPE DIVISION

DATE HEARD: 27 AUGUST 2008

DATE DELIVERED: 9 OCTOBER 2008

JUDGE(S): GREENLAND, AJ

LEGAL REPRESENTATIVES -

Appearances:

for the State/Plaintiff(s)/Applicant(s)/Appellant(s): ADV J McCONNACHIE

for the accused/defendant(s)/respondent(s) :ADV M PIENAAR

Instructing attorneys:

Plaintiff(s)/Applicant(s)/Appellant(s): MTOTYWA ATTORNEYS, KING WILLIAM'S
TOWN

Respondent(s)/Defendant(s) :DIRECTOR OF PUBLIC PROSECUTIONS,
GRAHAMSTOWN

CASE INFORMATION -

Nature of proceedings : APPEAL

Topic:

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO: CA & R220/08

In the matter between:

ZINGISANE MATHIBE APPELLANT

Versus

THE STATE RESPONDENT

JUDGMENT

GREENLAND A J: -

[1] This is an appeal against sentence passed in the Magistrate's Court, Bedford, on 26 June 2007.

The appellant was convicted of possession of four (4) bags of cannabis, weighing 48,5 kgs, in contravention of section 4(b), as read with sections 1, 13(d), 17(d), 18, 19, 20, 25, 64 and Part III of Schedule 2 of the Drugs and Drug Trafficking Act, No.140 of 1992.

He was sentenced to three (3) years imprisonment of which eighteen (18) months was suspended for a period of four (4) years on condition that the appellant is not convicted of a contravention of section 4(b) of Act 140 of 1992 (possession of undesirable dependence producing substances) or 5(b) of Act 140 of 1992 (dealing in undesirable dependence producing substances) committed during the period of suspension.

Grounds of appeal

[2] It is contended that "the appellant should be given a lesser sentence with the option of a fine" on account of the following to which it is submitted the court, a quo, paid insufficient regard –

the severity of the sentence is not matched by the gravity of the crime

appellant is a first offender

he was 22 years of age at the time of commission

he cooperated with the police

he is the family breadwinner earning R800 per month.

In argument on appeal it was also contended the magistrate had misdirected himself in finding that the accused was in possession in furtherance of distribution by dealers.

Facts – per the record

[3] When the charge was put to the appellant, on 15 May 2007, he pleaded guilty and tendered a written statement titled “Accused Statement in terms of section 112 (B) (sic) Act No. 51 of 1977”. In the statement the appellant admitted that police found the dagga in a vehicle being driven by him at the time. However he claimed that he had borrowed the vehicle. All he was prepared to say about the dagga was that –

“The vehicle was searched and in the boot the four (4) bags were found to be that of dagga which I suspected all along”.

The trial was then postponed until 26 June 2007 and on resumption appellant, via his counsel, tendered further admissions in terms of section 220 of the CPA that –

“

When loading the bag of dagga accused knew that the bag contains dagga because of the smell and because he was advised by the Nigerians that it was dagga

When the accused was arrested he told the police that it was dagga he had been transporting in his car

Accused knows the smell of dagga ”

On the above facts it can be accepted that the accused was in possession of the dagga not as owner but as holder/transporter on behalf of others.

Magistrate’s reasons for sentence

[4] In his reasons for sentence the magistrate considered, inter alia: -

All the personal circumstances of the appellant;

The nature and seriousness of the offence pointing to the quantity and weight of the dagga.

The interests of society which he held to be adversely affected on account of the quantity involved.

In balancing all of the above the magistrate specifically found that the dagga was not for the appellant’s own consumption but possessed on behalf of others who, as a matter of probability, were in the business of dealing in dagga. He observed that “without the active and willing assistance of persons such as the accused they would have to carry the risk of transporting the

dagga themselves”. He was mindful of the fact that dagga use and dealing was prevalent in the Eastern Cape in both the urban and rural areas. This contributed to the incidence of crime and a breakdown in family and community relationships. He was also of the view that the severe penalties prescribed were indicative of legislative insistence on the inherent seriousness of the offence.

As regards the claim that the appellant had shown remorse the magistrate found that this was not genuine as evidenced by the appellant’s grudging admission of the facts. In truth the appellant had little option but to admit the incriminatory

facts.

In terms of a consideration of all the facts he concluded that a deterrent sentence of imprisonment was indicated but this should be balanced or ameliorated in terms of the appellant’s personal circumstances including the fact that he was a first offender. He therefore suspended half of the sentence. In his view the sentence reflected these fair and just considerations.

Misdirection?

- [5] It was submitted that the magistrate’s findings regarding the appellant’s possession on behalf of dealers and the effect such conduct has on the problem in the Eastern Cape was a misdirection in that its effect was to visit on the appellant criminal responsibility that accrues to dealers of which the appellant was not a member.

Discussion on approach

- [6] In my view there is no misdirection. On the appellant’s version the magistrate had no option but to accept that the appellant was holding/transporting the dagga not as owner but on behalf of others. Because of the quantity involved he was right in concluding that the probability was that such persons were dealers. The appellant could not have imagined anything else either. So precedents such as *S v MBATHA* 2000

- (2) SACR 409 (W) must be distinguished.

It is to state the obvious that assisting dealers by transporting a large quantity of dagga must have an aggravating effect on the problem of dagga use in the province as expounded by the magistrate.

There is also a complaint that the magistrate erred in describing the appellant’s explanation as “convoluted”.

It is clear from a reading of the record that the magistrate meant no more than that the explanation was not forthcoming as one simple, clear and coherent piece of information but as a two-piece grudgingly advanced offering on the part of the appellant.

Where a court has exercised a judicial discretion on all indicated facts, factors and circumstances an appeal court is precluded from interfering unless the sentence arrived at is simply not appropriate. This sometimes occurs in terms of severity, i.e., so

severe that no reasonable court would have imposed it. In terms thereof the question is whether or not the sentence can be categorised as shockingly disproportionate to the offence committed. See *S v SHAIK AND OTHERS*

[2007] ZACC 19; 2008 (2) SA 208 (CC) at 238 -

“[72] The function of any court adjudicating an appeal against a sentence must be kept in mind, for it is relevant to whether there are prospects of success. It has been stated repeatedly by courts that an appeal court will not easily interfere with a sentence imposed by a trial court exercising its discretion. The question is not which sentence the appeal court would have imposed, but rather whether the sentence is shockingly inappropriate, or whether an irregularity or misdirection occurred. 76

76 See for example *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g - j; *S v Brand* 1998 (1) SACR 296 (C) at 303c - e; *S v Pillay* 1977

(4) SA 531 (A) at 535A - G; *S v Rabie* 1975 (4) SA 855 (A) at 857C - F; *S v Sibiya* 1973 (2) SA 51 (A) at 56A - B and 57B - C; *S v Berliner* 1967 (2) SA 193 (A) at 200G; *S v Fazzie and Others* 1964 (4) SA 673 (A) at 683A and 684A - C; *S v Anderson* 1964 (3) SA 494 (A) at 495C - H; *R v Zulu and Others* 1951 (1) SA 489 (N) at 494A - G and 497A - D; *R v Reece* 1939 TPD 242 at 243 - 244; *R v Taljaard* 1924 TPD 581 at 582 and 583; *R v Mapumulo and Others* 1920 AD 56 at 57.”

This court was referred to the unreported case of *Nzimani Veldman v S* CA&R 250/04 in which on appeal to this Division the court held that a sentence of two (2) years imprisonment suspended for five (5) years plus a further R6,000 or twelve (12) months imprisonment was appropriate and

“in line with sentences which are imposed by the lower courts in this Division and which are confirmed by this court on appeal or automatic review every week...”

following conviction for dealing in 6, 5 kilograms of dagga.

The court was also referred to the unreported case of *S v Cetywayo and others*, Review No. 20060003 in which a sentence of two (2) years imprisonment and, in addition a fine of R5,000 both suspended for five (5) years was confirmed as appropriate on conviction for dealing in 14,060 kg of dagga.

Also referred to was the case of *Mtsi v S* CA&R 247/2005 in which case a sentence of seven (7) years imprisonment was deemed appropriate for dealing in 970.5 kg of dagga.

It will be noted that all the above cases concerned dealing in dagga which is intrinsically more serious than possession. Also notable appears reluctance on the part of the court to impose a purely custodial sentence except as regards dealing in exceptional quantity, i.e., 970.5 kg.

Against that is the fact that the cases are all distinguishable in that in none of them did the court advert to the prejudice in terms of a public interest test set out in detail by the magistrate in this case. Quite clearly the situation is dynamic and ever evolving. What pertained in the past might not pertain now. There would appear to be no comparable precedents.

As regards the seriousness in which the offence is viewed legislatively the penalty section being section 17 provides -

“17 Penalties

Any person who is convicted of an offence under this Act shall be liable-

a)

in the case of an offence referred to in section 13 (b) or (d), 14 or 15, to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding 15 years, or to both such fine and such imprisonment; and

.....

(It is section 13 (d) that renders possession of dagga in breach of section 4(b) an offence).

In the light of this provision the magistrate cannot be faulted in viewing the offence in the most serious light and respecting what presents as legislative imperative to impose an exemplary sentence. As said he was influenced by the quantity and weight of dagga involved. At 48, 5 kg these present as considerable.

Traditionally courts are reluctant to imprison a first offender. There is a plethora of authority on this aspect of penal approach. See for instance *S v REAY* 1987

(1) SA 873 (A) which involved a youthful first offender convicted of breaking and entering in order to steal drugs.

However courts can and do imprison first offenders if the offence is classified as so serious as to render this unavoidable. It is a matter of a judicial discretion exercised in the light of all the facts, factors and circumstances. See *S v MASHER* 1970 (4) SA 519 (N) where the court refused to interfere with a sentence of imprisonment on a eighteen (18) year old first offender convicted of a shocking display of driving, recklessness and inconsideration of other road users .

Sight cannot be lost of an aspect which the magistrate was apparently alive to but only partially adverted to in referring to the breakdown in family and social cohesion. The fact is that the legislature has classified dagga as a dependency inducing drug howsoever aspects of this may have been put in dispute in the Constitutional case of *PRINCE v PRESIDENT, CAPE LAW SOCIETY, AND OTHERS* [2002] ZACC 1; 2002

(2) SA 794 (CC) at 808 –

[26] The harmful effect of cannabis which the prohibition seeks to prevent is the psychological dependence that it has the potential to produce. 27 On the medical evidence on record, there is no indication of the amount of cannabis that must be consumed in order to produce such

harm. Nor is there any evidence to indicate whether bathing in it or burning it as incense poses the risk of harm that the prohibition

seeks to prevent. The medical evidence focused on the smoking of cannabis and its harmful effects.

27 It should be emphasised that in general the evidence of the nature and the extent of the harm caused by cannabis is the subject of a huge medical controversy. See generally Boister 'Decriminalising dagga in the new South Africa: Rekindling the debate' 1995

(8) SA Journal of Criminal Justice 21 at 26; Paschke 'Personal use and possession of dagga: A matter of privacy or prohibition?' 1995 (8) SA Journal of Criminal Justice 109 at 112-3. Professor Ames notes that the prohibition on the use or possession of dagga has prevented effective research on the harmful effects of cannabis that is essential to separating the facts from the myths about the harmful effects of cannabis.

The magistrate was not wrong in regarding societal prejudice as important. Drug dependency and abuse is a terrible problem in South Africa.

Conclusion

[7] It is not possible to draw a line in the sand and state at what point imprisonment of a first offender for possession of this drug is justified. What must be upheld is that 48, 5 kg of dagga is a considerable amount and the magistrate cannot be faulted in his overall assessment and exercise of judicial discretion. In particular, because of the quantity involved, an exemplary sentence

was indicated for the reasons set out by the magistrate.

It is my judgement that the magistrate cannot be faulted as regards sentence and that the appeal be dismissed. I propose accordingly.

GREENLAND A.J

I AGREE. It is so ordered.

Sangoni J

FOR THE APPELLANT : ADV J C McCONNACHIE

INSTRUCTED BY : MTOTYWA ATTORNEYS

16 ARTHUR ATREET

KING WILLIAMS TOWN

FOR THE RESPONDENT : ADV M PIENAAR

INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTIONS

HIGH STREET

GRAHAMSTOWN

HEARD ON : 27 August 2008

DELIVERED ON : 09 october 2008

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