KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case no: AR265/11

In the matter between:

SELBY NHLANHLA MBATHA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MADONDO J

Introduction

[1] I have had the benefit of reading the judgment of Gyanda J. I am not in agreement with the approach adopted in interpreting the word "cultivation" and the conclusion that the cultivation of a single plant or few dagga plants per se constitutes dealing in dagga in contravention of the provisions of section 5 (b) of the Drugs and Drug Trafficking Act no. 140 of 1992 (the Act).

[2] This matter had served before Wallis J (as he then was) as an automatic review. In his review judgment he referred the matter to this Court in order for it to decide the question whether it is correct to treat the growing of a single dagga plant or bush in order to provide a source of dagga for personal use as "cultivation" in the sense in which that word is used in the definition of "deal in" in section 1 of the Act and to consider and decide on the continued

application of the decision in S v Van Zyl 1975 (2) SA 489 (N).

Factual Background

[3] The accused was charged in Dundee Magistrate's Court with the main count of dealing in 3.45kg, 6.50grams and 15.5 grams of dagga in contravention of the provisions of section 5(b) of the Act and the alternative count of possession of the same quantity of dagga in contravention of section 4(b) of the Act.

[4] The appellant pleaded not guilty to the main count but guilty to guilty to the alternative count. He stated that he possessed the dagga in question for personal use. However the state did not accept the plea on the alternative count and proceeded to trial on the main count. The evidence led by a single witness, established that following information Sonesh Singh, a Warrant Officer in the South African Police Service attached to Glencoe Dog Unit, and Constable Ndima had received as to the presence of dagga at the accused's homestead, 14B Dlamini Village, Dundee, they sought and obtained a search warrant.

[5] Armed with the search warrant they proceeded to the accused's homestead to conduct a search. On their arrival at 14B Dlamini Village they introduced themselves and explained the purpose of their visit to the accused and asked him for permission to conduct a search. After obtaining the required permission, Singh and Ndima started searching the house of the accused.

[6] At the foot of the bed they found a plastic parcel containing dagga. They then proceeded outside the house to conduct a further search on the premises. Outside the house they found a bread packet containing dagga seed and loose dagga in a bundle of newspaper.

Alongside the fence, within the precinct of the accused's' premises, they found a dagga plant 1.98m in height, which appeared to them to be well tended. They formed such an opinion on the basis that the patch where the dagga plant was found had been tilled, weeded and there were no other plants growing wildly around it.

[7] Singh did not dispute that the accused possessed dagga for his own smoking purposes. No evidence was led to show that the accused was dealing in dagga, nor did the accused admit dealing in dagga by cultivating it. On the close of the State case, the accused elected to remain silent and close his case without calling any evidence.

[8] The Learned Magistrate had difficulty in convicting the accused of dealing in dagga in the absence of evidence to that effect. Nor could the accused be presumed to have been dealing in dagga in terms of section 21(1)(a) of the Act on the ground that he had been found in possession of dagga in excess of 115 grams since such presumption had been held unconstitutional. However, the Magistrate relying on the fact that the definition of the word 'deal in' in the Act includes cultivation convicted the accused on the main count.

[9] However, it is worth pointing out that such a finding by the learned Magistrate was not supported by any evidence. The accused had only pleaded guilty to possession of dagga but not to the cultivation of the dagga plant. There is nothing in the particulars of the charge sheet which indicated that the accused cultivated the dagga plant in question and that by such cultivation he dealt in dagga. Nor was the accused warned that should the evidence establish that he was guilty of cultivating the dagga plant in question, he could on that ground alone be convicted of dealing in dagga since in terms of the Act cultivation of dagga constitutes dealing

in dagga. Therefore, it cannot be said that the charge of dealing in dagga embodied cultivation of the dagga plant. Though there was evidence that the dagga plant had been tended and from which it could reasonably be inferred that it was cultivated, still, it was incumbent upon the state to prove beyond a reasonable doubt that the accused cultivated the dagga plant in question.

[10] The State had therefore failed to prove that the accused had committed the prohibited act. The prosecution had not laid any basis for the admission of the evidence of Warrant Officer Singh that on enquiring from the accused whose dagga plant it was, the accused responded saying that it was his. Such evidence was inadmissible for conviction on the main count. It is, therefore, apparent that the accused was presumed to have cultivated the dagga plant in question simply on the ground that he had admitted being the owner of the premises in question.

Interpretation of the word "cultivation"

[11] In section 1 of the Act the definition of 'deal in', in relation to a drug, includes performing any act in connection with the trans-shipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.

[12] Though the word "cultivation" is not defined in the Act its meaning can be gleaned from authoritative dictionaries and decided authorities. In ascertaining the meaning of the word "cultivation", regard must be had to the purpose of the legislation, scope and the context in which the word is used. *See SAPS v Police and Prisons Civil Rights Union 2011 (6) SA 1 (CC) at 13 para 30.*

[13] The South African Concise Oxford Dictionary defines the word "cultivate" as meaning to:

> "Prepare and use (land) for crops or gardening, raise or grow (plants) especially on a large scale for commercial purposes"

[14] In R v Potgieter 1951 (1) SA 750 (N) at 751E the word 'cultivate' in section 61(1)(b) of Act 13 of 1928 was interpreted to mean "to promote or stimulate or foster the growth of a plant". In this case the Court was asked to decide whether or not, upon the evidence, the dagga growing on the appellant's land was cultivated. There was evidence that the plot had been weeded. The Magistrate after taking all the circumstances in to account, found as a fact that the accused had cultivated dagga. Potgieter was cited with approval in S v Ndaba 1962(3) SA 202(N) at 203 G-H; S v Buthelezi 1968(2) SA 714(N) at 715 D-E.

[15] In S v Guess 1976(4) SA 716(A) at 717B-C, the word "cultivate" was interpreted to ordinarily mean to promote or simulate the growth of a plant by any person. However, giving the word "cultivation" liberal interpretation so per se to constitute dealing in dagga without reference to *mens rea* presupposes strict liability in respect of the offence.

[16] This is quite evident in *S v Kgupane en Andere 1975(2) SA 73 (AD) at 75 H* where Bekker J said:

> "Na my mening geld the volgende; Dat 'n kweker van dagga skuldig is aan "handdryf" is nie te betwyfel nie. Hy word regstreeks getref en val binne die trefwydte van die statutêre omskrywing van "handeldryf" wat verskyn in art. I van die wet. Kweek van dagga is handeldryf. Die afleiding wat gemaak word uit hoofde van omskrywing van "handeldryf", gesien in die lig van die voorgeskrewe vonnis, is dat dit die bedoeling van die Wetgewer is om die nekslag toe te dien aan kweek van dagga al sou dit deur die kweker vir eie gebruik bestem vees. Met ander woorde, soos ek die artikel vertolk is die verbod gemik op die kweek van die plant ongeag vir water doel dit ook al bestem is …"

[17] According to the interpretive approach adopted in Kgupane case and other old decided

authorities to the meaning of cultivation, cultivation of any kind and on any scale amounts to dealing. It may take the form of a single dagga plant growing or a few home growing plants in pots or large commercial growing in the fields. All according to the said approach are prohibited in the Act and it does not distinguish cases on the basis of the size of the plant and number of the plants involved.

[18] It is clear from Kgupane case, *supra*, that conviction of dealing in dagga automatically follows upon mere proof beyond a reasonable doubt of the proscribed Act, i.e. cultivation of dagga. In essence, cultivation of dagga per se constitutes dealing in it without proof of intention to do so. The state is required to prove neither *mens rea* nor negligence. See *also R v City of Sault Ste. Marie, [1978]2 SCR 1299*. However, this approach raises serious legal and constitutional issues, which will appear more fully in my discussion in the judgment.

Mens rea

[19] In the old decided authorities the word "cultivation" has been interpreted as not requiring culpability. This approach, obviously, creates an anomalous situation in our justice system where an accused person is convicted of a criminal offence without the fulfilment of all the elements of criminal liability, namely; act, unlawful and culpable conduct which accord with the definitional elements of the crime charged, see CR Snyman: Criminal Law 4th ed. P37.

[20] Generally, an act or omission is not criminal unless it is accompanied by *mens rea* or a culpable state of mind of a person who does or commits it. *Mens rea* focuses on the mental state of the accused and requires proof of a positive state of mind such as intent, recklessness or wilful blindness. Negligence on the other hand, measures the conduct of the accused on the

basis of an objective standard, irrespective of the accused's subjective mental state. Where negligence is the basis of liability, the question is not what the accused intended but rather whether the accused exercised reasonable care. Negligence is an acceptable basis of liability in the regulatory context. Regulatory legislation is essential to the functioning of our society and to the protection of the public. It responds to the compelling need to protect the health and safety of the members of our society and to preserve our fragile environment. See *R v Wholesale Travel Inc [1991] SCR (4th) 145 CSCC.*

[21] The imposition of criminal liability in the absence of a criminal intention has for some hundreds of years at least been regarded as an abhorrent concept in South African Law and in Anglo –American Common Law. See *S v Coetzee and others 1997(1) SACR 379(CC) at 1414*. In S v Qumbella 1966(4) SA 356 (A) at 364D-F, it was held that the judicial thinking of that time was recognising more fully the scope and operation of the basic principle *actus non facit reum nisi mens sit rea* as a fundamental rule of our law.

[22] Homes JA at 364F referred to this rule as a "fundamental principle of fairness". It is on the basis of this principle that statutes creating criminal offences will, as far as their language permits, be interpreted as requiring the element of *mens rea* in some form, either subjective guilty intent or at least negligence.

[23] The general principle of our common law is that the criminal liability arises only where there has been unlawful conduct and blameworthiness. See *Coetzee case at 438 at 162*. For, it is the intention or the consciousness that one is committing a crime that really constitutes the criminality. In R v Wallendorf and others 1920 AD 383 at 394, it was held that it is a recognised

principle of our law and practice that "ordinarily speaking, a crime is not committed if the mind of the person doing the act in question be innocent."

[24] In S v Ngcobo 1972 (2) SA 557(N), the question arose whether *mens rea* was part of the offence created by section 2 (b) of Act 41 of 1971, which the possession of dagga, and if it was, whether the Act cast an onus upon a person who has been found in possession of dagga to prove on the balance of probabilities that he did not have the required *mens rea*. The court answered the first question in the affirmative and the second one in the negative. In S v Pather 1973(3) SA 164 (N) at 165E-F, the court held that unless a statutory prohibition expressly or by necessary implication excludes *mens rea* from an offence, such a mental state should be regarded as a necessary element of it.

[25] The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused person may be convicted while a reasonable doubt exists. See *R v Whyte (1989)51 DLR (6A) 481 at 493*.

[26] It was not the intention of the Legislature that liability imposed for cultivation of dagga should be strict. In S v Arenstein 1964(1) SA361 (AD) at 365C, it was held that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. Indications to the contrary maybe found in the language or the context of the prohibition or conjunction, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of *mens rea*. See also *R v H, 1944 AD 121 at 126*.

[27] In *R v Salmonson and another 1960(4) SA 748(T) at 751.* Claasen J said:

> "Where the section of an Act though the absence of such words as 'wilfully' or 'knowingly' unqualifiedly prohibits and act, it becomes necessary to decide whether it is an absolute prohibition or whether an absence of *mens rea* could be a defence."

[28] The Legislature may absolutely prohibit the doing of an act and constitute it an offence without reference to the state of mind of the offender, and regardless whether he had any intention of breaking the law or otherwise doing a wrongful act. However, the intention of the Legislature cannot be decided upon simple prohibitory groups only. In every case it is for the court to determine upon other considerations namely; the object of the statute in question, the context of the prohibition and the nature and extent of the penalty, whether or not a guilty mind is necessary to constitute the offence created by the statute. See *R v Wallendorf, supra, at 397; F v H at 126.*

[29] The object of the Act in the present matter is to provide for the prohibition of the use or possession of or dealing in drugs and of certain Acts relating to the manufacture or supply of certain substances or the acquisition or conversion of the proceeds of certain crimes, the recovery of the proceeds of drug trafficking and for matters connected therewith. It is apparent from the above that the Act aims at eliminating financial incentives from illicit trafficking in dagga but not to brand any Act relating to dagga handling as dealing. Therefore it is appropriate to conclude that the word "cultivation" should not be interpreted in isolation but with reference to dealing in dagga. For an accused person to be convicted of dealing in dagga merely on the basis that he or she has cultivated dagga, a link must be established between cultivation of and dealing in dagga. In other words, the evidence must show beyond a reasonable doubt that the accused person cultivated dagga for the purpose of selling or supplying it to other

people. In fact, the State must prove cultivation, prohibition, i.e. dealing in dagga and intention.

[30] In *S v Van der Merwe 1974(4) SA 310 (E),* the appellant had been convicted by a magistrate of dealing in dagga because he had watered and nurtured a small dagga plant which he kept in a small tin in his room, but the court, in allowing the appeal held as follows:

> "The legislation of this nature, with its far-reaching criminal consequences, had to be given a restrictive interpretation and that the definition of dealing in dagga should not be given a wider interpretation than was necessary to achieve the obvious intention of the legislature: equally a statute, particularly, a penal statute, should not be given an interpretation which would produce a manifestly absurd result."

Accordingly, in this case the court held that the action of the appellant could not be held to fall within the extended definition of "dealing in dagga". Conviction of unlawful possession of dagga in contravention of section 2(b) of the Act was substituted.

[31] In *S v Thembalethu 2009(1) SACR 50 (SCA) 55 para 8*, Kgomo AJA (as he then was) said the following:

> "The starting point in the interpretation of a statutory provision remains an endeavour to ascertain the intention of the legislature from the words used in the enactment. Those words must be accorded their ordinary, literal, grammatical meaning and a court may depart from the meaning only where to do so would lead to an absurdity so glaring that it could never have been contemplated by the legislature, as shown by the context or by such other considerations as the court is justified in taking into account … (Venter v Rex 1907 TS 910 at 915; and Randburg Town Council v Kerksay Investments (Pty) Ltd 1998 (1) SA 98 (SCA) [1997] 4 all SA 121 at 107 B-G)".

[32] The intention of the Legislature in prohibiting cultivation of dagga is to prevent sale or supply of it to other people. Therefore, the provisions relating to 'deal in' should not be construed in such a manner as to make a person who effectively possesses dagga for personal use, therapeutic or other purposes a dealer. In this regard SmalBerger J in *S v Solomon 1986(3) SA 705(A) at 709G* had the following to say:

> "Die wet tref 'n duidelike ondeskeid tussen handeldryf in, en die gebruik of besit van, verbode

> stof. Dit blyk uit die bepalings van Art 2 van de Wet. Hierdie ondereskuid is veral te bespeur by die strawwe wat vir handeldryf en besit onderskeidelik voorgeskryf is. Dit is aanduidende van wetgewer se bedoeling om nie hadeldryf en besit van eie gebruik, en diẹgene wat by die een of ander betrokke is oor dieselfde kam to skeer nie."

Constitutional issues

[33] The second question arises is whether the principle or practice according to which a court is free to interpret a statutory provision creating a crime in such a way that no culpability is required from liability is compatible with the Constitution.

[34] The general rule is that when a person has committed an unlawful act intentional or negligently, the State may punish him or her. Deprivation of liberty, without established culpability constitutes a breach of this established rule. In Coetzee case, *supra*, at 443 para 176, O' Regan J said:

> "Indeed the appropriate form of culpability may well be affected by the nature of the criminal prohibition as well as other factors. In addition, it should be borne in mind that significant leeway ought to be afforded to the Legislature to determine the appropriate level of culpability that should attach to any particular unlawful conduct to render it criminal. It is only when the Legislature has clearly abandoned any requirement of culpability manifestly appropriate to the unlawful conduct or potential sentence in question, that a provision maybe subject to successful constitutional challenge."

[35] Under article 14 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of December 1988, the taking of appropriate measures to prevent illicit cultivation of and to eradicate plants … containing narcotic or psychotropic such as … cannabis plants cultivated illicitly are permissible but the measures adopted must respect fundamental human rights ….

[36] In Canada the principle of strict liability is held to constitute infringement upon Canadian Charter of Rights and Freedoms (the Charter), provided that such an interpretation

results in imprisonment being imposed upon, because he is deprived of his liberty and security of person. However, it is not wrong to place a burden on a person to prove that he had not acted negligently. See *Motor Vehicle Act Reference (1985) 23 CCC (3rd) 289, [1785] 2 SCR 486 48CR (3d) 289; Wholesale Travel Inc (1991) SCR (4th) 145(SCC); R v Hess, R v Nguyen (1990) 59 CCC.*

[37] The Canadian Supreme Court has held that where a statute imposes criminal liability without any *mens rea* requirement (ie. absolute liability) which may result in imprisonment, it will be a breach of section 7 of the Charter. See *Motor Vehicle Act (19850 24 DLR (4th) 536 (SCC); R v Vaillancourt (1988) 47 DLR (4th) 399(SCC); R v Wholesale Travel Group Inc. (1982) 84 DLR (4th) 161 (SCC).*

[38] It is a principle of fundamental justice that a criminal offence punishable by imprisonment must have a *mens rea*. See *R v Hess; R v Nguyen [1990] 2 SCR 906*. Section 7 of the Canadian Charter of Rights and Freedoms (the Charter) provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of the fundamental justice."

[39] In *Re B.C. Motor Vehicle Act [1985] 2 SCR 486 at513*, Lamer J, writing for the majority, stated:

> "It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin Action *non facit reum nisi mens sit rea*."

[40] In R v Vaillan Court, [1987] 2SCR 636 at 652, it was found that section 7 of the Charter had elevated the requirement of *mens rea* from a presumption of statutory interpretation to a

constitutionally mandated element of a criminal offence. On the principle that the innocent should not be punished Dickson J in *Papp john v The Queen [1989] 2 SCR 120 at 138* said:

> "There rests now, at the foundation of our system of criminal justice, the precept that a man cannot be adjudged guilty and subjected to punishment unless the commission of the crime was voluntarily directed by a willing mind"

[41] The doctrine of *mens rea* is an integral and indispensable feature of criminal law. It is therefore not proper to punish a man unless he had known that he was doing wrong. See Kenny's Out lines of Criminal Law 19th ed: by JW Cecil Turner, Cambridge, University Press, 1966 at P13. The doctrine of *mens rea* reflects the conviction that a person should not be punished unless that person knew that he was committing the prohibited act or would have known that he was committing the prohibited act. Generally, *mens rea* is an essential ingredient of all cases that are criminal in the true sense not for offences created by statutes for the regulation of individual conduct in the interest of health, convenience, safety and general welfare of the public.

[42] Acts or actions are criminal when they constitute conduct that is itself, so abhorrent to the basic values of human society that it ought to be protected completely. While the criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally, directed to the prevention of future harm through the enforcement of minimum standards of conduct and care. The concept of fault in regulatory offences is based upon reasonable care standard and such does imply moral blameworthiness in the same manner as a criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

[43] In *Harding v Price 1948(1) AER 283 at p 284*, Lord Goddard CJ said:

> "… It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind …"

[44] In South Africa the principle of strict liability infringes negatively on the right to a fair trial provided for in section 35(3) of the Constitution, as well as with the right to freedom and security of the person provided for in section 12(1) Of the Constitution Act, 108 of 1996 (the Constitution). See Coetzee 1997(1) SACR 379(CC) 442 h-I per O'Regan; Magagula 2001(2) SACR 123 (T) 145-146, 146b.

Presumption of innocence

[45] The principle that a person should not be convicted unless he has some degree of *mens rea* is fundamental to our law. However, in the interpretive approach adopted by certain old decided cases the accused is convicted on the mere proof of the commission of the prescribed Act without reference to the culpability of the accused's conduct. This has the effect of shifting the onus onto the accused to prove his or her innocence.

[46] There is no question that the presumption of innocence is a fundamental legal right which plays a very import role in the administration of our criminal law system. The importance of the right is illustrated by its entrenchment in section 35(3)(h) of the Constitution. The said section provides:

> "(3) Every accused person has a right to a fair trial which includes the right —
> (a) ….
> (b) ….
> (c) ….
> (d) ….
> (e) ….
> (f) ….
> (g) ….
> (h) to be presumed innocent , to remain silent and not to testify during the proceedings."

[47] The presumption of innocence includes both the right of an accused to be presumed innocent until proved guilty, and the right to have the state bear the burden of proving guilty beyond a reasonable doubt. The interpretation which allows the court to convict an accused person of dealing in dagga on the mere proof of dagga cultivation without proof of *mens rea* places an onus on the accused to establish his innocence on the balance of probabilities in order to escape conviction. It does not exclude the possibility of the accused being innocent. The real concern is not whether the accused must prove an element or prove and excuse, but an accused may be convicted while a reasonable doubt exists. See R v Whyte [1988] 2 SCR 3. This was affirmed in R v Chaulk [1990] 3 SCR1303; Coetzee case, at 446 para 190. It is also in conflict with the long – established rule of the common law on the burden of proof that the prosecution must prove the guilt of the accused person beyond a reasonable doubt.

[48] The Constitutional Court has held that where a legislative provision imposes an obligation upon an accused to establish certain facts to avoid criminal liability it constitutes a breach of the presumption of innocence as enshrined in section 25(3)(c) of the interim Constitution (now section 35 (3)(h) of the Constitution). See S v Zuma and others 1995(1) SACR 568 (CC) 1995(2) SA 642; 1995 (4) BLLR 401 at para 33; S v Gwadiso 1995(2) SACR 748 (CC) 1996(1) SA 388; 1995(12) PLLR 1579 at para 15; S v Mbatha; S v Prinsloo 1996(1) SACR 371(CC); 1996(2) SA 464; 1996(3) BLLR 293 at para 12; S v Julius 1996(2) SACR 108(CC); 1996(4) SA 313; 1996(&) BLLR 899 at para 3.

[49] In Canada, the right to be presumed innocent is expressly protected by section 11(d) and inferentially by section 7 of the Charter, which provides:

> "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair public hearing by an independent and impartial tribunal."

[50] Section 11(d) requires, where a person faces penal consequences, that the individual be proven guilty beyond a reasonable doubt. The State bears the burden of proof and the prosecution must be carried out in accordance with lawful procedures and fairness. Section 11(d) is offended if an accused may be convicted notwithstanding a reasonable doubt on an essential element of the offence.

[51] The presumption of innocence for a regulated accused is not meaningless because the State must still prove the *actus reus*. Fault is presumed from the bringing about of the proscribed result and the onus shifts to the defendant to establish reasonable care on a balance of probabilities. See Wholesale Travel case, supra. In Narcotic Control Act, R.S.C 1970 CN – 158, the court held that s 8 of Practice Control Act infringed s 11 (d) by requiring the accused to prove (on a balance of probabilities) that he was not guilty of trafficking once the basic fact of possession had been proved.

[52] However, the US Supreme Court has held that where the person charged is aware of the regulated nature of the impugned conduct, it is constitutionally permissible to exact absolute liability offences, even where imprisonment is available as penalty. See United States v Balint, 258 US 250 (1922); United States v Dotterwhich; 320 U.S 277(1943).

[53] Even in the case of serious criminal offences, it has been held that placing a persuasive burden on the accused to establish a defence does not violate the presumption of innocence. See Patterson v New Work 432 U.S 197(1977); Martin v Ohio; 480 U.S 228(1987). The American

experience supports a finding that strict liability is constitutionally permissible. Though we can benefit from the American experience and learning in the decisions of the highest American Courts, should and must not be slavishly followed in South Africa, for, there are historical and other differences between American and South African Society.

Loss of Liberty and security of person

[54] Section 17 of the Act provides:

> "17. **Penalties** — Any person who is convicted of an offence under this Act shall be liable —
> (a) …
> (b) ….
> (c) ….
> (d) ….
> (d) ….
> (e) in the case of an offence referred to in section 13(f), to imprisonment for a period not exceeding 25 years , or to both such imprisonment and such fine as the court may deem fit to impose."

[55] The imposition of minimum imprisonment for an offence which may be committed unknowingly and with no wrong intent and for which no defence can be made deprives or may deprive of liberty offends the principles of fundamental justice .See Re. B.C. Motor Vehicle Act case, *supra*. At common law imprisonment was reserved for more serious *mens rea* offences. Where imprisonment is available as penalty, absolute liability cannot be imposed since it renders the fault element entirely and, in so doing, permits the punishment of the morally innocent. See *Wholesale Travel* Group Inc., supra.

[56] Generally speaking, the cause for deprivation of freedom must be in accordance with the basic tenets of the legal system. The prohibition of arbitrariness is at the core of the principle of legality, which forms part of the rule of law. The imprisonment following a conviction of strict liability violates the right to freedom because it is a basic principle of

criminal liability that punishment is justified by a degree of blameworthiness on the part of the accused. The state's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment. Criminal liability without fault is not consonant with the basic tenets of the legal system; it must therefore be justified under the general limitation clause (s36).

[57] Attachment of a mandatory imprisonment sanction to an absolute liability offence interferes with the provisions of section 12(1)(a) of the Constitution providing the right not to be deprived of freedom arbitrarily and without just cause in that an accused person convicted for cultivating dagga automatically loses his or her liability . Imprisonment is the most severe sentence imposed by law, apart from death, and is generally reserved as a last resort for occasions when other sanctions cannot achieve the objectives of the system.

[58] Section 12(1)(a) of the Constitution provides:

> "12(1) Everyone has the right to freedom and security of the person, which includes the right –
>
> a) not to be deprived of freedom arbitrarily or without just cause."

The section provides protection against detention or imprisonment. The substantive component requires the state to have good reasons for depriving someone of their freedom and the procedural component requires the deprivation to take place in accordance with fair procedure. The section guarantees both substantial and procedural protection.

[59] In Canada an absolute liability offence violates section 7 of the Charter only if and to the extent that it has the potential to deprive life, liberty or the security of the person. There is no need that imprisonment be mandatory. The combination of infringement and fine violates

section 7 irrespective of the nature of the offence and can only be salvaged if the authorities demonstrate under section 1 such a deprivation to be justified limit in a free and democratic society.

[60] In South Africa the infringement of the right is permissible in terms of the criteria for a legitimate limitation of rights laid down in section 36 of the Constitution. The law must serve a constitutionally acceptable purpose and that there must be sufficient proportionality between the harm done by the law and the benefit it is designed to achieve. This involves the weighing of competing values. In balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality. The purpose for which the right is limited and the importance of that purpose to such society, the extent of limitations, its efficacy and where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the rights in question. See *S v Mankwenyane 1995(3) SA 391 (CC).*

[61] Section 36 of the Constitution contains a set of relevant factors to be taken into account by a court when considering the reasonableness and justifiability of a limitation. There is absolutely nothing to show that the interpretive approach to the meaning of the word “cultivation” which infringes the right to innocence and the right to freedom and security of person constitutes a legitimate limitation of the rights in question. Nor, has it been shown that such infringement is for a good compelling reason and that it serves the purpose that is considered legitimate by all reasonable and right thinking citizens in a constitutional democracy. In order for the limitation on the right to freedom brought about the adopted interpretive approach to the definition of the word “cultivation” to achieve that, it must be

shown that it is reasonable in the sense that it does not invade the entrenched rights any further than it needs in order to achieve this purpose. In my view, the adopted approach does not pass the muster.

Deterrence effect of the sentence imposed - Decision in S v Van Zyl

[62] I now turn to determine whether the deprivation of liberty resulting from conviction for dealing in dagga by reason of cultivating a single plant or a few plants accords with the established fundamental principle of fairness. There is nothing to show that the cultivation of a single dagga plant or a few plants presents a reasonable risk of serious, substantial or significant harm to either the individual or society. Since, the adopted approach excludes culpability as a requirement; it is pointless to punish somebody who lacks culpability. The experience has taught that a person is not deterred from committing a particular offence if he is in danger of being convicted of it regardless of his knowledge of the surrounding circumstances. See also Stroud. Douglas Aikenhead, *Mens Rea*, London: Sweet & Maxwell, 1914 at pp. 10-11. The adopted approach therefore impacts negatively on the deterrent effect of the sentence imposed for the offence.

[63] Obviously, punishing a mentally innocent person would not achieve the desired purpose of the Act. The principle not to imprison a mentally innocent person stems from acute awareness that to imprison a 'mentally innocent' person is to inflict a grave injury on that person's dignity and sense of worth. There must be a correlation between the moral blame and punishment.

[64] Giving the word "cultivation" a liberal interpretation in relation to "deal in" will have the

effect of widening the meaning of the word "deal in" so to include any acts or activities related to the handling of dagga which would ordinarily not have fallen within the prohibition. Since the Act covers all forms of dagga cultivation from small domestic to large-scale commercial growing, the section exposes an accused that grows a single dagga plant or a few plants for their own use to severe punishment and to the full weight of the confiscation machinery. They stand to lose their assets including homes, for conviction of the offence of dealing in dagga may be followed by confiscation of assets under the Act (s 25).

[65] Section 25 of the Act empowers the court on convicting an accused person of dealing in drug, in addition to any punishment which the court may impose to declare any property including the immovable property which was used for the purpose of or in connection with the commission of the offence, under section 11(1)(g) of the Act or in the possession custody or under the control of the convicted person, to be forfeited to the State.

[66] In S v Van Zyl 1975(2) SA 484(N) the accused had cultivated three dagga plants in the flowerpot within the meaning of that word in the wide definition of "deal in" in the Act. At 492A-B, it was held that the Legislature could not have intended that an act such as the appellant's in relation to the cultivation of dagga should be regarded as an actual dealing in dagga, more particularly when a minor act, must in terms of section 2 of Act 41 of 1971, attract a minimum sentence of five years. The appellant's single contribution to the cultivation of the dagga plants was so trivial that the court should disregard it by applying the *maxim de minimis on curat lex* to the facts.

[67] Snyman rejects the *maxim of de minimis*. In my view, it should be confined to cases

where society is not prejudiced by the actions of the accused. In *R v Dane 1957 (2) SA 472 (N) 473D*, it was held that the maxim has a bearing in criminal cases, and can and should be applied in charges of extreme triviality. In S v Shangase and others 1972 (2) SA 410 (N) 425F- G, Harcourt J, said:

> " … however, the social evil involved and the manifestly severe intention of the Legislature discernible in the Act make it improper to say that the harm — actual and potential done — to the individual and to the community is of so trifling a nature that the maxim can be properly applied by a court once a prosecution has been before it . "

[68] The punishment imposed must bear some relationship to the offence charged. It must be a fit sentence proportionate to the seriousness of the offence. Only if this is so, can the public be satisfied that the offender deserves the punishment he received and feel a confidence in the fairness and rationality of the legal system.

Supremacy of Constitution

[69] When construing legislation with a view to ascertaining its purpose and the meaning of the words used therein, intention of the Legislature is no longer a dominant consideration or decisive factor. Section 2 makes Constitution the supreme law of the country, and any law or conduct that is inconsistent with the provisions of the Constitution is invalid , to the extent of the inconsistency, of no force or effect, and the obligations imposed by it must be fulfilled.

[70] Section 39(2) of the Constitution enjoins every court tribunal or forum, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. In consequence thereof the definition of the word "cultivation" as well as the decision in S v Van

Zyl should and must be considered and interpreted through the prism of the Constitution. See S v Dzukuda and others; S v Tshilo 2000(4) SA 1078 (CC) in para 38 at 1101-1102B; 200(2) SACR 443(C) at 465h-j; S v Malgas 2001(2) SA 1222 (SCA) at para1230 B-E. Courts must therefore look to the Constitution in order to assess any encroachment of rights by statutory provisions.

Conclusion

[71] Regard being had to the severe penalty of imprisonment for a maximum period of 25 years or to both such imprisonment and fine as the court may deem fit to impose for contravention of section 5(b), I am satisfied that the Legislature did not intend to exclude *mens rea* as an essential ingredient of the offence created by the inclusion of the word "cultivation" in the definition of "deal in" in the Act. See also *R V Tsotsi 1956 (2) SA 782 (ad) at 785*. In *Tshwete v Minister of Home Affairs (RSA) 1988 (4) SA 586 (AD) 612F,* Nestadt JA said:

> " … where a statute is reasonably capable of more than one meaning, a Court will give it the meaning which least interferes with the liberty of the individual (*R v Sachs 1953 (1) SA 392 (A) at 399H*), that a strict construction is placed on statutory provision which interferes with elementary rights (Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 552), that a statute is not presumed not to take away prior existing rights (*Barlow & Jones Ltd v Elephant Trading Co. 1905 TS 637 at 648*) and that an interpretation which avoids harshness and injustice will, if possible, be Adopted (*Principal Immigration Officer v Bhula 1931 AD 323at33)*."

[72] The law must serve a constitutionally acceptable purpose. The State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may do so in a manner which is procedurally unfair. See Coetzee case at 437 per O'Regan J. In the same case at 422a-b, Kentridge AJ said:

> " … if a provision of a statute plainly infringes the constitution it should not be uphold simply because it is unlikely to be invoked or because a person prosecuted under such a statute will readily obtain an acquittal. "

[73] In the present matter the accused was convicted of dealing in dagga on the mere basis that the word "cultivation" is included in the definition of "deal in" in section 1 of the Act

without proof of *mens rea*. This has the effect of shifting the onus to the accused to prove his innocence. Where a legislative provision imposes an obligation upon an accused to establish certain facts in order to avoid criminal liability constitutes a breach of the presumption of innocence as enshrined in section 35(3)(h) of the Constitution.

[74] As stated above, contravention of the provisions of section 5(b) of the Act carries a heavy penalty. Sentencing an accused person to imprisonment or a combination of the custodial sentence and a fine deprives the accused of his freedom. Convicting and sentencing a person without proof of *mens rea* offends both against common law fundamental principle of fairness and section 12(1) (a) of the Constitution. This section aims at protecting physical liberty and security of person against unwarranted intrusion by the State. The first part of the prohibition requires that there must be rational connection between the deprivation of freedom and some of objectively determinable purpose. The second part requires the purpose, reason or cause for deprivation of freedom to be just.

[75] The infringement will not be unconstitutional if it takes place for a reason that is recognised as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. The purpose of the limitation restriction on the rights will not be unjustifiable unless there is a good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and there is no other way in which the purpose can be achieved without restricting rights.

[76] Proof of *mens rea* as the essential ingredient of criminal liability is an established fundamental principle of justice of our legal system and therefore it cannot legitimately be

dispensed with in serious criminal offence carrying a heavy penalty save for certain regulatory offences. In the present case *mens rea* is not expressly excluded by the provision of the Act, nor, can it be said that it is excluded by necessary implication. The word "cultivation" should restrictively be interpreted to mean cultivation for commercial purposes or to supply to other people. In order to secure conviction of dealing on the ground of dagga cultivation, the State must prove beyond reasonable doubt cultivation, dealing and the *mens rea* to commit such an offence on the part of the accused. In other words, connection between cultivation of and dealing in dagga must be proved beyond all reasonable doubt.

[77] In my view, a distinction (implicit in the 1988 United Nations Convention) must be drawn between more and less serious cases of cultivation of dagga. The less serious cases involving a single or small number of plants for personal use must be prosecuted under section 4(b) for unlawful possession. Whereas the more serious, particularly, of large – scale commercial growing from which it can reasonably be inferred that the accused is dealing in dagga and where on conviction the imposition of severe sentences and confiscation of proceeds of crime might be appropriate, should continue to be prosecuted as dealing under section 5(b). However, an accused person may be charged with cultivation of and hence dealing in dagga if the evidence sufficiently establishes that a particular accused has cultivated dagga for commercial purposes or dealt in dagga though on a small scale.

[78] In the result, appeal against conviction should succeed. Accordingly, a conviction for dealing in dagga is set aside and the conviction for possession of dagga is substituted therefore.