REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 211 / 04

In the matter between

MAVIS XABA — **FIRST APPELLANT**
JOSEPH ZONDO — **SECOND APPELLANT**

and

THE STATE — **RESPONDENT**

Coram : **NAVSA, BRAND and CONRADIE JJA**

Date of hearing : **3 MARCH 2005**

Date of delivery : **18 March 2005**

SUMMARY

Contravention of s 5(b) of the Drugs and Drug Trafficking Act – sentence for dealing in large amount of dagga – police corrupted in process – sentences of 20 and 18 years nevertheless too severe – 14 years imprisonment recent high water mark for dagga dealing.

J U D G M E N T

CONRADIE JA

[1] Mavis Xaba, the first appellant, and Joseph Zondo, the second appellant, are brother and sister. They were wholesale cannabis merchants. Both were caught in an entrapment operation so well conducted that there was no way out for them. Mavis Xaba pleaded guilty to five charges of dealing, Joseph Zondo pleaded guilty to three. They were duly convicted. The regional magistrate at Middelburg sentenced the first to twenty and the second to eighteen years' imprisonment. Two other accused who had also pleaded guilty were sentenced to fifteen and ten years' imprisonment after the regional magistrate had taken all counts together for the purpose of sentence.

[2] All four the accused appealed their sentences to the Pretoria High Court. The appeals were dismissed. Much later the two appellants applied for leave to appeal. Condonation for the late applications was granted but leave was refused on 8 October 1998. A long delay then followed that appears to have been largely caused by the disappearance of the original record. Eventually it was reconstructed to everybody's satisfaction and on petition leave was granted to the appellants to appeal to this court.

[3] The size of the family business can be judged by the quantities of cannabis that the trap, inspector Wilhelm Arendt, at the request of the first appellant, transported to the homes of the siblings. Eighteen bags of dagga were delivered to the home of the first appellant. The mass of the first consignment of seven bags is unknown, but the second weighed 149.92 kg. This was followed by 11 bags with a mass of 206.58 kg and 10 bags weighing 139.64 kg. The smallest bags weighed 14 kg each. If one assumes that this was the approximate mass of each bag in the first consignment, the total so transported was about 595 kg.

[4] The second appellant received from Arendt a consignment of ten bags with a mass of 149.92 kilograms and then another ten bags with a mass of 139.64 kg. The first appellant pleaded guilty to dealing in these consignments as well because she was the one who had arranged for the trap to transport them.

[5] In addition, 500kg of dagga was found in the possession of the appellants. Of this, the first appellant accepted responsibility for 265.52 kg. The second appellant acknowledged that the other half of the stock weighing 259.152 kg belonged to him.

[6] It is clear that the appellants' homes and businesses in Standerton served as depots for dagga sourced in the Bergville area. The size and audacity of their

operation attracted the attention of the organised crime and narcotics division of the area police. Inspector Arendt was introduced to the first appellant by a prisoner called Bosch, a former policeman, who had once acted as a courier for the appellants. Arendt had him released from gaol for a day to accompany him to the first appellant's home and introduce him as someone wanting to make a bit of extra money. Bosch assured the first appellant that Arendt was a safe contact. Since Arendt arrived at her house in a marked police van one might have thought that she would take some persuading. She did not. She, and no doubt brother Joseph also, had an amicable relationship with policemen in the area. As she explained to Arendt later when he professed misgivings about transporting cannabis for her, she had contacts everywhere, also in the narcotics branch, and anyway he need have no fear since the police tended to stop black people coming from the Bergville area but not whites and especially not a policeman. On a later occasion, when he was also observed by the second appellant, Arendt delivered a cannabis consignment at the first appellant's home dressed in full police uniform.

[7] These snippets of evidence must be understood in the context of the evidence given by Captain Botha, then the unit commander of the narcotics bureau in Ermelo. He explained that Standerton was a focal point for dagga smuggling and that the Xaba-Zondo family enterprise was identified as one requiring infiltration (at considerable government expense) not least because of allegations of police

involvement in their trade. This seemed to be borne out by the discovery (during the police's raid on the businesses of the two appellants) of a number of bags of dagga that had been stolen from the police exhibit store at Standerton. The thieves were not identified and the appellants gave no explanation of how these stolen exhibits had come into their possession. Moreover, there was not the faintest challenge in cross-examination by the appellants' attorney of any of this evidence.

[8] The argument that the regional magistrate did not in this regard have evidence before him that he could properly have taken into account in the assessment of sentence is therefore misconceived. The court *a quo* rather sidestepped the issue by finding that the magistrate did not take police involvement – and the corruption that this necessarily entailed – into account in aggravation of sentence. I do not believe that this is correct. The regional magistrate did not explicitly say that he took account of it but he devoted considerable attention to it in his judgment and I do not understand why he would have bothered to do so if he did not mean it to enter into his assessment. It was, of course, an aggravating feature, as it must be of any crime where the criminal not only breaks the law but subverts a law enforcement agency in order to do so.

[9] Also wrong is the argument that the police operation went on for too long and served only to increase the quantity of dagga that the first appellant could be

proved to have dealt in and so unfairly increase her sentence. The argument neglects to take account of the fact that the police were concerned to crush what they believed to be a drug dealing syndicate and that an arrest after the first conveyance would simply have served to alert other miscreants (and particularly errant policemen) who it was believed might be caught in the net. What is more, when an arrest is made at an early stage of an operation the risk is always there that an accused might fabricate some exculpatory excuse that the prosecution, for want of more extensive evidence, cannot counter.

[10] Before us the regional magistrate was criticized for having found that the first appellant was the leader of a dagga dealing syndicate. The 'syndicate' was more like a partnership. There were the sibling-partners (with the first appellant as managing partner) and then, as one would expect, the helpers, two of whom were also trapped. They performed odd jobs like showing Arendt the way to the pick-up points near Bergville and loading the dagga onto his all-wheel drive pick up. Many more supposed accomplices were arrested but these are the only four participants who were eventually charged.

[11] No misdirection by the regional magistrate having been shown, the only question that remains is whether, as was argued, the sentences of the two appellants are strikingly inappropriate. Whilst not misdirecting himself in any way,

a presiding officer may nevertheless err in translating the guilt of an accused into years in prison. In order to do so properly he must be alive to the levels of punishment considered to be socially appropriate or desirable. How many years' incarceration a particular drug offence will bring an accused is something that has to be determined by a general and necessarily rough comparison of what the presiding officer has in mind with the sort of sentence that courts are at the time imposing for that kind of offence and the penalties prescribed by the lawgiver. He or she then makes the adjustments required by the special circumstances of the case, most prominent of which are the personal circumstances of the accused: his record, his contrition and that kind of thing.[1]

[12] The Drugs and Drug Trafficking Act 140 of 1992 ('the Act') prescribes the same maximum penalties for dealing in dangerous dependence-producing substances as it does for dealing in undesirable dependence-producing substances. Paragraph (f) of section 13 makes a contravention of a provision of section 5(*b*) (which prohibits dealing in these substances) an offence. Section 17 prescribes the penalty: '…imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose.'

[1] *S v Jimenez* 2003 (1) SACR 507 (SCA) paras [6] and [16].

[13] Cannabis merchants and heroin merchants thus face the same maximum penalty. No one will dispute that the contraband dealt in by the one is more destructive than that dealt in by the other. In fact, the Act says so. The lesser evil of cannabis has been judicially recognized at the highest level.[2] The worst imaginable case of heroin dealing, involving consignments worth millions, would attract a penalty of twenty five years imprisonment and no more. It is possible that some dagga dealing operation might evoke the kind of moral indignation that would justify an equivalent sentence, but it would have to be a most unusual case, perhaps involving a recidivist offender in an organized crime context.

[14] The sentence of twenty years' imprisonment imposed on the first appellant is too close to the maximum prescribed punishment, one manifestly intended for a worst-case scenario. The sentence of eighteen years' imprisonment imposed on the second appellant is, having regard to his lesser role, also too harsh. In the scale of doing societal harm the appellants did not rank as close to the top as their sentences might lead one to suppose.

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[2] In *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) a unanimous Constitutional Court gave the applicant leave to adduce evidence on how cannabis is used by the Rastafarian religion and whether its use and possession was regulated by that religion. In the sequel, *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC), the major difference between the majority view (five of the nine judges) and the other four was whether the use of cannabis for liturgical purposes could be properly controlled. The minority who held control to be feasible found that although 'uncontrolled consumption of cannabis, especially when it is consumed in large doses, poses a risk of harm to the user' [61] it was not so harmful that its limited sacral use ought to be prohibited. One cannot imagine such a close outcome on use, whether controlled or not, for sacral purposes of, say, morphine or cocaine.

[15] It is next necessary and instructive to make that rough comparison between these sentences and those that other courts have found appropriate. It has often been pointed out that no two cases are alike and this is self-evidently true, but the fact remains that courts must strive for some consistency in punishment and where a sentence is extravagantly high an appeal court becomes entitled to interfere with it.

[16] In *S v Morebudi* 1999 (2) SACR 664 (SCA) an enterprising smuggler who transported his dagga in a trailer (specially modified for that purpose at a cost of R28 000) was caught with nearly one and a half tons of dagga hidden in secret compartments. His sentence of 14 years' imprisonment was confirmed on appeal in a judgment delivered during November 1999. It appears to be the high water mark for a dagga sentence confirmed by this court in recent years and by that I mean since the Act came into operation in April 1993.

[17] The regional magistrate could not have known about *S v Morebudi* because the appellants were sentenced towards the end of 1997; the court *a quo* whose proceedings were concluded in October 1998 would not have known about it either. They would, however, have known about *S v Smith en Andere* 1978 (3) SA 749 (A) where the maximum imprisonment, at the time fifteen years, was confirmed for dealing in about a ton of dagga.

[18] Counsel for the second appellant told us from the Bar that she had enquired from the director of public prosecutions in Pretoria and had not been advised of any sentence for a dagga offence as high as twenty years. Her researches into reported cases did not reveal any either. I have found none. The most severe reported sentence, as I remarked earlier, is *S v Morebudi* which was described by Mpati AJA as a robust one.

[19] The aggravating features of the appellants' offences, in particular the evidently widespread corruption of the local police, warrant a sentence up to that level but not beyond. The first appellant's sentence should be altered to one of 14 years' imprisonment and the second appellant's to 12 years' imprisonment. Accused number 4 in the regional court, Hendrik David, who was sentenced to ten years' imprisonment should, if he has behaved himself reasonably well, have been released from prison by now. Accused number three, Fortune Hlongwane, was, like the second appellant, sentenced to eighteen years' imprisonment. The director of public prosecutions is requested to see to it that his attention is directed to this judgment so that he might apply for leave to appeal if he is still incarcerated.

[20] The appeal is upheld.

1. The sentence of the first appellant is set aside and replaced by one of fourteen years' imprisonment;

2. The sentence of the second appellant is set aside and replaced by one of twelve years' imprisonment.

J H CONRADIE
JUDGE OFAPPEAL

CONCURRING:

NAVSA JA
BRAND JA