THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER: 547/98

In the matter between:

MOLEFE PIUS MOREBUDI APPELLANT

and

THE STATE RESPONDENT

CORAM: **SMALBERGER, SCOTT JJA AND MPATI AJA**

DATE OF HEARING: **16 NOVEMBER 1999**

DATE OF JUDGMENT: **26 NOVEMBER 1999**

JUDGMENT

Drug offences - Dagga - dealing in, in contravention of s 5(b) of Drugs and Drug Trafficking Act 140 of 1992 - Sentence - second offender convicted of dealing in 1433 kg of dagga - court having regard to previous conviction 20 years old - sentence of 14 years' imprisonment confirmed on appeal.

MPATI AJA

This is an appeal against sentence only. The appellant and a co-accused were convicted in the regional court, Pretoria, of dealing in dagga in contravention of section 5(b) of the Drugs and Drug Trafficking Act, 140 of 1992. They were sentenced to 14 years' and 7 years' imprisonment respectively and the vehicle involved was declared forfeited to the State. Their appeal to the Transvaal Provincial Division of the High Court against both their convictions and sentences failed. The appellant's further appeal, against sentence, is with leave of this Court.

At the trial the following facts were either common cause or not in dispute. On 28 June 1995 the vehicle, consisting of a mechanical horse and a large trailer, was stopped in Pretoria by members of the Narcotics Bureau (SANAB). Two of them had followed the vehicle from Villiers. The driver of the mechanical horse was one Kgosana,

who was initially accused 1, but subsequently absconded. The appellant's co-accused was a passenger. On conducting a search of the trailer, the SANAB members found 85 bags of dagga weighing, in total, 1433 kg in a secret compartment in the roof and front thereof. The driver and passenger were arrested and their subsequent questioning led to the appellant's arrest. The appellant was the registered owner of both the mechanical horse and trailer. The trailer had been converted from a flat-bed into one with a "double roof" with a 50 cm spacing between the two levels. The secret compartment spanned the whole roof, forming an inverted "L" shape with another compartment at the front of the trailer. The conversion was done by one Greyling on the appellant's instructions.

The appellant's version was that at the relevant time he conducted, *inter alia*, the business of selling fruit and vegetables in

Lesotho and Transkei. He had dispatched the vehicle with a load of fruit and vegetables to be sold in Lesotho and when it was stopped by the police on the day in question it was returning from Lesotho. There were some vegetables in the trailer. The appellant denied any knowledge of the dagga and testified that Kgosana, his driver, had told him:

> "dat hy 'n kans in die lewe wou neem".

The magistrate rejected the appellant's version and found, correctly in my view, "dat die vervoer van groente en vrugte slegs as 'n front gedien het". The magistrate held further:

> "By die verwerping van beskuldigde 1 en 2 se weergawes, waar dit nie in ooreenstemming met die van die staat is nie, is die enigste redelike afleiding wat ek maak, dat beskuldigde 1 die operasie geïnisieer het en aan die hoof daarvan staan omdat die voertuig aan hom behoort en hy die vals panele laat insit het en daarvoor betaal het. Verder dat beskuldigde 2 en die drywer in sy diens was en opdragte van hom ontvang het ... Verder

> dat beskuldigde 2 die dagga vir beskuldigde 1 gaan haal, ingevoer en karwei het met die doel om daarin handel te dryf."

(Reference to accused 2 in the last sentence must have been intended to be a reference to both accused 2 and the driver.) These findings have not been attacked on appeal. However, Mr du Plessis, for the appellant, argued that the appellant's testimony that he had had the secret compartment built in the trailer at the request of a third party, a Mr Oliphant, who wished to convey therein illegal immigrants into the country, should have been accepted as being reasonably possibly true. That evidence was rejected by the magistrate, correctly so, in my view. Absent any credible explanation to the contrary, the only reasonable inference to be drawn from the facts is that the appellant had the secret compartment built for the specific purpose of conveying dagga therein.

Mr du Plessis, for the appellant, contended that the magistrate

misdirected himself in three respects with regard to sentence. I shall deal with these in turn.

First, it was argued that the magistrate erred in attaching any weight to the appellant's previous conviction. In 1976 the appellant was sentenced to 9 years' imprisonment for dealing in dagga. It appears that that sentence was reduced on appeal to 7 years' imprisonment. The magistrate says this about the appellant's previous conviction:

> "Hierdie vorige veroordeling is baie oud. Dit is alreeds ... ongeveer 20 jaar oud. Uit die aard van die saak sal hierdie vorige veroordeling nie so swaar teen u tel soos 'n meer onlangse ene nie maar dit is nogtans 'n vorige veroordeling wat ek nie geheel en al buite rekening kan laat nie. Dit dui vir my daarop dat u al vantevore met die gereg gebots het en dat u weer op verkeerde weë is."

The argument on behalf of the appellant was that this previous conviction, because of its age, ought to have been disregarded. Section

271 A of the Criminal Procedure Act 51 of 1977 makes provision for the lapse of certain previous convictions upon expiry of a period of 10 years after the date of conviction. The appellant's previous conviction does not fall within that category and has accordingly not lapsed. It is so that in many instances a previous conviction as old as 20 years, and even less, might well be disregarded, depending upon the circumstances. *In casu*, the magistrate's remarks need to be read in their proper context. All he says is that while the appellant was fully aware of the consequences of the crime, having had a previous warning, he did not take heed of such warning. In my view, the magistrate was perfectly entitled to have regard to the appellant's previous conviction, to the limited extent that he did .

The second point raised by Mr du Plessis was that the magistrate treated the appellant as the "Mafia-type organiser of a large network of

dealers" referred to in *S v Nkombini* 1990 (2) SACR 465 (Tk) and that in so doing the magistrate over-emphasised the seriousness of the offence and the interests of society. In this regard, so it was argued, the magistrate misdirected himself.

White J, with whom Beck CJ concurred, said in *S v Nkombini, supra*, at 469 *i*:

> "In my opinion terms of imprisonment of 10 to 15 years are reserved for the very serious cases, eg the Mafia-type organiser of a large network of dealers."

The learned Judge then referred to a decision of this Court in *S v Smith en Andere* 1978 (3) SA 749 (A) where sentences of 15 years' imprisonment (the maximum sentence at the time) imposed on the two appellants for dealing in 1075,4 kg of dagga were confirmed. When *S v Nkombini* was decided the maximum sentence was also 15 years. For that and other reasons the guidelines laid down at 469*b* - 470*a* may no

longer be valid. Cf *S v Heilig* 1999 (1) SACR 379 (T) at 387 *c-i.* In *S v Smith en Andere, supra*, Trengove AJA, for the majority, said (at 758F-G):

> "Die appellante het nie getuienis ter versagting van vonnis afgelê nie en nie een van hulle het aan die verhoorhof verduidelik hoe hy by die operasie betrokke geraak het en wat sy aandeel presies was nie. Die algehele indruk wat die getuienis skep is, soos die landdros sê, dat die appellante 'deel gehad het aan 'n omvangryke smokkelaarsnetwerk'. Oortreders wat in hierdie kategorie val moet swaar gestraf word."

The following passage from the judgment of the majority(at 758 C-E) illustrates the facts of that case (*Smith en Andere*) relevant to sentence:

> "Appellante nrs 1 en 2 is met 'n besondere groot hoeveelheid dagga betrap, naamlik 1075,4 kilogram. Dit is duidelik dat hulle op weg was na die Kaapstadse omgewing. Saam met appellant nr 3 het hulle die hele onderneming fyn beplan. Hulle het 'n voertuig in die hande gekry wat by uitnemendheid geskik was vir hulle doel - dit was voorsien van 'n addisionele petroltenk en

> die bak was toegebou en voorsien met twee swaaideure wat kan sluit. Hulle het daarbenewens, voor hulle vertrek uit Bloemfontein, die voertuig op ‘n fiktiewe naam geregistreer en, toe appellante nrs 1 en 2 deur die polisie voorgekeer is, het hulle allerhande leuens vertel en jakkalsdraaie gemaak om te verhoed dat die polisie agterkom dat hulle ‘n vrag dagga in die bak het. Die appellante het die verhoorhof op geen stadium in hul vertroue geneem nie.”

As in the case of *S v Smith en Andere*, *supra*, we are, *in casu*, clearly dealing with someone operating on a large scale. The crime was meticulously planned. Much time and attention were devoted to it. A huge sum of R28 000,00 was expended - this was common cause - in converting the trailer into one with a secret compartment capable of holding an enormous quantity of dagga. The appellant even went back to Greyling to have the front part of the secret compartment enlarged. Access to the secret compartment was gained by way of a panel in the roof, situated towards the rear of the trailer and operated

by means of a cable, which ran along hooks inside the secret compartment. It was not visible from outside. All this is indicative of meticulous planning..

Taking these factors into consideration, it is doubtful that the conveyance of dagga would have been a once-off operation. Whether the appellant was a one-man dealer or formed part of an "omvangryke smokkelaarsnetwerk" makes little difference, regard being had to the quantity of dagga involved. On the facts of this case the appellant was an actual dealer in dagga and not merely one who "vanweë die wye omskrywing van 'handeldryf' in art 1 van die Wet, eintlik net in 'n tegniese sin aan handeldryf in dwelmstowwe skuldig is". *S v Smith en Andere*, *supra,* at 758B.

In my view the second basis of attack must also fail.

Mr du Plessis's third point was that the magistrate, with a view

to imposing an exemplary punishment, discounted the appellant's age, the effect which a long period of imprisonment would have on him, his financial losses due to his vehicle being declared forfeited to the State and the destruction of his family life. Mr du Plessis accordingly submitted that the magistrate over-emphasised the seriousness of the crime at the expense of the appellant's personal circumstances and that from this the inference to be drawn is that the magistrate exercised his discretion improperly. In this regard reference was made to *S v Collett* 1990 (1) SACR 465 (A) at 470*b*-471*a*.

In the course of his judgment on sentence the magistrate said of the appellant:

> "[E]k neem in ag dat u 53 jaar oud is. Dat u die vader van twee kinders is. Dat u getroud is en dat u vrou wel werksaam is en dat hierdie saak u alreeds groot finansiële verliese op die hals gehaal het. In die eerste plek is u al sedert Januarie verlede jaar in hegtenis. Ek aanvaar dat u besigheid by die huis nie meer so goed bedryf word as

> toe u daar was nie.. En dan is u voorhaker en sleepwa ter waarde van R63 000,00, ek sal dit so aanvaar, soos voorgelê deur mnr Duvenhage en nie betwis is deur die staat nie, ook dan nou verbeurd verklaar aan die staat. Dit is 'n aansienlike verlies en ek aanvaar dit so. U is egter nie 'n eerste oortreder nie."

It is clear to me that the magistrate duly considered the appellant's personal circumstances and in fact highlighted the heavy financial losses suffered by the appellant. The thrust, however, is that the appellant, not being a first offender, was well aware of the consequences of his deeds and chose to take the risk in spite of such awareness.

Again, regard being had to the quantity of dagga involved in this case, I can find no fault with the magistrate's approach. The present is the kind of matter Jones J had in mind in *S v Tom*1991 (1) SACR 681 (E) where, in altering a sentence of 16 years' imprisonment imposed on a 46 year old accused for dealing in 32 kg of dagga - the

accused had lost his job and had succumbed to the temptation of being paid R1 000,00 for conveying the dagga - the learned judge said:

> "... a sentence of 16 years' imprisonment should ... be reserved for those who pay the R1000 rather than the smaller middle men who run the risks."

In the result the sentence was reduced on review to 7 years' imprisonment.

There being no irregularity or misdirection committed by the magistrate, the only ground upon which this Court can interfere with the sentence imposed is if the sentence induces a sense of shock, i.e. "if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed". *S v De Jager and Another* 1965 (2) SA 616 (A) at 629 A-B. The sentence of 14 years' imprisonment may well be said to be a robust one, but I am not persuaded that there is any proper basis upon which this Court could

interfere with it.

The appeal is dismissed.

L MPATI
ACTING JUDGE OF APPEAL

CONCUR:

SMALBERGER JA
SCOTT JA