



Republic of South Africa

In the High Court of South Africa
(Western Cape High Court, Cape Town)

In the matter between:

Case No: A281/2010

PHILLIP ANDREWS

Appellant

And

THE STATE

Respondent

Judgment delivered on this 3rd Day March 2011

SABA, AJ

[1] The appellant who was assisted by a legal representative throughout pleaded not guilty in George District Court on 7 October 2009 to a charge of contravening section 4 (b) of the Drugs and Drug Trafficking Act, 140 of 1992 in that he was found in possession of dagga weighing 295 grams. The appellant did not give any plea explanation.

[2] On 22 October 2009 the appellant was convicted and sentenced to three months imprisonment. His application for leave to appeal against conviction and sentence was refused by the Court a quo on 22 October 2009.

[3] His petition for leave to appeal against the conviction and sentence was granted by this Court on 22 February 2010. He now appeals against his conviction and sentence.

[4] The state case regarding the events of 26 July 2009 at George Correctional Services Centre is based on the evidence of the following witnesses: - Xolisa Faba was one of the Correctional Officers who conducted a surprise search on the inmates of cell six at George Correctional Services Centre. He testified that the appellant came to him with a box with sheets, pillow case on top of which was a towel with a green plastic bag. Appellant refused to give the bag to him for purposes of the search. Faba took this bag and looked in it. He found that it had six money bags containing dagga. The appellant did not respond when he asked him about the dagga. He took the dagga and the appellant to the security office. Police were called, dagga was weighed and the appellant was arrested. Under cross examination it was disclosed that Faba had made two statements about the incident. He testified that after making the first statement, the police officer came back and requested him to make a second statement as the first statement was wrong, according to the police officer. Faba was also not happy with his first statement. In his second statement which was only made on 14 September 2009, Faba said the appellant had admitted ownership of the dagga to him when he asked him who the owner of the dagga was. This is in direct conflict with his evidence in chief where he said that he asked the appellant where he got the dagga, to which there was no reply.

[5] Nandipha Gqwetha, also a correctional Officer, was present during the search. She stated that while Faba was busy searching the appellant, she was busy

searching the appellant's property. When Faba finished searching the appellant, he came to assist her in searching the appellant's property. The appellant became nervous and took a plastic bag from the ground and covered it with a towel. Faba took the plastic bag and looked at it. Inside the bag he found loose dagga, dagga contained in plastic bags she referred to as "pille sake" as well as plastic bags containing money.

[6] Jaco Kotze, another correctional officer, only saw loose dagga in a plastic bag when it was brought to him in his office by Faba in the presence of the appellant. He said he asked the appellant about the dagga and that the appellant said the dagga belonged to him.

[7] The appellant testified that he was the twentieth person to be searched that day. Before the search was conducted his property was placed in front of him on the floor. When he was searched another inmate was standing a metre away from him. He said the officer pulled a green bag containing dagga from under the blanket. The bag was in a heap of items that had already been searched. He also mentioned that after items were searched, the items would be thrown on top of the bundle of property already searched.

[8] Giwende Elliot Njinana for the defence testified that he was not one of the inmates who were searched on this day but was looking on as the search was conducted. He said when the appellant appeared from his cell, there was a group of inmates who had already been searched and their property was lying on the floor. A parcel was then taken from the property of another inmate called Hans. He said Mrs Gqwetha was not present during the search because other inmates were only wearing underwear during the search. After the appellant was accused of

possessing the dagga found, he spoke to Faba about this false allegation and Faba said he should keep quiet.

[9] In her ex tempore judgement the magistrate stated that the facts regarding the search and that the dagga was found, were largely common cause and that the issue was whether the dagga belonged to the appellant. She stated that the version of the appellant that the property which was next to him was already searched and that the plastic bag was found among that property, was improbable because the dagga would have been found when the property was first searched. In addition, it was improbable that Faba would leave the appellant's property and search property already searched and belonging to another person.

[10] The following facts are common cause:

- (i) That a surprise search was conducted on the inmates of section E, cell 6;
- (ii) About eleven Correctional officers formed a line each searching one of at least thirty six inmates;
- (iii) During the search, a green plastic bag containing dagga was found among the property;
- (iv) The accused was arrested after a plastic bag containing dagga was found.

[11] It is in dispute whether appellant was in possession of the plastic bag containing dagga.

[12] The state adduced the evidence of two eyewitnesses, Faba and Gqwetha. They both say that the appellant was in possession of the dagga. Faba said that the appellant came to him to be searched holding his belongings and that the bag of dagga was amongst the items he had in his hands. Gqwetho says that she helped Faba by searching the appellant's property and that while she was searching a bundle of items on the floor, the appellant took a plastic bag which contained the dagga from the items on the ground and covered it with a towel. The two versions differ materially from one another. In my view the direct evidence of possession is not reliable and does not establish direct possession beyond reasonable doubt. The next question is whether the circumstantial evidence establishes possession beyond reasonable doubt. Put differently, the question is whether the only reasonable inference is that the appellant was in possession of the dagga.

[13] There were about 36 or more prisoners being searched that particular day, and each had to bring all his property to another room where the search was conducted. In the circumstances, it seems improbable that an inmate would bring a plastic bag containing dagga all the way from cell number 6 to the officers in the other room, knowing well what would happen when the dagga was found. From the record, there is no evidence that the inmates were watched when they were moving their property from cell six to the room where the search was going to be conducted.

[14] In the light of these facts the appellant's version, that the dagga did not belong to him and was not in his possession is reasonably possibly true. In my view, there

is a reasonable possibility that another inmate due to be searched could have hid the bag of dagga amongst the items on the floor.

[15] In the result, I propose the following order:

1. The appeal against conviction succeeds.
2. The conviction and sentence is set aside.



N. SABA

Acting Judge of the High Court

I agree, and it is so ordered.



W.J. LOUW

Judge of the High Court