Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
High Court Ref No: 14452
Magistrate's serial No: 34/2014
CASE NO: B741/2014

From the Court of the Magistrate for the District of **KUILS RIVER** held at **KUILS RIVER**

In the matter between:

THE STATE

and

WILHELM PIETERSEN

REVIEW JUDGMENT

BINNS-WARD J:

[1] This matter came on automatic review in terms of the Criminal Procedure Act 51 of 1977. The accused had been convicted by the additional magistrate at Kuils River of having been in possession of approximately 470 grams of dagga (cannabis) in contravention of s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992. He had pleaded guilty to the charge. No previous convictions were proved. The accused, whose income was given as R800 per week, was sentenced to a fine of R4 000, alternatively twenty months' imprisonment. The matter was submitted together with another case, S v Kayalethu Mdingi (Kuils River magistrates' court case no. B751/2014), in which the accused had been convicted in the same court, also on a

plea of guilty, of the unlawful possession of 900 grams of dagga and sentenced to a fine of R5000 or two years' imprisonment. Mdingi's case also involved a first offender. In the second matter the accused was unemployed. The accepted facts would suggest that both offenders were rastafarians.

[2] The sentences appeared to me to be unduly severe for first offenders convicted of this offence. In this regard it bears mention that dagga is an 'undesirable dependence-producing substance' within the meaning of the Act, as distinct from a 'dangerous dependence-producing substance'. The proscribed narcotic substances falling within the first category are often referred to by the term 'soft drugs', while the second category, which includes drugs like heroin and cocaine, comprises what are colloquially called 'hard drugs'. Possession of or dealing in substances falling within either category is treated in terms of s 4(b)[1] and 5(b)[2] of the statute, respectively, without any express discrimination. Notwithstanding the absence of any express distinction in the Act between the categories of substance for the purposes of the offences of possession or dealing, the relevant jurisprudence in this country going back for nearly half a century illustrates that the courts, understandably, have treated them quite differently for sentencing purposes. Offences involving the possession of or dealing in dagga have historically been treated much more leniently than those involving 'hard drugs'; cf. Du Toit et al *Commentary on the Criminal Procedure Act* (Juta) loose-leaf service RS 17, 2007 chF3-pp.9-10, s.v. *Dagga*.

[3] Consistently with this approach, Borchers J, with whom Malan J (as he then was) concurred, observed in *S v Tshabalala* 2007 (2) SACR 263 (W) at 265h, '*dealing in dagga is considered to be less of an evil than dealing in "hard" drugs such as cocaine and mandrax*'. The learned judge's observation was supported by reference to remarks to similar effect by Van Heerden JA, writing for the Appellate Division, in *S v Nkabinda* 1993 (1) SACR 6 (A) at 9e-f. (In the latter case the appellant had her originally imposed sentence of 48 months' imprisonment, of which 20 months had been conditionally suspended, for dealing in 750 grams of dagga

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[1] Section 4(b) provides in relevant part that '*No person shall have in his possession - any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless-*
....'.

[2] Section 5(b) provides in relevant part that 'No person shall deal in- *any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless-*
....'.

reduced to one of 18 months' imprisonment, which was wholly suspended for five years.)

[4] The offence of *dealing* in substances proscribed in terms of the Act, whatever their category, is, moreover, treated markedly more severely than that of unlawfully *possessing* them. Indeed, in this regard the statutory regime in terms of the Act – I leave aside for present purposes the minimum sentence provisions separately instituted in respect of certain instances of drug offence in terms of the Criminal Law Amendment Act 105 of 1997 – does expressly draw a distinction. It provides for a maximum sentence of 25 years' imprisonment for dealing offences generally, and one of 15 years' imprisonment for offences involving mere possession.[3] The sentences imposed by the magistrate appeared to me to be more in accordance with what might be expected in respect of a first conviction for dealing in the amounts of dagga involved.

[5] With these considerations in mind I addressed the following query to the trial magistrate:

> The sentences in both these matters appear to be unduly severe.
>
> In the matter in which the accused was convicted of being in possession of 0,9kg of dagga, the accused is unemployed and there is no indication of any ability on his part to pay a fine of R5000. The impression in the circumstances is that the accused would in all likelihood have to serve the alternative of two years' imprisonment, which seems wholly inappropriate for a first offender.
>
> Similar considerations apply in respect of the second case, in which the fine imposed amounted to more than one month's entire income for the accused, who was also a first offender.
>
> (These remarks are made notwithstanding that it has been established on enquiry by the registrar that both accused did pay the fines.)
>
> The magistrate's comments are requested. The magistrate is requested, in particular, to indicate what precedential guidelines, if any, informed the determination of the sentences, as the review judge's consideration of applicable precedent would suggest that the sentences imposed are more consistent with what might have been expected had the accused been convicted of dealing, rather than possession.

[6] The magistrate responded very fully and informatively, for which I record my appreciation. I set out below extracts from the response which express the substantive content of the magistrate's reply:

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[3] See s 17 read with s 13.

Mnr Pietersen het tydens sy eerste verskyning gepleit en was na ondervraging in terme van artikel 112(1)(b) Wet 51/1977 skuldig bevind. Die beskuldigde het die hof meegedeel dat hy 'n "Rasta-Fees" in die Paarl sou bywoon en die dagga as offerande sou aanwend.

Die beskuldigde is in diens, verdien 'n redelike inkomste en het geen afhanklikes nie.

Die hoeveelheid dagga (cannibis) in die beskuldigde se besit gevind, was baie meer as wat die gewone gebruiker vir eie gebruik sou hou. Alhoewel die beskuldigde nie gemeld het dat hy dit met ander by die byeenkoms sou deel nie, sou dit waarskynlik die geval wees.

In terme van artikel 1 van die wet op Dwelmmiddels en Dwelmsmakkelary, no. 140/1992 beteken "handeldryf" met betrekking tot 'n dwelmmiddel, ook 'n handeling verrig in verband met die oorlaai, invoer, verbouing, insameling, vervaardiging, lewering, voorskryf, toediening, verkoop, versending of uitvoer van die dwelmmiddel

"verkoop", met betrekking tot 'n dwelmmiddel, ook om die dwelmmiddel vir verkoop aan te bied, te adverteer, te besit of uit te stal, om dit, hetsy teen 'n teenprestasie of andersins, van die hand te sit, of om dit te verruil,

Die Staat sou die beskuldigde dus kon aankla in terme van artikel 5(b) van Wet 140/1992. Dit is egter die Voorsittende Beampte se ervaring dat staatsaanklaers alte dikwels die "makliker" uitweg kies en eerder 'n aanklag in terme van artikel 4(b) van Wet 140/1992 stel. Aangesien die bewyslas op die staat rus ten einde handel te bewys, ooggetuies ten opsigte van handel baie keer ontbreek en die vonnisse baie swaarder daar uitsien, verkies aangeklaagdes ook om eerder skuld op "besit" te erken. Die persepsie is dat die saak vinniger afgehandel sal word.

....

Artikel 17(e) gelees met artikel 5(b) Wet 140/1992 bepaal dat iemand wat aan 'n misdryf ingevolge hierdie wet skuldig bevind word is strafbaar "in die geval van 'n misdrys in artikel 13(f) bedoel met gevangenisstraf vir 'n tydperk van hoogstens 25 jaar, of met sowel daardie gevangenisstraf as die boete was die hof goedvind om op te lê.

Dit beteken dat iemand wie aan handeldryf skuldig bevind was, gevangenisstraf opgelê moet word of gevangenisstraf en 'n boete (nie 'n boete alternatiewelik gevangenisstraf nie)

Die opgeledge vonnis in hierdie saak is dus nie moontlik indien die beskuldigde aan oortreding van artikel 5(b) skuldig bevind sou wees nie.

Die Voorsittende Beampte het met verloop van tyd agtergekom dat die besitters van groot hoeveelhede dagga selde getuienis onder eed voor vonnis aflê (hul ex parte medelelings kon dus nie getoes word nie), dat die dagga meestal bedoel is om met ander te deel en dat daar gewoonlik 'n vangnet in plek is wanneer stywe boets opgelê word. Mnr Willem Pietersen se boete was op 25 April 2014 betaal.

Die Senior Landdros van die distrik het in oorleg met ander rolspelers besluit dat die SAPD 'n erkenning van skuld ten bedrae van R100.00 vir besit van 1 stop dagga mag vasstel. Die Voorsittende Beampte gebruik hierdie as riglyn ten einde boetebedrae by skuldigbevinding te bepaal. Die gewig van 'n pak (parcel) dagga kan wissel van geval to geval, maar 'n bedrag

> van R1000.00 0 R1500.00 per pak is billik. Die persoonlike omstandigehede van 'n beskuldigde sal noodwendig ook 'n rol speel ten eiende 'n billike vonnis te bepaal. ...
>
> Die Voorsittende Beampte het kennis geneem van die beslissing in *S v Motsiawedi* 1993(1) SACR 306 (W). Die realiteit is egter dat die breë gemeenskap se wense nie altyd wettig, moreel aanvaarbaar, of in die beste belang van ander se fisiese – of geestesgesondheid is nie. Daar is medies vewys dat die gebruik van substanse (cannibis daarby inbegrepe) 'n fisiologie effek op die gebruiker het en kan lei tot psigiatriese siektes (ingesluit skisofrenie, bipolêre gedragverskeuring en psigose). (Sien ook 'n berig in Die Burger, Saterdag 21 Junie 2014 op p6: *Navorsing bewys: Dagga as tiener maak jou dom as grootmens*)
>
> Dit is dus wenslik om die breër gemeenskap op te voed, in te lig, die gevare uit te spel en oortreders behoorlik te straf.
>
> Dit is ook die Voorsittende Bemapte se ervaring dat die meeste oortreders nie 'n opgeskorte vonnis as 'n straf beskou nie (Dit word daagliks bevestig wanneer opgeskorte vonnisse nie tydens artikel 60(11B) ondervragings gemeld word nie)
>
> Daar word respekvol gesubmiteer dat 'n stewige boete (spesifiek by 'n eerste oortreder) aan die beskuldigde, sy familie, vriendekring en "verspreiders" se sak sal raak en dat dit baie effektief is ter voorkoming van verdere misdaadpleging.

The response was illustrated by reference to five previous matters sent on automatic review to this court by the trial magistrate. They all concerned convictions in respect of offences in terms of s 4(b) of the Act. In each case the convictions and sentences had been confirmed by different judges of this court. In four of the five cases, the factual summary given by the magistrate in her reply suggests clearly that the accused had in fact been guilty of dealing and should have been charged accordingly. There is no indication on the J4 forms sent to me in respect of the matters cited by the magistrate that the reviewing judges were astute to the fact that the sentences imposed were apparently affected by the dealing-related character of the matters involved, or that they were conscious of the disparity between some of those sentences and those which would be in line with the reported cases in respect of sentences for mere possession of dagga of which the accused persons concerned had been convicted. The magistrate did not direct my attention to any reasoned judgments of the superior courts that would support her approach.

[7] If regard is had to the sentences imposed in dagga *dealing* cases in the reported jurisprudence – a selection is conveniently collected in the judgment in *Tshabala* supra, and others may be found in the judgment of Mohamed J (later Chief Justice) in *S v Mthembu and Another* 1992 (1) SACR 683 (W) – the sentences imposed in the current matters for mere possession are strikingly disproportionately

severe. In respect of the amounts imposed by way of fines one may accept that the diminishing effect of the passage of time on the value of money would afford justification for an increasing trend in the nominal amount of the fines imposed, but not on the length of the terms of imprisonment fixed as the alternative if the fines are not paid. Thus, in the current case the alternative of 20 months' imprisonment was manifestly inappropriate. It is greater than that typically imposed in respect of *dealing* in comparable amounts of dagga in the reported cases to which one is able to have regard. When fixing the period of imprisonment which an accused must serve if the fine imposed is not paid, a court must have in mind that the accused might actually have to serve it. Three months' imprisonment would meet the justice of the case in respect of the conviction of a first offender for possession of 470 grams of dagga.

[8] It is evident from the magistrate's remarks that her approach has been to treat the accused, at least to some material degree, as if they had been convicted of dealing, rather than mere possession. Possession for the purpose of dealing falls within the wide definition of dealing in the Act,[4] to which the magistrate has directed attention in her reply. It is thus fundamentally misdirected for a court in sentencing an offender convicted of possessing a prohibited substance within the meaning of s 4(b) of the Act to take into account in determining an appropriate sanction any opinion that it may have that the substance was held in possession for the purpose of dealing. Any such approach would be tantamount to punishing the offender for the more serious offence of which he has not been convicted, and, as in the matters currently under consideration, may not even have been charged. There is also no warrant for any policy by a court to compensate for the dereliction of the prosecutor in charging an accused under s 4(b) or accepting a tendered plea under that provision, rather than s 5(b), in circumstances in which the latter would be more appropriate, simply because it is thought to be easier thereby to secure a conviction.

[9] There is no merit in the point the magistrate sought to make in regard to the fact that the penalty for an offence involving a contravention of s 5(b) does not offer

[4] Thus '*deal in*' is defined in s 1 of the Act as '*in relation to a drug, includes performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug*', which falls to be understood in the context of the definition of '*sell*', which is '*in relation to a drug, includes to offer, advertise, possess or expose the drug for sale, to dispose of it, whether for consideration or otherwise, or to exchange it*'.

the option of a fine without such being coupled with a sentence of imprisonment as justification for sentences imposed in the matters currently under consideration, namely fines with a period of imprisonment being fixed in the alternative. On the contrary, The distinction between the penalties provided in terms of s 17(d) (in respect of possession in contravention of s 4(b)) and s 17(e) (in respect of dealing in prohibited substances in terms of s 5(b)) goes to underscore that sentencing in respect of the discrete categories of offence must be approached with a conscious appreciation of the distinction that the legislature has drawn between them. Lower courts are also enjoined to be guided by the reasoned judgments of the higher courts in respect of sentencing in like matters.

[10] It is also misdirected of the magistrate to have a policy of computing the fines that are imposed in any case of possession of dagga with reference to the R100 per gram admission of guilt fee that the senior magistrate for the district concerned has determined in terms of s 57(5) of the Criminal Procedure Act. Admission of guilt procedures are designed for minor offences in respect of which public policy would not require an accused person willing to admit his guilt to appear in court. A sense of proportionality and consistency is desirable, but it is not appropriately achieved in sentencing matters by adopting a mechanically arithmetical approach to the computation of fines in matters concerning issues like possession of drugs, driving under the influence and speeding that lend themselves to mathematical calculation based on quantitative relationships. The approach which the magistrate has admitted to having adopted in this regard inevitably puts courts in danger of giving insufficient attention to matters such as weighing the relevant correspondence between an accused's resources and the effect of a fine and the appropriateness in given cases of conditionally suspending part of the sentence. It is an approach that is irreconcilable with the individualisation of sentencing that is fundamentally informed by the considerations inherent in the well-established *Zinn* triad principle. In the current case a fine in an amount exceeding the accused's entire monthly income from employment was strikingly excessive in the circumstances.

[11] The magistrate's comments about the perceptions of offenders and the community that suspended sentences are no punishment at all are not directly in point in the two matters before me. But if they are truly reflective of the reality of the position, it speaks to the failure by prosecutors and judicial officers to fulfil their

responsibility to see to it that effective measures are taken to put suspended sentences into effect when the conditions of suspension have been breached, rather than to the inherent inefficacy of the sentencing option itself.

[12] The fact that the fine was paid in full and apparently in a single instalment suggests that the magistrate's suspicions that the accused was in fact a dealer or a cog in a dealership network might be well-founded, and her cynicism thus to some extent justified. However, if that is the case, the unsatisfactory situation to which the magistrate alludes falls to be addressed by the prosecution framing the charges in such cases appropriately, not by sentencing the offender as if the charges had been so framed. I shall direct the Registrar to forward a copy of this judgment to the Director of Public Prosecutions so that he may take whatever measures he may consider appropriate to address the issues concerning the framing of charges and the implementation of suspended sentences to which the magistrate has drawn attention.

[13] In the circumstances it would be inconsistent with the requirements of justice to allow the sentence to stand. The following orders are therefore made:

1. The conviction and the order declaring the seized cannabis forfeit to the state are confirmed.
2. The sentence of a fine of R4 000 or twenty months' imprisonment imposed on the accused is set aside and replaced with a sentence of R2 000 or three months' imprisonment.
3. The clerk of the court is directed to reimburse the accused with the amount paid in excess of that fixed in terms of the substituted sentence, alternatively, in the event that he cannot be traced, to pay the amount for his account into the Guardian's Fund at the Office of the Master of the High Court, Cape Town.
4. The Registrar is directed to send a copy of this judgment to the Director of Public Prosecutions, Western Cape, for consideration pursuant to the remarks made in paragraph 12.

A.G. BINNS-WARD

Judge of the High Court

BOZALEK J:

I agree.

L.J. BOZALEK
Judge of the High Court