

IN THE GAUTENG DIVISION OF THE HIGH COURT
PRETORIA, REPUBLIC OF SOUTH AFRICA

15/5/2014

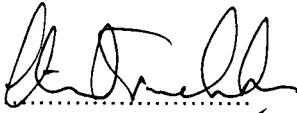
CASE NO: A947/2013

In the matter between:

MBUSISENI ZWELITHINI SHEZI

Appellant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	13/05/14 DATE	 SIGNATURE

THE STATE

Respondent

JUDGMENT

Tuchten J:

- 1 The appellant was convicted, on a plea of guilty, in a magistrate's court of dealing in 150 kg of dagga, contrary to s 5(b) of the Drugs and Drug Trafficking Act, 140 of 1992 ("the Act"). He was sentenced to 6 years imprisonment of which 3 years were suspended and, in addition, a fine of R50 000 or three years imprisonment. The Opel Corsa vehicle used in the commission of the offence was declared forfeit to the State and ordered to be destroyed.

- 2 The appellant appeals against his sentence, leave in this regard having been granted by the court *a quo*.
- 3 The appellant did not testify. The State proved that the appellant had two previous convictions for the illegal possession of substances in contravention of the Act: in 2005 he was convicted of possession of a dependence-producing substance in contravention of the Act and, at the same hearing, of driving a motor vehicle without a license so it is reasonable to assume that the appellant was transporting the substance at the time.
- 4 The appellant's legal representative made submissions in mitigation on behalf of the appellant. The correctness of the facts relative to the appellant's personal circumstances was not disputed by the State and the magistrate took what was told to him into account.
- 5 The appellant was 42 at the time of his trial, was said to be unemployed, was the owner of a vehicle, was married with nine children and was said to have "limited money" for a fine and be unable to obtain "any more immediately". The area of jurisdiction of the court in which the appellant was charged borders on Swaziland. That court regularly hears cases relating to dagga smuggled into the Republic from that kingdom. On the day of the appellant's trial, he was

but one of several accused persons appearing before the court for alleged drug-related offences. The offence of dealing in dagga was described by the magistrate as alarmingly prevalent in the district of the court *a quo*.

- 6 The appellant, however, disclosed through his legal representative that he was employed to transport the dagga from an address in the Republic to an undisclosed location because he was the owner of a vehicle. He was to receive a fee of R3 500 of which R2 500 was paid up front. He knew, his lawyer said, that transporting dagga constituted the offence of dealing in it. But he did so because he was desperately poor. The appellant was however at the time of his trial the owner of a house in Pumula, Germiston as well as the owner of the vehicle in which he was transporting the dagga. How this desperately poor man managed to accumulate these assets was not disclosed to the court *a quo*. The appellant told the court *a quo* through his lawyer that he had managed to scrape together R5 000 for a fine.
- 7 In his reasons the magistrate rightly pointed to the harmful effects of dagga on the lives of members of our society. I would add that many young people are among its victims. He considered a wholly suspended sentence but decided that it would not be appropriate. The magistrate was, further, careful to impose a sentence that did not

sacrifice the appellant to warn other like-minded persons of the harsh punishments that would await them if they were convicted.

- 8 It is argued on behalf of the appellant that the magistrate erred in using the knowledge of the value he had gained through his judicial duties. The magistrate said that on a conservative estimate, 150 kg of dagga had a street value of R150 000.

- 9 In *R v Pretoria Timber Co (Pty) Ltd. and Another* 1949 4 SA 368 T 371, the court held

As a general rule judicial notice may be taken of facts which are so notorious that there is no necessity to prove them; the basis of the rule being that the Court assumes that the matter is so notorious that it will not be disputed.

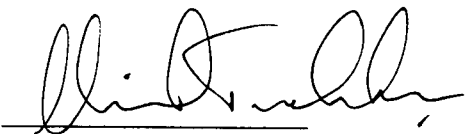
- 10 I think that the street value of dagga in a jurisdiction in which the crime of dealing in this substance is part of the daily judicial fare is decidedly a matter upon which a judicial officer presiding in that court can take judicial knowledge. It is instructive that when the appellant sought leave to appeal from the magistrate, his legal representative did not suggest that the magistrate impermissibly assessed the value of the dagga which the appellant was transporting.

- 11 And then it is submitted that the cumulative effect of the imprisonment and the fine was grossly disproportionate. Here it is instructive to contrast the disparate positions adopted by the appellant as to his financial means. While for the purposes of sentence, the appellant claimed to be poor and unemployed, for the purposes of leave to appeal the appellant focussed his attack on the custodial portion of the sentence and said that he not only "would be in a position to pay a fine but [was] actually begging for the opportunity to pay the fine".
- 12 I think that far from being the humble impoverished victim of economic circumstance, the appellant is, or was at the time of his trial, probably an affluent drug dealer. The earlier non-custodial sentences imposed upon the appellant for possession of drugs did not deter him.
- 13 It was submitted by the appellant's counsel that by pleading guilty the appellant had shown remorse. *In S v Matyityi* 2011 1 SACR 40 SCA para 13, the Supreme Court of Appeal trenchantly pointed to the difference between regret and remorse:

There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's

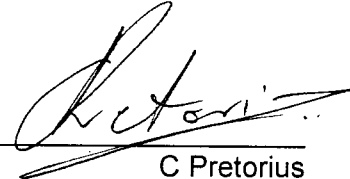
error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. [footnotes omitted]

- 14 As the appellant failed signally to take the court *a quo* into his confidence and there is nothing to indicate that he had anything approaching a change of heart about his crime, it cannot be said that he showed remorse. He was probably sorry that he had been caught with 150 kg of dagga in his motor car. But that is not remorse. The likelihood is that he pleaded guilty because he had been caught red handed.
- 15 In the circumstances I do not think that the sentence is harsh at all. The magistrate has not been shown to have misdirected himself. There are thus no grounds upon which this court could interfere on appeal with the sentence imposed. I would dismiss the appeal and confirm the conviction and sentence.

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NB Tuchten
Judge of the High Court
13 May 2014

I agree. It is so ordered.

A handwritten signature in black ink, appearing to read 'C Pretorius', written over a horizontal line.

C Pretorius
Judge of the High Court
13 May 2014