

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

CASE NO. A 240/09

In the review between:

REFILOE LWANA

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: RAMPAL, J *et* NAIDOO, AJ

JUDGMENT BY: NAIDOO, AJ

HEARD ON: 12 MARCH 2012

DELIVERED ON: 15 MARCH 2012

NAIDOO AJ

- [1] The appellant and one Siseko Katshaza were charged with dealing in 254,25 kilograms of cannabis , commonly referred to as dagga. They both pleaded guilty and were convicted accordingly in the Wepener Magistrates Court on 26 September 2008. They were each sentenced to

pay a fine of R15 000.00 or in default of payment to undergo eight (8) years' imprisonment. They were each sentenced to a further five (5) years' imprisonment which was wholly suspended for five (5) years, on condition that they are not convicted of contravening the provisions of the Drugs and Drug Trafficking Act 140 of 1992, committed during the period of suspension. With the leave of the trial court, only the appellant now appeals against the sentence. Mr Katshaza chose not to pursue the appeal. The appellant was legally represented during the trial in the Magistrates Court. Mr K. Pretorius appears on behalf of the appellant in this court and Ms A Bester on behalf of the State.

- [2] The facts of this matter, according to the statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 prepared by the appellant's attorney and confirmed by the appellant are, briefly, that the police observed the appellant loading a light delivery vehicle, commonly referred to as a *bakkie*, with bags on a farm in Lesotho. They observed him entering South Africa and stopped him as he entered this country. The police

discovered, in the bakkie, ten bags containing the dagga, which weighed approximately 254,25 kilograms. The appellant was then arrested. He admitted that he loaded the ten bags of dagga onto the bakkie and that he entered South Africa illegally with the intention of selling the dagga. The prosecution accepted the appellant's plea.

[3] The grounds of appeal are that

- the appellant was the sole breadwinner in his family,
- he is a first offender,
- he wishes to continue with his studies, and
- the sentence is too harsh.

[4] An appeal court should interfere with the sentence imposed by a trial court only if the trial court has misdirected itself in the imposition of sentence, resulting in a sentence which is so inappropriate that it induces a sense of shock. This principle was succinctly stated in the case of **Gregory Lex Blank v The State 1995(1) SACR**

62 (A), where the court said:

“It has repeatedly been emphasized by this court that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial judge and that a court of appeal can interfere only where such discretion was not properly exercised. One of the ways in which it may be shown that a trial court's discretion was not properly exercised is by pointing to a misdirection in the court's reasons for sentence. The principle in this regard is expressed as follows by Trolip JA in **S v Pillay 1977 (4)**

SA 531 (A) at p 535 E-F:

‘Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that

the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.'"

- [5] The personal circumstances of the appellant were placed on record, namely that he was 22 years old at the time of the commission of the offence, and that he is the sole breadwinner in his family, caring for his parents, siblings, his 5 month old daughter and girlfriend. It was also placed on record that he intended to use the money he made from selling the dagga to further his studies. While the magistrate did not specifically refer to the appellant's personal circumstances in sentencing him, I cannot find that this, in itself, is a misdirection or that it justifies the interference of this court. The quantity of dagga found in the appellant's possession was very large, with what must be a high street value. The magistrate appears to have considered the negative impact of drugs and drug dealing when he referred to the economic consequences of drug dealing and the effects of drugs

on people who use drugs. He was correct in pointing out that this was a very serious offence, which required strict sanction.

- [6] Mr Pretorius, for the appellant, submitted that the sentence was “shockingly excessive” and that it induced a sense of shock. Ms Bester expressed the view that the sentence was shockingly inappropriate in that it was too lenient, but due to the length of time that had elapsed since the sentence was passed, she would not pursue an application for the increase in the sentence.

The sentence to be imposed in a matter depends entirely on the circumstances of the particular case, and although sentences imposed in other similar matters are useful guides to sentencing, that is all they are – a guide. Ms Bester referred the court to the matter of **S v Lutshutu 2001(1) SACR 643 (EC)**, where a sentence of six (6) years’ imprisonment was imposed on the accused who was convicted of dealing in 145kg of dagga. The quantity of dagga in the present case exceeds this by over 100kg.

[7] In this matter, I cannot find that the kind of misdirection, described in the Blank case, referred to above, exists. I am of the view that the sentence in this matter is not one which resulted from a misdirection by the trial court in the manner in which it dealt with the facts or the application of the law to the facts, and in the circumstances, my view is that this court should not interfere with the sentence imposed by the trial court.

[8] I, accordingly, propose that the following order be made:

- 1) The appeal against sentence is dismissed;
- 2) The conviction stands.

NAIDOO, AJ

I agree, and it is so ordered

RAMPAI, J

**Counsel for Appellant:
Instructed by:**

Mr. K Pretorius
**Bloemfontein Justice
Centre**

**Counsel for the Respondent:
Instructed by:**

Ms A Bester
The State